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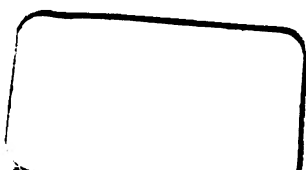
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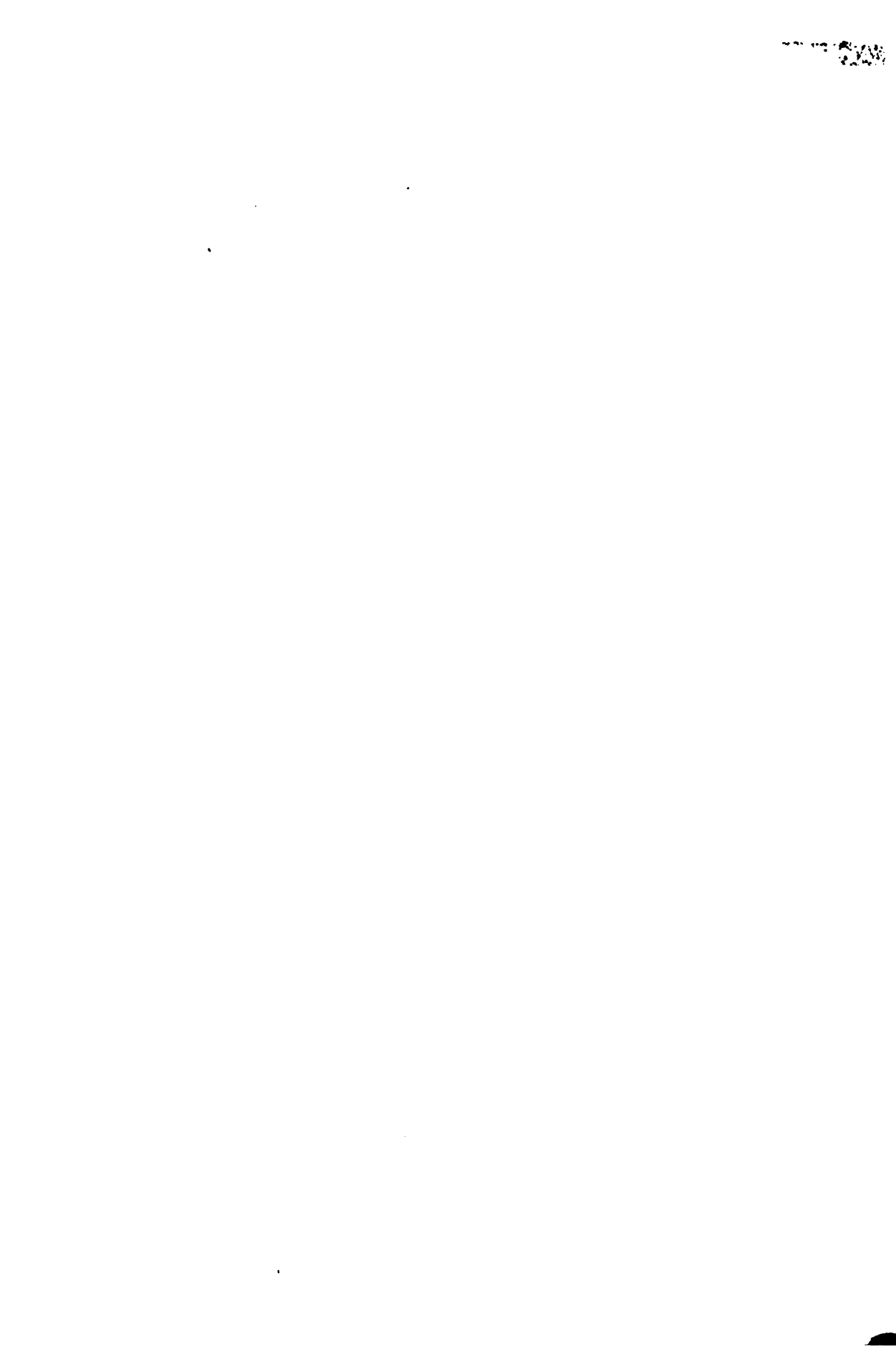
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STATE v. POTTER.

(Supreme Court of North Carolina. April 5, 1904.)

HOMICIDE—CONSPIRACY—EVIDENCE—INSTRUCTIONS.

1. On a prosecution for murder, the giving of an instruction on conspiracy between defendant and another, though correct as an abstract proposition, *held* error, in that the evidence did not show any conspiracy or combination.

Clark, C. J., dissenting.

Appeal from Superior Court, Watauga County; Long, Judge.

Clarence Potter was convicted of murder in the first degree, and he appeals. Reversed.

W. H. Bower, for appellant. The Attorney General, for the State.

MONTGOMERY, J. The prisoner was convicted of murder in the first degree of A. W. Howell at spring term, 1903, of the superior court of Watauga county. There was evidence on the part of the state tending to show that a warrant was issued by a justice of the peace, and placed in the hands of Calvin Turnmire, a constable, to be served on the prisoner, and that another warrant, issued by a justice of the peace named Smith, in which the prisoner and Boone Potter, his near kinsman, were intended to be charged with a forcible trespass, was placed in the hands of the deceased as a specially deputized officer for service on the accused; that Turnmire and the deceased, together with Will Hamby, Joe Wilson, and June Snider, on the night before the homicide, met and stayed all night in the house of a man by the name of Hodges, a short distance from a saw-mill where it was anticipated that Clarence and Boone Potter would bring saw logs to the mill; that on the early morning of the next day, the 5th of November, Clarence and Boone arrived with a load of logs on a wagon drawn by four mules, whereupon Turnmire, who testified that he had summoned Hamby to assist him in the arrest of Clarence, while the deceased and the others (Wilson and Snider) were to arrest Boone, walked up to Clarence and told him that he had a warrant for

him; that Hamby read the warrant to Clarence, who was standing behind the wagon, and about 15 or 20 paces from Boone, who was in front of the lead mule; that Hamby, when he read the warrant in an ordinary tone, had his back towards Boone, and that, just about the time of the conclusion of the reading of the warrant by Hamby to Clarence, Boone came around to Clarence and said, "Come on, cousin," whereupon both mounted the wagon and drove rapidly off down the road toward their home. There was no evidence that either one of the party had said a word about the arrest of Boone before the wagon was driven off. The whole posse overtook and headed off the team, after having given chase for about 300 yards, at a branch or creek that crossed the road. The witnesses for the state testified that the deceased, with a pistol in one hand, and the warrant plainly visible in the other, headed off Boone, who was driving the team, at the same time demanding his surrender and notifying him that he had a warrant for his arrest; that thereupon Clarence, who was on the other side of the team, handed his pistol across the hind mule to Boone, who thereupon shot the deceased in the arm and breast, while almost at the same time the prisoner, Clarence, struck the deceased on the forehead with a large stone. The prisoner testified that the deceased fired at Boone first. Howell died three days afterwards. Four physicians were examined, but we can get very little out of their evidence, except that either wound might have caused the death.

The case was tried with great care by his honor, and with marked ability he instructed the jury upon the many perplexing and important features of the case. In one aspect of the case, however, his honor committed an error; that error being founded on a mistaken view of the nature of certain of the evidence. His honor, in stating the contention of the state, used this language: "Upon this indictment the state first maintains that the prisoner is guilty of murder in the first degree; that he maliciously and feloniously, and with premeditation and deliberation, slew the deceased with a deadly weapon, or aided, assisted, and helped to do it, or con-

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1285.

spired, co-operated, and acted in concert with Boone Potter in thus slaying the deceased." It is to be seen, from the contention of the state, that a conspiracy on the part of Boone and the prisoner to kill the deceased was one ground upon which the state relied to show deliberation and premeditation on the part of the prisoner, and on that point his honor instructed the jury: "You are instructed further that the burden is upon the state to satisfy you beyond a reasonable doubt not only that the killing was done by the prisoner, or by his assistance, aid, help, and assent, or in consequence of concert and *conspiracy* with another [the word "conspiracy" italicized by us], but also with deliberation and premeditation. * * * And if you find that the prisoner slew the deceased with a deadly weapon, or that he conspired with or aided and abetted Boone in doing the killing with a deadly weapon, you will examine all the evidence and circumstances, and say whether you are satisfied from them that the killing was done with premeditation and deliberation; and, if you so find, you will find the prisoner guilty of murder in the first degree." His honor, to make clearer his meaning in connection with that part of his charge, said: "In other words, if the state has shown beyond a reasonable doubt, and you so find, that the deceased and those associated with him had a lawful warrant from a justice of the peace to arrest Clarence Potter, the prisoner, and also a lawful warrant to arrest Boone Potter, for shooting into and breaking into a house, and, on the day the deceased was injured, the deceased and the posse with him, duly summoned for the purpose, and acting with him as such posse, read the warrant to Clarence, and notified him to consider himself under arrest, and that this was done openly, in the daytime, within about 15 paces of Boone Potter; and you further find that Clarence failed to submit to the arrest, but, under a suggestion of Boone, got on the wagon then and there hitched, and under their control, and hurriedly drove away; and you further find that the deceased and his associates, with their warrants, pursued and overtook them, and Clarence and Boone and their associate, Heck, at the branch, and that thereupon the deceased, with the warrant open in his hand, notified Boone that he had a warrant for him, in hearing distance of Boone and Clarence, and, by declarations made by the deceased or the posse, both Boone and Clarence were fixed with the knowledge that the deceased and his associates were clothed with a warrant to arrest Boone; and you find that Boone hastily descended from the wagon on one side, and Clarence on the other, and, by preconcert and understanding and agreement between themselves, the prisoner handed Boone a pistol over the mules, in consequence of words or motions between themselves, and thereupon Boone deliberately and premeditatedly shot at the deceased twice in rapid succession,

with the deliberate intention to take his life; and you find that the death of the deceased ensued from the wound inflicted—Boone Potter would be guilty of murder in the first degree. And if, in addition to the foregoing facts, you find that Clarence understood that the officers had a warrant for himself, and had read it to him, and that he was there engaged in escaping from the officers, and that Boone understood this, and that they were acting in concert in flight; and you find that Boone and Clarence, from their acts and conduct, were acting in concert throughout, and both had predetermined and agreed to resist arrest to the extent to take the life of any one of the officers authorized to execute the warrant, and with premeditated and deliberate purpose to resist the arrest of Boone by the deceased or his associates, or the arrest of himself, the object of the officers being known, and with a premeditated purpose to kill to effect their purpose, and in pursuance of this purpose he handed Boone the pistol to kill the deceased, and Boone shot the deceased with the pistol, and thereby inflicted injuries from which the deceased died—the prisoner is guilty of murder in the first degree, and you will so find." It is clearly to be seen, from his honor's instruction, that he not only regarded what occurred at the sawmill at the time the officers attempted to arrest Clarence as evidence tending to show a part of a conspiracy between Boone and Clarence to resist the officers, even if it became necessary to kill one or all of them, but he carefully recited to the jury all the incidents connected with the attempted arrest. We cannot agree with his honor that the facts connected with the attempted arrest at the sawmill furnished any evidence whatsoever of a conspiracy to kill one or all of the officers, or any one of the posse. Boone, by all of the evidence, did not know, at the sawmill, and at the time of the attempted arrest of Clarence, that any warrant had been issued for him. It seems that the jury believed that Boone heard the warrant read to Clarence, although he was 15 or 20 paces off, with a wagon and four mules between him and Hamby, who read the warrant, and Hamby speaking in an ordinary tone, and with his back towards Boone; but that evidence having been believed by the jury, though it might have been sufficient to justify them in finding that there was an agreement between Boone and the prisoner, entered into at the very time of the arrest of Clarence, to effect the escape of Clarence, it certainly, in our judgment, was not evidence of a conspiracy to kill the deceased or any member of the posse. In fact, the witnesses for the state showed that neither Boone nor Clarence had made any preparations to use Clarence's pistol on the occasion before the arrival of the party at the branch, where the team was headed off. Neither Boone nor the prisoner had heard anything of the warrants, or the preparations to arrest either Boone or Clarence,

before their arrival at the sawmill; and at the branch, Clarence's pistol was between his overalls and his trousers, and his suspender had to be unbuttoned before he could get the pistol out. All of which goes to show that not until the parties left the sawmill was there any preparation made to use the pistol.

As we have said, this case was conducted by his honor with marked ability, and, so far as his connection with the making up of the case on appeal is concerned, all is correct; but the remainder of the record comes before us in poor shape. In many parts of the evidence bearing on vital points of the case, we are at a loss to understand what the witnesses said. Then there are hyphens and blank spaces and inconsistent words, confusing to the understanding. This is especially so in respect to the two warrants said to have been issued for the prisoner and Boone. Those papers are referred to as Exhibits A and B, but they are nowhere to be seen in the record. They are not alleged to have been lost, and no proof of their contents is offered.

For the one error pointed out, there must be a new trial.

CONNOR, J. (concurring). I would be content to concur in the opinion written by Mr. Justice MONTGOMERY, without saying more, but for the fact that my understanding of the testimony is so entirely different from that of the Chief Justice, as set out in his dissenting opinion, that I feel constrained to give my reasons for concurring in the conclusion arrived at by the majority of the court. If I understood the facts as does the Chief Justice, I should not hesitate to concur in his conclusions as to the law. It is a source of regret to me that it is sought to place the majority of the court in the position, from the viewpoint of the Chief Justice, of giving encouragement to the commissions of murders in this state. As I gather the transactions from the state's witnesses, Turnmire had a warrant for the arrest of the defendant for a misdemeanor, and the deceased, Howell, had a warrant for the arrest of Boone Potter. There was much controversy as to the regularity of the warrant and the deputation to Howell, and, although these warrants were used upon the trial, and are referred to in the testimony as Exhibits A and B, they are not attached to the record in the case, and we are unable to pass upon their regularity. Defendant is a young man of 19 years, uneducated. Boone Potter, it seems, was older. They are cousins. They were engaged in hauling logs to a sawmill. On the night prior to the homicide, Turnmire and Howell collected a posse, composed of one Joseph Wilson, who said that he had served a term of eight years in the penitentiary, Hamby, and Snider, at the house of one Hodges. On the morning of the homicide they went to the mill, and in a short time the defendant and Boone Potter

drove up with their wagon. Turnmire and Hamby called the defendant out to one side, four or five steps from the wagon, and told him that they had a warrant for him. Hamby's account of the transaction at this point was as follows: "Defendant said, 'All right.' Turnmire handed warrant to me, and told me to read it, and I read it. Defendant two feet from me. I read it in common tone. Boone was then fifteen steps off. Had my back to Boone. Defendant said: 'I cannot have my trial to-day. I have got to help Boone haul logs.' Defendant asked Turnmire to file bond. Turnmire said: 'Yes; we will do what is right.' Defendant asked if he would take his father on bond. He said: 'Yes; anybody most.'" The defendant's testimony upon this point is as follows: "On night prior to the homicide, was at Boone Potter's. Lived there. Worked for him. He was logging. Took log to mill on that morning. Turnmire told me they had warrant for me. I asked him to let me change some clothes. He gave me leave. I asked him if he'd take father on my bond, and he said, 'Yes.' It was raining, I wanted dry clothes. He said, 'All right.' I got on the wagon. I thought [he] was coming on. We got on wagon and started towards home. Sorter rainy. Boone trotted off. When he is not loaded, drives fast." Hamby says: "I heard Boone talking, and we come to where Wilson, Howell, and Snider were. Could not hear what Boone said until after I turned round. He said, 'Go down with me, cousin.' Bounced upon wagon, and told Clarence to come on. Defendant slipped on wagon as Boone started off in a trot. Boone began whipping mules. Am kin to Boone and Clarence by marriage. I said to Howell: 'Now, what are you going to do? We will run on down and arrest them.' We ran on down to where they crossed the creek, Howell in front." There was no evidence that a word was said to Boone about the warrant for him, or that he knew that there was such a warrant, or a warrant for defendant; nor is there any evidence that the defendant knew that deceased had a warrant for Boone. There seems to be no substantial difference in the testimony in regard to what occurred at the time of the homicide. After the wagon drove off, some of the witnesses used the term, "The mules loped down the hill." The deceased and his posse ran after them. The mules at the foot of the hill came to a stop, when the homicide occurred in the manner set forth in the opinion of the court. The portion of his honor's charge to which defendant excepted, and which exception, I think, should be sustained, is as follows: After saying to the jury that if they found certain conditions, etc., his honor said: "And if, in addition to the foregoing facts, you find that Clarence understood that the officers had a warrant for himself, and had read it to him, and that he was then engaged in escaping from the officers, and that Boone

understood this, and that they were acting in concert in flight; and you find that Boone and Clarence were acting in concert throughout, and that both had predetermined and agreed to resist arrest to the extent of taking the life of any one of the officers authorized to execute the warrant, and, with premeditation and deliberation, purposed to resist the arrest of Boone by the deceased or his associates, or an arrest of himself, the object of the officers being known, and with the premeditated purpose to kill to effect their purpose, and in pursuance of this purpose he handed Boone the pistol to kill the deceased, and that Boone shot the deceased with the pistol, and thereby inflicted injuries from which deceased died—the prisoner is guilty of murder in the first degree, and you will so find.” There can be no question that the law as laid down by his honor is correct, but I cannot find in the testimony any evidence to support the theory submitted to the jury, that Boone and the defendant had formed and preconceived a purpose to resist arrest to the extent of taking the life of the officers or their associates. I can find no testimony tending to show that Boone had any knowledge that the deceased had a warrant for him, or that Clarence had any such knowledge; nor can I see any evidence that Clarence was attempting to escape arrest. Taking the testimony of the state's witnesses and of the defendant, which in no material respect contradicts them, I can see nothing in the conduct of Clarence at the time the warrant was read to him indicating a purpose to resist the arrest. His suggestion to the officer to give his father as security, followed by the officer's acceptance of the suggestion, excludes, to my mind, any possible theory of a purpose on his part to resist an arrest. No witness says that Boone heard, or could have heard, the conversation between Turnmire, Hamby, and Clarence. His conduct appears to me to be entirely consistent with that of a man in his station in life, making his daily bread by his labor. He had unloaded his wagon, and I can see nothing in his conduct inconsistent with what might have been expected of a man of his occupation. It is not denied that it was a rainy day. As he drove off, he went down hill. The fact that he hit his mules with his whip, and that they loped off, does not impress my mind with any purpose to escape the posse or officers, in the absence of any evidence that he knew or suspected that they had any warrant for him. If I am correct in my conclusion that there was no evidence to sustain the theory of a preconceived purpose between the defendant and Boone Potter to escape arrest, to the extent of taking the life of the officers, then such theory should not have been submitted to the jury. This is elementary. I do not undertake to say that at the time of the homicide there was no evidence of premeditation. The doctrine of instantaneous premeditation seems

to be well established by this court, and, in deference to the opinions of the eminent judges who have preceded me, I have given it my approval in the disposition of appeals which have come before us. In the light of these decisions, it was not error in his honor to leave the question to the jury whether the homicide was the result of premeditation. I do not think that the defendant should have been required to carry with him to the jury the theory of a preconceived purpose, in combination with Boone, to resist arrest to the extent of taking the life of the officer or his associates. Upon his own showing, this uneducated young mountaineer, before reaching his majority, is guilty of murder in the second degree. It is more than probable that at the best he will forfeit to the state more than a score of years of his freedom. I make no comment on the unfortunate man who lost his life. Whether he was a “brave officer” or not, I do not know; and I forbear saying more, upon the record before us, than that it is fortunate for the administration of our criminal law that it is not the custom to proceed as these men did in the arrest of persons charged with violating the law. I cannot think, from his own testimony, that the majesty of the law was promoted, or respect for it increased, by the services of the witness Wilson. But these are not questions before us. I cannot but regret that it so frequently occurs that such widely divergent views exist in this court in regard to the plainest principles of the criminal law. I am sure that each member of this court is prompted by no other motive or purpose than to declare the law as he believes it to be, and as befits a judge. Certainly the state has made ample provision for the protection of her officers in the discharge of their duties, and I am sure that the judges of the superior court and of this court do all in their power to enforce the law in this respect. This defendant is, upon his own testimony, guilty of murder. A jury may upon another trial find him guilty of the capital felony. This will be for the jury. I express no opinion in respect to their duty. I simply give expression to my conviction that there was no evidence that the homicide was the result of a preconceived purpose between the two men engaged in the affair to resist arrest to the extent of taking the life of the officer.

WALKER, J. (concurring). I concur in the opinion of the court as delivered by Justice MONTGOMERY, and also in the opinion of Justice CONNOR, as his views in regard to one aspect of this case, which are therein fully and clearly expressed, coincide with mine, and I shall add but a few words to what he has so well said. The learned and able judge who presided at the trial of this case charged the jury correctly as to the law of “premeditation and deliberation,” so far as the charge was confined to what oc-

curred at the branch, when Boone Potter and the defendant were overtaken by the posse; but he fell into error, I think, when he added: "If, in addition to the foregoing facts, you find that Clarence understood that the officers had a warrant for himself, and had read it to him, and that he was then engaged in escaping from the officers, and that Boone understood this, and that they were acting in concert in flight; and you find that Boone and Clarence, from their acts and conduct, were acting in concert throughout, and both had predetermined and agreed to resist arrest to the extent of taking the life of any one of the officers, being known, and with a premeditated purpose to kill to effect their purpose, and in pursuance of this purpose he handed Boone the pistol to kill the deceased, and Boone shot the deceased with the pistol, and thereby inflicted injuries from which the deceased died—the prisoner is guilty of murder in the first degree, and you will so find." There was no evidence whatever as to any preconceived design to resist arrest prior to the time the officers overtook and stopped them at the branch. Indeed, the evidence as to the transactions up to that time tended to prove directly the contrary. I do not think it can be successfully contended that the two men had conceived the purpose to resist arrest when they were driving away from the officers, and in the direction of their home, with all possible speed. Ever if Clarence had not supposed that his offer to give his father as bail was satisfactory (and there is evidence to show that he did think it had been accepted), and even if Boone Potter was aware of what had taken place between Clarence and the officers, and thought that they had attempted to arrest him, and if the two were not merely returning to their home, as they supposed they had a right to do, but were attempting to escape from the officers, I yet do not think that the instruction which I have quoted from the charge of the court was correct. There is a vast difference, in law, between trying to escape arrest, and forming a conspiracy or preconceived design to resist it. The rights of the parties in the two cases given are essentially different, and this difference we stated fully at the last term in *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757. There is no proof in the case of anything said or done by the Potters when they were driving towards the branch that has the slightest tendency to show a preconceived design to resist arrest, and, this being so, it only remains to be considered whether the instruction was calculated to prejudice the defendant. It is hardly necessary to argue this question, as the harm to the defendant is perfectly apparent on the face of the instruction. Nothing can be more prejudicial than a charge to the jury to convict, based upon a theory not supported by the evidence. *State v. Smith*, 125 N. C. 615, 34 S. E. 235

CLARK, C. J. (dissenting). The prisoner is not indicted for or convicted of conspiracy, but of murder. His honor told the jury that "the burden is upon the state to satisfy the jury, beyond a reasonable doubt, not only that the killing was done by the prisoner, or by his assistance, aid, help, and assent, or in consequence of concert and conspiracy with another, but also with deliberation and premeditation; * * * and if you find that the prisoner slew the deceased with a deadly weapon, or that he conspired with or aided and abetted Boone in doing the killing with a deadly weapon, you will examine all the evidence and circumstances, and say whether you are satisfied from them that the killing was done with premeditation and deliberation, and, if you so find, you will find the prisoner guilty of murder in the first degree." It would be difficult to make the charge more absolutely in accordance with the precedents. The learned and accurate judge was not charging upon an indictment for conspiracy, nor telling the jury what would amount to a conspiracy. He recited the evidence, as it was his duty to do, but impartially and fairly. It was in evidence that, when the summons was served upon the prisoner, Boone, who was near by, called to the prisoner to jump on the wagon, and immediately the horses were put into a lope down the hill, and this by men both of whom had been evading arrest; that the deceased officer and his posse started after them and headed them off, and, with his warrant in one hand, and pistol in the other, the deceased, who, as an officer, had a right to carry the pistol, ordered Boone to stop. Then Boone Potter said to prisoner, "Shoot, or give me the pistol," and motioned to the prisoner to hand him the pistol, and he did so, whereupon Boone fired at the officer. This was sufficient aiding and abetting, combining and conspiring, to make the prisoner guilty, whether (as is doubtful) the prisoner or Boone killed the deceased. Though the judge recited the evidence, as it was his duty to do, he did not, as the opinion assumes, tell the jury that the action in putting the horses into a lope was a conspiracy or combination, nor could the court tell them it was, nor that it was not. The remark, "Shoot, or give me the pistol," is certainly some evidence, taken with the other circumstances, of a combination or conspiracy—the pursuit of a common design. That was for the jury to consider, for the jury also alone could say whether Boone knew the warrant had been served on Clarence, as he had the opportunity to do (*State v. Bowman*, 80 N. C. 432; *State v. Perkins*, 10 N. C. 377), and was acting in concert in the flight. The motion for the pistol, the accompanying remark, and the handing it over under the circumstances, the immediate use of it by Boone, and the prisoner joining in the attack with a rock, certainly constituted some evidence (and very strong evidence) of aiding,

abetting, combining, and conspiring; and, if there was any evidence, it was properly left to the jury. The court told the jury that they should examine the evidence, and if, "upon all the evidence and circumstances, the jury was satisfied of premeditation and deliberation," etc. Upon all the authorities, unless they are to be overruled, a moment of premeditation, no matter how brief, is sufficient, if the jury find that there was premeditation and deliberation. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722, and numerous cases since.

The deceased was an officer bravely and faithfully trying to obey the process which his state had put into his hands to be served. The prisoner and Boone were defendants in that warrant, resisting the power of the state. When halted, and the process shown him, Boone motions to the prisoner to hand him his pistol. He evidently knew the prisoner had it. The latter hands it over, and for use on the deceased, as the jury had a right to infer. Boone fires upon the officer because he was trying to serve the warrant, and the prisoner joins in the assault upon the officer with a stone. Which caused the death is immaterial. There was a joint action—a combination and conspiracy in the doing the unlawful act. There was no self-defense or manslaughter, as the jury found the facts to be; and the jury having found, as the judge instructed them was necessary, first, that there was joint action, by aiding, abetting, or combining and conspiring, and then, further, that the killing was done with premeditation and deliberation, there could be no other verdict than murder in the first degree. If there is no liability to capital punishment for taking the life of an officer under the circumstances of this case, then the only safe method of serving process on those defying the state's authority will be service by mail or with a shotgun; and the Legislature should so provide, authorizing the officer to fire first. The life of the officer is worth at least as much to the state and to his family and friends as that of the defiant lawbreaker, and the life of the latter is not the only one that should be regarded with tenderness in the administration of the law. The Legislature, in its wisdom, can abolish capital punishment except when the killing has been done by lying in wait or poisoning (and, indeed, in all cases), but it has not seen fit to do so. No case could be presented more strongly demanding the capital sentence of the law than this, where two men, who had been defying the law and the service of its precepts, are halted by an officer with the state's process in his hand, and one of them motions to the prisoner for his pistol, which is passed over to him by the prisoner, and both unite with pistol and rock in taking the officer's life, for no other cause than he was there honestly, faithfully endeavoring to obey the trust the state had confided in him. Is the state not strong enough, is it not just

enough, to vindicate its majesty, and execute the law against the willful murderer of its own officer when its process is thus defied, and its officer slain, without provocation or excuse, for no fault save that he was endeavoring to do his sworn duty? Shall the condition of him who defies the law be so far better than that of him who shall attempt to execute it that the officer may lose his life, but the lawbreaker cannot? That state certainly cannot have faithful service which is more tender of the life of him who resists and slays an officer in the discharge of duty than careful to throw the terror of its power as a shield around the officer who would execute its orders.

(134 N. C. 134)

STATE v. MARSH.

(Supreme Court of North Carolina. Oct. 20, 1903.)

CRIMINAL LAW—APPEAL—REVERSAL—ERROR OF RECORD—MISPRISON—CERTIORARI—REHEARING—SUPREME COURT—JURISDICTION.

1. Where, on appeal from a conviction of rape, the judgment was reversed on the ground that the indictment, as shown in the record, failed to contain an allegation that the crime was committed against the will of the prosecutrix, and it thereafter appeared that such allegation was in fact contained in the indictment, but was omitted from the record by the misprision of the clerk, the Supreme Court had jurisdiction, after the term at which the judgment was reversed, to grant a writ of certiorari for the correction of the record, and reset the case for hearing on the exceptions taken at the trial.

Douglas and Walker, JJ., dissenting.

John Marsh was convicted of rape, and he appealed. On motion by the state for writ of certiorari, after reversal, to correct the record, and for rehearing. Motion granted.

See 43 S. E. 828.

Armfield & Williams and Redwine & Stack, for appellant. The Attorney General and Adams & Jerome, for the State.

OLARK, C. J. This case was before us at last term. 132 N. C. 1000, 43 S. E. 828. There were numerous exceptions, none of which were considered, because a motion in arrest of judgment was made and allowed for the absence from the indictment (for rape), as sent up in the record, of the words "against her will." This objection was not taken below. It now appears, by the inspection of the indictment by the judge below, and his finding of fact thereon, that those words were in fact in the indictment as found by the grand jury, and upon which the prisoner was tried, and were omitted by the clerk in making up the record. This case has therefore not been before us, and the state asks for the correction of the indictment by a certiorari to insert the words omitted by the clerk, and that the case may be argued upon the record, and the exceptions taken at the trial.

If this were an application to rehear a criminal cause, the court would not entertain it. *State v. Council*, 129 N. C. 511, 39 S. E. 814, and cases there cited. A rehearing is based on an allegation that the court committed an error of law in the previous opinion, and asks the reconsideration of that opinion. It is an appeal from the court to itself, on the ground of error in its rulings of law, just as an appeal is taken from the superior court. Here there was no error of law. The decision at last term is correct, as the record stood. This is a motion to correct the record to speak the truth, and to place the true record before us for the first time, and to consider the exceptions taken, they not having been passed on. The same point, after similar action upon an untrue record caused by the false certificate of the clerk of the lower court, has been passed upon by the Supreme Court of Florida, and the motion to restore the cause to the docket allowed (*Lovett v. State*, 29 Fla. 384, 11 South. 176), in an able and well-considered opinion by Chief Justice Rainey. In that case a new trial had been granted on the ground that the record in a trial for murder did not show that the prisoner was personally present at the trial. Subsequently, it being made to appear to the court that the record did show such fact, but that such paragraph had been omitted in the transcript by the clerk, the court ordered a certiorari to correct the omission, and restored the cause to the docket for argument upon the exceptions taken at the trial, and it was so heard upon the true record. 30 Fla. 142, 11 South. 550, 17 L. R. A. 705. The same power is vested in this court by article 4, § 8, of the Constitution, which gives it power to issue any remedial writ necessary for a general supervision and control of the lower courts. Instances of supervision to insure justice are *Biggs, Ex parte*, 64 N. C. 202, and *State v. Jefferson*, 66 N. C. 311. In *Lovett v. State*, 29 Fla. 384, 11 South. 176, above cited, the court said (pages 404, 405, 407, 29 Fla., and pages 180, 181, 11 South.): "No advantage can be gained from any action of this tribunal upon an untruthful representation of that record, however ignorant the convict or the counsel may be of the real status of the record, or the incorrectness of the transcript, and however free from blame the clerk may have been in the mistake characterizing his transcript and certificate. * * * The fact still remains that a false record has been brought here on behalf of the convict, and a reversal has been obtained in his behalf upon it, such reversal being based solely upon its false feature; and this fact is not changed, nor its result modified, by the innocence of the prisoner, his counsel, and the Attorney General, but the extent of the imposition and of the mistake is only made the greater. * * * We have been misled into reversing a judgment on a false record; into acting in a cause when that cause, as it really is and

only can be acted on by us, has not been before us. * * * The state is not prohibited by any principle of law known to us from arresting the reversal which has been made of her judgment upon such false representation. She is entitled to require the party seeking relief from such judgment to bring to the appellate court the record of the cause in which it was obtained, for, without this, that cause is not before the appellate tribunal for consideration. Any other doctrine than this must result in the frequent consummation of fraud upon the courts, and its constant encouragement." And at page 895, 29 Fla., and page 178, 11 South., the chief justice says that, when the judgment has been granted "upon a false suggestion or under a mistake as to the facts, the court will afford relief after adjournment of the term, and, if necessary, recall the remittitur and stay proceedings in the court below."

Mistakes of this court or of its clerk, not mistakes of law, but of fact, have been often corrected after the mandate has gone down, and even at subsequent terms. *Scott v. Queen*, 95 N. C. 340; *Cook v. Moore*, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587; *Summerlin v. Cowles*, 107 N. C. 459, 12 S. E. 234; *Scroggs v. Stevenson*, 108 N. C. 260, 12 S. E. 1081; *Bernhardt v. Brown*, 118 N. C., at page 710, 24 S. E. 527, 715, 36 L. R. A. 402. For as strong a reason, this court can order a correction of a record below when, by reason of the false or erroneous certificate of the clerk, the record, as it was, has never been before us. This is not new practice. "Upon a judgment of the King's Bench, if there be error in the process or through defaults of the clerks, it may be reversed in the same court, for error in fact is not error of the judges, and reversing it is not reversing their own judgment." 2 Tidd's Prac. 1187. Also *Insurance Co. v. McCormick*, 20 Wis., at page 284, where it is said that "the errors are not errors in the judgment itself. The court, in rendering judgment, never passed upon them." In this case the court, through error for which the appellant is responsible (for it was his duty to bring up a true record), has taken action on a bill of indictment on which the prisoner was not tried, and on nothing whatever that took place at that trial. We are not asked to reverse our judgment, but to correct an error of fact. The prisoner brought up the record. He presented us, as an alleged error, a statement of a matter which was false. The record he presented stated that the indictment on which he was tried omitted the words "against her will." He relied upon that omission, and asked an arrest of judgment on that account. We allowed it solely on that account. He has no ground to ask to benefit by that untrue statement in the record he presented to us, and it is immaterial that it does not appear how the omission came to be made. The case has never been before us.

In civil cases, counsel on both sides have

opportunity to scan the whole record carefully, and, if there is omission or other error, ordinarily a certiorari can and should be applied for before the cause is called for argument. But in criminal actions the rotating solicitor has no opportunity to see the record proper, nor any part of the transcript, except "the case on appeal" served on him, and does not see even that after the clerk copies the case "as settled." When, as here, there was no point made below on the bill of indictment, the indictment made no part even of the "case on appeal" served on the solicitor. There is no provision of law, nor any practice, requiring solicitors to go back to the county seats, nor to have full transcripts of the record sent them before coming up to this court. The Attorney General is bound to rely upon the correctness of the record laid before him. He was not at the trial below. If, therefore, a clerk can omit material parts of the indictment, and the defendant, notwithstanding the duty is on him to bring up a true record, can profit by this error of fact (whether intentional or unintentional could rarely, if ever, be shown), new trials will depend, not upon the correct rulings of the judge below, but upon the greater or less carefulness of the clerk, or of the copyist often furnished him by the appellant. It is not sufficient to say that the appellant can be again put on trial. There is the expense to the public of another trial, and witnesses may have moved away or died. The state is entitled, in the interest of justice, to have the cause presented here on the record as the matter was presented below, and it is the duty of the appellant to bring up such true record. When there is a fatal misstatement of fact therein, appellants must understand that their negligence in presenting a false record (to put it in the mildest form) cannot avail them any more than if they had made the omission fraudulently, which can never be shown. In *State v. Daniel*, 121 N. C. 575, 28 S. E. 255, the court said that the defendant "was derelict in not sending up a proper transcript, and the court would not permit him a continuance of the cause for his own neglect, but would send down, *ex mero motu*, an *instant* certiorari to cure the defect in the transcript." If the court will not allow an appellant a continuance even for omissions or error in the record, it will certainly not permit him to enjoy a new trial by reason of such default by him.

In England a defendant in criminal cases is allowed no appeal. We allow an appeal, but the burden is on the appellant to assign his errors and bring up a true record. When he fails to do either, he cannot take profit from his omission of duty.

The judge below having, from inspection of the record, found that the indictment on which the appellant was tried in fact contains the words "against her will," and that being already certified to this court, the rec-

ord here can be amended to include them, as upon certiorari, and the cause will be restored to the docket, to be heard in its order upon the exceptions taken below, when the district to which it belongs is called, unless, for cause shown, it is placed at the end of the district, or at the end of the docket for this term. It does not appear that the words were omitted by the fraud of the appellant, or of any one for him. If it did, the appeal should properly be dismissed.

The motion to restore the cause to the docket is allowed. Motion allowed.

WALKER, J. (dissenting). The defendant was indicted in the court below for the crime of rape, and, having been convicted, appealed to this court. At the last term we arrested the judgment upon the ground that there was no allegation in the indictment that the offense had been committed "against the will of the prosecutrix." 132 N. C. 1000, 43 S. E. 828. The opinion of this court was filed on the 31st day of March, 1903, and the certificate was sent to the superior court on the 1st day of May, 1903, so that the case was retained in this court, under the rule, for the purpose of correction, a full month before it was returned to the lower court. This court adjourned for the term on the 11th day of June, 1903; and it appears, therefore, that the state had ample opportunity, after the filing of the opinion, and before the adjournment at the last term, to have called the alleged error or defect in the transcript to our attention. But it failed to do so. The state is not entitled to any more consideration or indulgence in this court in respect to the trial of cases in which it is concerned, than other litigants, except that the causes in which it is a party may be advanced sometimes, when they affect the public interest, and a speedy hearing is desired. It is bound, however, by the same rules of practice and procedure, and must give the same attention to its cases and exercise the same degree of diligence, as other parties. *State v. Price*, 110 N. C. 599, 15 S. E. 116. In *State v. Cameron*, 121 N. C. 572, 28 S. E. 139, we held that "the law which regulates the matter of appeals is the same in both civil and criminal cases," and that "in criminal appeals the respondent is the state, represented by the solicitor of the district in which the case is tried," and that he is as much the representative of the state in all matters pertaining to the preparation of cases, in all respects, for transmission to this court, as is an attorney of record the representative of his client in a civil case. There is no duty imposed upon an attorney in a civil suit with respect to the settlement of the case on appeal, and the transmission of a transcript of the record to this court, that does not equally rest upon the solicitor in an appeal taken in a criminal case. The only difference between the two classes of cases is one which does not materially af-

fect the question we are now discussing, and that difference is that in a civil case the appellant must pay the fees of the clerk for making out the transcript in advance, if he demands it, while the state is not required to do so when it appeals; but the appellant in a civil case is no more bound to see that the record is correctly copied and transmitted to this court than is the state in a criminal case. The duty of copying and transmitting the record is one which, as this court has frequently decided, appertains to the office of the clerk. It is his official duty to send up a perfect transcript, and not in any sense the duty of the appellant, except as hereinafter stated, in any kind of case. This is made perfectly clear in *State v. Butts*, 91 N. C. 524, 526. In that case it is said by the court that while "it would be well for counsel to see that transcripts are properly made up before they come to this court," in order to protect the interests of their client, yet it is the official duty of the clerk to see that a true and perfect transcript is sent to this court. It may be conceded that, if the record is defective, the appellant in a civil case will not be allowed a continuance in order to have it perfected, or indulged in any other way with respect to it; and, if the defect is one that will injure his client if not corrected, he must abide the consequences of his neglect or omission in not having the record made perfect. He must apply for the necessary process for that purpose in apt time. While this is the rule in civil cases, it also obtains in criminal cases, as to both parties to the record—the state and the defendant. When it is said to be the duty of the appellant to see that the record is correctly certified to this court, nothing more is or can be meant than that, if the record is not here at the proper time, his appeal will be dismissed, or, if the record is defective, and he does not move in apt time to have it corrected, the case must be heard just as if the record was perfect in form, and the party in default must take the consequences of his neglect. Surely the appellee cannot avail himself of a defect which defeated him in the case, and then apply for and obtain a writ of certiorari after the adjournment of the term, upon the ground that the appellant failed himself to apply for the writ. That would be to permit the appellee to take advantage of the laches of his adversary, where he unreasonably relied upon him to look after and care for his interests in this court. If in a civil case a plaintiff (appellee) should permit his case to be argued and decided in this court without having called our attention to a defect in the record, for example, the careless or inadvertent insertion of a material allegation in his complaint, so that it would appear he has no cause of action, and, by reason thereof the judgment is arrested or the action dismissed, would he be heard at the next term to allege the defect and be granted a writ of certiorari, so that the case could

be reheard? The mere statement of the proposition carries with it its own sufficient refutation. How, then, can the state, who occupies substantially the same position in this court as the plaintiff (appellee) in a civil case, and is subject to the same rules, be allowed to do so, when the indictment, as certified to this court, is defective? If it is allowed in the latter case, there is no sound reason why it should not be in the former, unless there is something in the mere sovereignty of the state, or her peculiar prerogative, which gives her rights and privileges in this court not enjoyed by a citizen; and no such claim was made by our learned and able Attorney General, who lets no point escape him, and it is not even suggested in the opinion of the court. The Supreme Court of the United States has ruled that the government, when it comes into the federal courts to litigate with one of its citizens, must submit to the rules of practice and procedure of its courts, and its rights and privileges at every stage in the trial of the cause are substantially in every respect the same as those of the citizen, and it cannot have any superior advantages. *Fink v. O'Neill*, 106 U. S. 272, 27 L. Ed. 196; *U. S. v. R. Co.*, 105 U. S. 263, 26 L. Ed. 1021; *U. S. v. Thompson*, 93 U. S. 586, 23 L. Ed. 982; *Carr v. U. S.*, 98 U. S. 438, 26 L. Ed. 209; *Sibbald v. U. S.*, 12 Pet. 489, 9 L. Ed. 1167.

When it is conceded, as it must needs be, that the state and its citizens stand before this court on terms of perfect equality, and that right and justice under the law must be administered in the same way to each of them, the fallacy of the reasoning by which the conclusion of the court is reached, and its insufficiency to justify that conclusion, is clearly seen, unless we propose to overrule many cases heretofore decided in this court in which it has been held that parties must be diligent in applying for remedial writs for the purpose of perfecting the transcript, and that an application for a certiorari, upon the suggestion of a diminution of the record, cannot be made after the term to which the appeal is taken, and at which the case is decided, and not even at that term unless it is made before the argument commences. A complete reversal of this wise and safe rule is the logical result of the decision in this case, but a consequence more dangerous in its tendency may follow, for no limit of time is set by the ruling of the court for such an application to be made. If it can be made at the first term after the one at which the case is decided, why not at the second term, and so on without limit? It will not answer the argument to say that in the court below the state is represented by one officer, the solicitor, and in this court by another, the Attorney General, for the duty of looking after the interest of the state in the lower court, where the transcript is prepared, and from which it is transmitted, devolves solely upon the solicitor, as we have seen, unless he

is assisted by private counsel, as in this case, or unless he specially appoints some other member of the bar to represent him, which appointment must be made in the manner pointed out by this court. *State v. Cameron*, supra; *State v. Clenny*, 133 N. C. 662, 45 S. E. 525. In the case last cited, Montgomery, J., for the court, says: "The solicitor, as we have said in *State v. Cameron*, represents the state in criminal prosecutions, and the statement of the case on appeal in such cases should be submitted to him for acceptance or objection." It appears, therefore, that he is as fully invested with plenary power and authority in all matters affecting the state's interests, with the corresponding duty of taking care of those interests, as the attorney of a party in a civil case. If there is a duty resting upon the latter to examine the transcript of the record before it leaves the hands of the clerk, the same duty rests upon the solicitor, and the consequence to the state must be the same, if this duty has not been performed in a criminal case, as it would be to a party in a civil case if the duty is neglected by him. There is no greater obligation imposed upon an appellant to examine a transcript than there is upon an appellee, in so far as the party in default may be injuriously affected in this court. The same diligence is required of the appellee as of the appellant in discovering defects and having the record perfected. If there is an omission of matter material to his case, and the appellee fails at the proper time to seek the remedy for supplying it, he must suffer the consequences, just in the same way and in the same degree as the appellant. I must deny the correctness of the proposition impliedly asserted in the opinion of the court that any positive legal duty is devolved upon an appellant or an appellee to see that a true and perfect transcript is sent to this court, and that his failure to do so will be imputed to him as a fraudulent or even a false representation to this court, if the transcript is defective or is other than a perfect copy of the record below. He makes no representation to this court, but simply relies, as he has a perfect right to do, upon the clerk, whose duty it is to certify the transcript. The appellant's duty is fully performed when he has caused the case on appeal to be settled and filed with the clerk, and paid the latter his fee for sending up the transcript to this court. There his duty ends, and that of the clerk begins, with this possible qualification, if it is a qualification: That, if the record, as certified by the clerk, happens to be defective, and the appellant fails to have it corrected in due time, so that he loses in this court, he must bear the loss, just as the appellee must do if the defect causes him to be cast in the suit, and he has not taken the proper means to have it remedied. It follows from what I have already said that neither the defendant's counsel nor the solicitor was in the least derelict in his

duty, as both had the right, if they chose to do so, to rely upon the clerk, who is the custodian of the record, and the officer appointed by the law for the purpose of preparing and transmitting a perfect transcript of it to this court; and it is not infrequently the case that counsel and the solicitor thus rely, as they each have a perfect right to do, upon the clerk to perform his duty in the premises. But if the clerk fails, by mere inadvertence or oversight, to make a true copy, the defect may be cured by applying to this court for the proper writ in apt time—that is, at the term to which the appeal is taken—and the consequence of the failure to make this application will fall upon him who is prejudiced by it, and who fails to take the necessary steps to protect his interests. This must be so in all cases. I am not denying or questioning the power of this court to correct its own records in order to make them speak the truth. That power is fully conceded, but it is not the one which is being exercised in this case. This court may not only amend its own records at any time, but it may supply any defects in the transcript sent to it from the lower courts, by issuing the proper remedial writ, provided it is done upon seasonable application of a party, or of its own motion within the time allotted by law. It has been uniformly decided by the court that an application for a writ of certiorari for the purpose of correcting a record must be made, except in rare cases, before the cause is submitted for argument (*McDaniel v. Pollock*, 87 N. C. 503), and in no case can the writ issue after the expiration of the first term; and especially is this so when the case has been decided, and not merely continued, at that term (*State v. Blackburn*, 80 N. C. 477; *State v. Harris*, 114 N. C. 830, 19 S. E. 154; *State v. Rhodes*, 112 N. C. 857, 17 S. E. 164). In the cases cited it is held that, if a party has good ground for a certiorari, he must move for it at least before the argument upon the merits; and, if he fails to do so, he must abide the consequences of his own neglect, although he may be able afterwards to show by proof ever so conclusive, that there is a material defect in the record, and one, too, which would reverse the decision of the court. There must be an end to litigation somewhere. No man should be permitted to prolong it by his own neglect, and thus to profit by his own wrong. But I think the precise question has been decided by the court in *Wilson v. Lineberger*, 84 N. C. 836. In that case the plaintiff's counsel moved to correct the record at the term next after the case was heard and decided, with the intention of asking for a rehearing. Smith, C. J., for the court, said: "The motion is a novel one, and without precedent in the practice of the courts. If the evidence shall change the aspect of the case, and make it materially different from what it was when heard, we should be required, not to rehear and correct

an error of law, but to try a new case. If there is an error in the former decision, it must be discovered in the case then presented, without modification of facts." And again: "It was the duty of counsel to suggest the diminution before the cause was heard, and then ask for this remedial process, not to wait till the decision, and then demand it. It would be productive of much mischief to relax the salutary rule which requires counsel to see that their cause is properly before the court in the record, and to abide the consequences if it is not." The court did not confine its decision in that case to the particular character of the amendment required, but simply applied the general principle that no amendment of any kind can be made at a subsequent term so as to present a question different from that appearing in the original record. The court well said that it would introduce a novelty into the practice and procedure of the court, which would be productive of untold mischief and incalculable harm.

When this court has decided a case, and the opinion and judgment have been certified to the court below, its jurisdiction with respect to the case is at an end, at least when the court has adjourned for the term at which the decision was made. The terms of this court are fixed by law (Const. art. 4, § 7; Code, c. 24, § 953; Acts 1887, p. 100, c. 49; Acts 1901, p. 897, c. 660) in the same manner as are the terms of the superior court; and when, under the statute, this court has finished the business of any one term, and adjourned, its jurisdiction of a case decided at that term ceases, and it cannot again acquire jurisdiction of it, except by petition to rehear under the established rule of the court, or by a new appeal. In discussing this question, the court, in *White v. Butcher*, 97 N. C. 7, 2 S. E. 59, says: "The remand arrested further action here at this point. * * * The practical result to be secured was the conveyance of the title to the property, as would have been the case here, had the jurisdiction over the cause been retained. But it was no longer in this court for any further order, unless, perhaps, the transmission of the papers and transcript; but the neglect to transmit them did not retain the cause itself after the order, nor impair the efficiency of the order." In *Ruffin v. Harrison*, 91 N. C. 398, the court, after stating the general proposition that a rehearing will not be granted upon a summary motion to modify a final judgment of this court, proceeds: "The court has no power to amend or modify the final decree, entered at the last term, upon an application like this. After final judgment, the court cannot disturb it, unless upon an application to rehear, or for fraud, accident, or mistake alleged in an independent action, or, perhaps, in some cases, a party might be relieved against a judgment, order, or other proceeding taken against him through his mistake, inadvert-

tence, surprise, or excusable neglect,' within a year after the entry of the same. * * * This, of course, does not imply that the court has not power to correct the entry of its orders, judgments, and decrees so as to make them conform to the truth, or what the court did in granting them, or to set aside an irregular judgment in a proper case. The practical effect of granting the prayer of the petitioners would be to give them the benefit of a rehearing upon a summary application to change the final decree at a term of the court subsequent to that at which it was granted. We are not aware of any rule of procedure or practice that warrants such action. The application must be denied, and the petition in this respect dismissed." In regard to this subject, the court, in *Cook v. Moore*, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587, says in this emphatic language: "It is not contended that this court can reverse, set aside, or modify in any material respect a regular final judgment at a term thereof subsequent to that at which it was entered. It is clear and well settled that it has no such authority, except upon an application to rehear, or because of 'mistake, inadvertence, surprise, or excusable neglect,' as may be allowed by statute." It will not, of course, be contended in the case at bar that this court has the power to correct the judgment at the last term because of "mistake, inadvertence, surprise, or excusable neglect." In *Moore v. Hinnant*, 90 N. C. 163, it is said: "But the court has not the power at a subsequent term to revoke, set aside, alter, or amend a final judgment entered at a former term, except upon application to rehear, or because of 'mistake, inadvertence, surprise, or excusable neglect,' as allowed by law. The exercise of such a power is forbidden by principle and the overwhelming weight of authority, if, indeed, there can be any well-considered case that sustains it. * * * It is a fundamental principle of the common law, as the authorities ancient and modern show, that the court cannot change and modify its final judgments at a term subsequent to the term at which they were entered. During the term the record, including the judgment, is in fieri, and may be amended or set aside as to the court may seem proper, but after the term the power to interfere with it no longer exists. This court has seldom had occasion to refer to the subject of the power of a court of record to change its judgments after the term at which they were entered, but it has repeatedly incidentally recognized the doctrine that such power does not exist." It is also stated in *Moore v. Hinnant*, supra, that a judgment regularly entered, if not erroneous, can in no case be altered at a subsequent term, otherwise than by a petition to rehear, except for the purpose of making the record express the intention of the court at that time, upon the record as then before it, so that it may speak the truth as to that record. In that case,

from which I have made only a few brief extracts, Merrimon, J., for the court, goes fully into the question we have under consideration, and denies the existence of the power or jurisdiction now about to be exercised in this case, and concludes that it would give rise to "universal distrust, endless strife and confusion, and would violate the cardinal maxim that it is to the interest of the state that there should be an end to litigation." He quotes freely from Coke and Blackstone, and supports the doctrine by the citation of numerous and weighty authorities. His quotation from Coke is an apt one: "During the terme wherein any judicial act is done, the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll and admitteth no alteration, averment or proof to the contrarie." Other and numerous authorities in support of the position will be found collected in *Moore v. Hinnant and Cook v. Moore*, supra.

The case of *Rice v. Railroad*, 21 How. 82, 16 L. Ed. 31, it seems to me, is directly in point. In that case the record upon which the appeal was heard and decided failed to show that there had been a final judgment in the court below, which was required as a basis of a writ of error to the lower court. It was sought, at the term next after the decision, by writ of certiorari, to bring up and file a new record, showing that there had been a final judgment, and to have the former judgment annulled and a rehearing granted. Taney, C. J., for the court, says: "We think the motion to annul the judgment of the last term and reinstate the case cannot be granted. The suit is a common-law action for a trespass on real property, and the judgment of the court below can be brought here for revision by writ of error only. That writ was issued by the plaintiff in error, returnable to the last term of this court, and it brought the transcript before us at that term. It was judicially acted on, and decided by this court, and, when the term closed, that decision was final, so far as concerned the authority and jurisdiction of this court under that writ. The writ was *functus officio*, and, if the parties desire to bring the record of the case again before this court, it must be done by another writ of error." He then refers to the case of *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531, which was cited in support of the petition to rehear, and says that it is not in point, as the appellate jurisdiction of the Supreme Court in admiralty cases is quite different from that in cases at common law; it being allowable in admiralty cases to amend the pleadings and take new evidence in the Supreme Court, "so as, in effect, to make it a different case from that decided by the court below." In *Sibbald v. U. S.*, 12 Pet. 492, 9 L. Ed. 1167, the court says: "No principle is

better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes [in the appellate court], or to reinstate a cause dismissed by mistake, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing." The doctrine is very strongly stated by the court in *Bronson v. Schulten*, 104 U. S. 415, 26 L. Ed. 799, thus: "But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." In *Bank v. Moss*, 6 How. 38, 12 L. Ed. 334, the court said: "The action was not regularly on the docket at the new term following the one at which the judgment had been rendered, when the court undertook to set the judgment aside. The power of the court over the original action itself, or its merits, under the proceedings then existing, had been exhausted—ended. This means the power to decide on it, or to change opinions once given, or to make new decisions and alterations on material points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court at a previous term, is never a sufficient justification for revising and annulling it at a subsequent term, in this summary way, on motion. We would not be understood by this to deprive a court at a subsequent term of power to set right mere forms in its judgments, or of power to correct mistakes of its clerks. The right to correct any mere clerical errors, so as to conform the record to the truth, always remains."

A case directly in point is that of *State v. Dickson*, 97 Ind. 125, where it appeared from the record as sent to the appellate court that the indictment had not been returned into open court by the grand jury, and the judgment was arrested. A motion was made for leave to amend the record by showing that the indictment had been returned into open court, and then for a rehearing of the case upon the record as thus amended. This is like our case in all respects. The court said: "Counsel for the state accompany their petition for rehearing with a mo-

tion to have the clerk of the court below certify to this court certain portions of the record alleged to be omitted in the transcript. No objection, so far as the record before us is concerned, is made to our decision. The settled practice of this court forbids the correction of the record after a case has been decided." So in *Garner v. State*, 36 Tex. 693, after the judgment was arrested for lack of an essential averment in the bill, a motion similar to the one in this case was made and refused because the court had lost its jurisdiction. In each of the following cases, a motion was made at a term subsequent to that at which the judgment of the appellate court was entered to amend the record and rehear the case: In *Cruiser v. State*, 18 N. J. Law, 209, the court says: "These, it is true, are mere mistakes in form; they are clerical errors only; but I have searched in vain for any authority in this court to amend, or order amendment below, after a writ of error in a criminal case. I cannot find a single case in which it has been done." It was said in *State v. Daugherty*, 59 Mo. 104: "If the record was incomplete or defective when the case was here on a former occasion, diminution should have been suggested, and a rule obtained for sending up a perfect transcript. But the party submitted his case upon the record filed in the court, and the judgment rendered thereon is final, and whilst it remains unreversed it conclusively bars any further proceedings. If parties were permitted, after a final judgment in this court, to go back to the circuit court, and there get an amended transcript, and bring the case again here, at their mere will and pleasure, there would be no final disposition of cases." So, in *Fielden v. People*, 128 Ill. 599, 21 N. E. 585, it was said by the court, "Amendments not in affirmance, but in derogation, of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered." And again it is said: "This motion, not having been made at the same term at which final judgment was rendered—not until the case had passed beyond the power of this court to stay by its order the execution of the judgment—clearly comes too late." A strong case, and one also directly in point, is *Cory v. State*, 55 Ga. 239, in which the court uses this language: "It is said that the clerk, in copying the bill of indictment, made a mistake and wrote 'with' when he should have written 'without the consent of the owner.' This may or may not be true. It has not been verified to us in the only way it can legally be done, by a suggestion of a diminution of the record on or before the calling of the case. Code, § 4282, rule 9. Our only recourse is to adhere to the law and to rule on principle. It may sometimes work seeming injustice. A departure from it would open the floodgates of speculation, and unsettle the entire practice of the court. In this case any wrong can be but temporary. The

party can be tried again, and, if found guilty on the second count, properly framed, he can be punished according to law." See, also, *U. S. v. Adams*, 9 Wall. 557, 19 L. Ed. 584; *Christopher v. Searcy*, 12 Bush, 171; 3 Cyc. Law & Pro. p. 214, and note 16, where many cases are collected.

The court, in its opinion, relies very much on the case of *Lovett v. State*, 29 Fla. 384, 11 South. 176, 16 L. R. A. 313; but the case is not, in my opinion, an authority for its decision. In the first place, the motion in that case for a certiorari for the purpose of correcting the record so that there could be a rehearing of the case upon the amended transcript was made at the same term at which the case was first heard and decided. This is sufficient to distinguish it from the case at bar. The court merely recalled its remittitur while the case was, as it said, in its possession and within its control, under its rules of practice; but, even in doing that, it went beyond what this court had repeatedly decided to be the law in such cases under its rules. If the facts of that case were like those of the case we are considering, and the same point had been presented, the authorities cited in support of the decision would not, I think, sustain it. They are, in the main, cases in which the courts asserted the right to amend their own records so that they could be made to speak the truth. The case of *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531, on which that court relied, was, as we have already said, a case in admiralty, and the court gave its decision in it under the rules of the admiralty courts in such cases. But those rules do not apply to cases at common law. The court, in *Lovett v. State*, concedes the general doctrine that, after the appellate court has sent down its certificate or remittitur and adjourned for the term, it has lost its jurisdiction of the case, but not so if the motion for a certiorari is submitted during the term at which the decision is made. "Where a case has been heard," the court says, "upon its merits in an appellate court, according to its rules of practice, and the judgment of the court has been correctly entered, and the time, if any, allowed by the statute or its rules for a rehearing having passed, and, no application for a rehearing having been made, the remittitur issues and is lodged in the lower court, it may well be said that the appellate court has lost its jurisdiction of the cause, and has not power to recall or reconsider it. Under these circumstances, it has fairly and duly exercised its appellate functions and exhausted its powers as to the cause. There must be an end of litigation; public policy, as well as the interest of individual litigants, demands it; and the rule just announced is indispensable to such a consummation." The court also says: "It is apparent that the state's motion is made during the term of court at which the judgment which it is sought to have revoked was pronounced and entered,

and it is a general rule of the common law that courts have power either to modify or vacate their judgments and decrees during the term at which they were rendered, or while they are in fieri." Even in that case the court relied largely upon decisions in civil cases in which the error or mistake occurred in the appellate court. The case of *The Palmyra*, which was also cited by the court, and much relied on in support of its decision, has been fully explained, and shown not to be an authority in support of the court's ruling.

No suggestion of fraud upon the court has been made in this case. Indeed, the Attorney General admitted there was no fraud, but a mere inadvertence of the clerk in copying the indictment.

My conclusion is that, on principle and authority, the court is without jurisdiction to grant the relief prayed for by the state. The decision of the court, in my opinion, is in conflict with those cases in which it is held that a petition to rehear will not be entertained in a criminal case, and further establishes a new doctrine—that a criminal case cannot only be reheard in this court, but that the record may be amended for the purpose of a rehearing. The remedy of the state is to send another bill. To a new indictment the plea of former conviction cannot avail the defendant, though some doubt as to this seems to have been entertained in the court below. In order to sustain the plea of former acquittal or former conviction, it must appear that the former judgment "still remains in full force and effect, and not in the least reversed or made void." *State v. Williams*, 94 N. C. 891.

It is said in the opinion that by article 4, § 8, of the Constitution, this court may issue remedial writs necessary for a general supervision and control of the inferior courts. This is admitted, but it does not follow by any means that they may be issued contrary to the well-established course and practice of the court. In the two cases cited by the court as illustrations of the proper exercise of this power, namely, *Biggs, Ex parte*, 64 N. C. 202, and *State v. Jefferson*, 66 N. C. 311, the writs were applied for in apt time, and issued regularly and in strict accordance with the well settled rules of procedure in this court. Again, the court says "that mistakes of this court or of its clerk, not mistakes of law, but of fact, have been often corrected after the mandate had gone down, and even at a subsequent term," and numerous cases are cited to sustain the proposition. Citations are not necessary for that purpose. The proposition is also admitted, but the deduction made from it by the court I do not think is either logical or warranted. The citation from *Tidd's Practice* is, I think, a complete refutation of it. The correction, as Mr. Tidd said, must be made in the same court where the mistake occurred. All the authorities cited by the court in this connection simply

refer to the familiar principle that a court may correct its own records so as to make them speak the truth. I venture to assert, with all deference, that there is not a single authority cited by the court which, when properly considered and restricted to its peculiar facts, sustains its conclusion, or which conflicts with the numerous cases decided by this court, and which I have already cited in support of the view I have taken of this case. My deliberate conviction is that the ruling of the court introduces a new and dangerous precedent into its practice and procedure, and unsettles those decisions in which the right to rehear in criminal cases is said not to exist.

The motion of the state, in my opinion, should be denied.

DOUGLAS, J. (dissenting). I fully concur in the able dissenting opinion of Justice WALKER which leaves but little for me to say, but there are some parts of the opinion of the court on which I will briefly comment.

The court says: "We are not asked to reverse our judgment, but to correct an error of fact." I do not so understand it. In the first place, we have no power at any time to correct a fact found in the court below, and, even if we give the clerk of the court below any opportunity to correct the record sent up by him, it would do the state no good, as long as our judgment remains, arresting the judgment in the court below, which in this case would be equivalent to granting the defendant a new trial, as a new bill of indictment could have been sent against him. The motion of the Attorney General to correct the "error of fact" is simply preliminary to his further motion to rehear the case on the record as so amended. If the Attorney General had simply asked to have the error of fact corrected in the record, without disturbing our judgment, I would not have dissented so strenuously. But when he asks us, after the expiration of the term at which the defendant has been granted an arrest of judgment, to take him back, reverse our judgment, and hang him under an old sentence legally set aside at a former term, I must emphatically dissent. It is true, upon the rehearing of the case this court granted the defendant another new trial upon a different ground, but that does not cure the invalidity in the rehearing itself. Suppose that the prisoner had been again tried and acquitted upon a new bill pending the rehearing, and upon the rehearing this court had found no other ground of error; would it have been our duty to have affirmed the judgment and sentence of death? This would have been a greater violation of the letter of the law than the execution of Sir Walter Raleigh, who was executed 15 years after sentence, upon a judgment which had, however, never been formally reversed. The opinion does not call it a rehearing, but what else is it? Taking the facts as they are, what other

name can we apply to it? The case is taken back and reconsidered, and a new judgment rendered. I do not mean to say that this case could properly be reheard. On the contrary, not a single requisite exists for a rehearing, even if this court had not decided in *State v. Council*, 129 N. C. 511, 39 S. E. 814, that petitions to rehear are not allowable in criminal actions. It may be asked why, having dissented in *Council's Case*, I should also dissent in the case at bar, which practically overrules every principle underlying the decision in *Council's Case*. I do so for the sufficient reason that, even admitting that the state is entitled to a rehearing, it has complied with none of the requisites prescribed by the rules of this court. Moreover, the opinion of the court cites *Council's Case* with approval, and it is impossible for both decisions to be right under the same system of jurisprudence. If we cannot rehear a case to do justice to the prisoner by correcting our own error, we surely cannot rehear it simply to hang him.

(124 N. C. 533)

BRYAN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. March 29, 1904.)

TRIAL—INSTRUCTIONS.

1. Instructions without foundation in the evidence should not be given.

Douglas, J., dissenting.

Appeal from Superior Court, Catawba County; Long, Judge.

Action by W. B. Bryan against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

S. J. Ervin and A. B. Andrews, Jr., for appellant. Thos. M. Hufham and Self & Whitener, for appellee.

MONTGOMERY, J. The plaintiff, an employé of the defendant company at the time when he was hurt, was engaged with a squad of hands, under a boss, in loading a box car with heavy timber. In his complaint, as it was first drawn, the negligence alleged was that the defendant was engaged in the work with an insufficient force of hands. The complaint was amended, after the answer was put in, as follows: "That the defendant company was negligent in that said Whitley, foreman and boss of defendant's force of laborers as aforesaid, negligently ordered said Sigman to hold said stringer or piece of timber on said car in an unsafe manner, with a stick slanting downward from the car to his [said Sigman's] shoulder, which was dangerous to plaintiff, and done without notice to him."

The defendant excepted to one of his honor's instructions to the jury, which was as follows: "If the jury should find that Whitley and one of the hands, without notice to plaintiff, quit the work at a critical juncture

in the lifting and placing, and thus prevented the completion of the lifting, and left the plaintiff and his associates at the work in a perilous position, from which plaintiff could not, by reasonable care, extricate himself, and you find that this negligence of Whitley was the proximate cause of the injury, you will answer the first issue [as to the defendant's negligence] 'Yea.'" There was no evidence to support such an instruction.

The exception to the rule as to the measure of damages, laid down by his honor, must also be sustained. His honor instructed the jury: "If the plaintiff is entitled to recover, he is entitled to have a reasonable satisfaction for the loss of both bodily and mental powers." The exception was upon the ground that there was no evidence of any loss of mental power. Upon a careful inspection of the evidence, we find that there is none to that effect. *Smith v. Railroad*, 123 N. C. 712, 38 S. E. 170; *Wilkie v. Railroad*, 123 N. C. 113, 38 S. E. 280.

New trial.

DOUGLAS, J., dissents.

(124 N. C. 630)

STATE v. MUNN.

(Supreme Court of North Carolina. March 29, 1904.)

HOMICIDE—INSTRUCTIONS—HARMLESS ERROR.

1. On a prosecution for murder, any error in the charge as to mitigation below murder in the second degree was harmless, where the jury found that defendant killed deceased willfully, deliberately, and with premeditation, and that he was guilty of murder in the first degree, after they had been fully instructed as to the difference between murder in the first and second degrees.

Appeal from Superior Court, Cumberland County; Bryan, Judge.

William R. Munn was convicted of murder in the first degree, and he appeals. Affirmed.

Thos. H. Sutton, for appellant. The Attorney General and N. A. Sinclair, for the State.

OLARK, C. J. In this case, if the evidence of the state is to be believed—and the jury by their verdict have found it to be true—a most aggravated and inhuman murder was committed by the prisoner. It is our province to consider only the alleged errors of law committed by the trial judge, and which his counsel has seen fit to point out and assign by exceptions thereto taken in apt time and duly entered in the record. Rule 27 of this court (39 S. E. vii) provides: "No other exceptions than those set out or filed and made part of the case shall be considered by this court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment." This rule formulates the decisions of this court.

¶ 1. See *Homicide*, vol. 26, Cent. Dig. § 732.

See cases cited in Clark's Code (3d Ed.) pp. 512, 514. The errors alleged have been ably and exhaustively argued by the prisoner's counsel, and the court has carefully and diligently examined each and every exception with proper regard to the importance of the case. We find no error therein. In a case of this nature, whenever there is reason to believe that injustice has been done, and a meritorious exception has by some inadvertence not been taken, the Attorney General has always consented cheerfully to an exception being entered here nunc pro tunc. The point counsel wished to present, though not excepted to, that there was error in the charge as to mitigation from murder in the second degree, would not be before us even if it had been excepted to, for the reason that the jury found, upon the very full and careful charge of the court as to the difference between murder in the first and second degrees, that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately, and with premeditation, and was guilty of murder in the first degree. The state has thus satisfied them of facts raising the crime above murder in the second degree, which only was presumed from the killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error. There is no exception which presents any new point nor any new or unusual application of an old principle. As often stated heretofore by us (Douglas, J., in *Parker v. R. B.*, 133 N. C. 337, 45 S. E. 658; *Osborn v. Leach*, 133 N. C. 428, 45 S. E. 783; *State v. Council*, 129 N. C., at page 516, 39 S. E. 814), the decision is all that concerns the parties to any appeal. An opinion giving at length the reasons for any decision is useful solely as a guide to the trial court and to this court in future cases presenting the same or similar points.

Finding no error on any of the grounds presented by the exceptions, and there being no new propositions of law or application of any principles which have not been already passed upon and announced by the court in former cases, and fully satisfied that justice has been done, and a fair trial has been had by the prisoner, it does not seem to us necessary to do more than to say that, after full and most careful investigation in this case, we find no error.

(134 N. C. 683)

STATE v. BLACKMAN.

(Supreme Court of North Carolina. March 29, 1904.)

INTOXICATING LIQUORS—UNLAWFULLY KEEPING FOR SALE—INSTRUCTIONS.

1. An instruction, on a prosecution for unlawfully keeping liquor for sale, that if defendant had whisky in his possession he would

be guilty of keeping it unlawfully, was erroneous, it being for the jury to determine from all the evidence whether he was guilty as charged.

Appeal from Superior Court, Union County; Justice, Judge.

Robert Blackman was convicted of illegally keeping liquor for sale, and he appeals. Reversed.

Redwine & Stack, for appellant. Adams, Jerome & Armfield and the Attorney General, for the State.

PER CURIAM. His honor said to the jury that the first question to decide was "whether the man had the whisky in his possession; if he did, that would make him guilty of keeping it unlawfully." The defendant excepted. In any point of view, the instruction was erroneous. The jury should have been permitted upon the whole of the evidence to say whether or not the defendant was guilty as charged. For this error, without passing upon the other exceptions, there must be a new trial.

(134 N. C. 495)

Ex parte SMITH et al.

Appeal of HAMILTON.

(Supreme Court of North Carolina. March 29, 1904.)

LIMITATIONS—ACTION—WHAT IS—PARTITION—DECREE FOR OWELTY—EXECUTION.

1. The statute of presumptions (Rev. Code, c. 65, § 18) raised a presumption of payment of all judgments or decrees within 10 years after their rendition. The statute of limitations (Code, § 136) excepted from its operations actions commenced prior to August 24, 1868, but this section was repealed by Laws 1891, p. 102, c. 113, which, however, excepted from the repeal actions instituted prior to January 1, 1893. Code, § 152, subsec. 1, bars actions on a judgment or decree 10 years after the date of the rendition of the judgment or decree, and section 153 bars actions for relief not otherwise provided for in 10 years. *Held*, that where a decree of commissioners in partition, which charged owelty against one purpart, was confirmed in 1862, a proceeding for leave to issue execution to recover the owelty, instituted in 1903, was barred.

2. A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action," within the meaning of limitations.

Appeal from Superior Court, Wayne County; Peebles, Judge.

Partition proceedings ex parte John Smith and others. Motion by John S. Hamilton for leave to issue execution on a judgment for owelty; Asher Edwards, respondent. From a judgment denying the motion, Hamilton appeals. Affirmed.

H. L. Stevens, for appellant. F. A. Daniels and W. C. Munroe, for appellee.

WALKER, J. This is a motion in a partition proceeding formerly pending in the court of pleas and quarter sessions to docket the same, and for leave to issue execution upon a judgment therein rendered which char-

[1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. §§ 321, 322, 344.

ged one of the tracts of land with a sum of money to be paid to another tract for the purpose of effecting equality of partition. At the November term, 1861, partition was decreed, and lot No. 6 was assigned by the commissioners to Amelia Smith, subject, however, to a charge of \$150.66 in favor of lot No. 1, which was assigned to John S. Hamilton, who now makes this motion. In the allotment, the commissioners, in awarding the sum to be paid by lot No. 6 to lot No. 1, used this language: "We do assess the boot before named to be paid or due whenever said dower right of Martha Hamilton shall cease upon the said land." The report of the commissioners was confirmed by decree of the court at February term, 1862. Martha Hamilton died in 1878. Asher Edwards, who is the respondent in this proceeding, has acquired the title to lot No. 1 by mesne conveyances from Amelia Smith, and is now in possession of it. He has answered the petition of Hamilton by pleading, among other things not necessary to be stated, that the charge upon the land has been paid, and that the right to enforce the same is barred by the statute of limitations. So far as it appears, he does not allege actual payment, but simply pleads payment, and relies upon the lapse of time to sustain the plea; that is, he relies both upon the statute of presumptions and the statute of limitations. The pleas are in proper form, and the question is again presented whether the judgment or decree of a court charging one lot with a sum of money to be paid to the owner of another lot in order to equalize the division of land, or for "owelty of partition," can be affected either by the statute of presumptions or the statute of limitations. The judgment in this case was rendered in 1862, and, but for the provision inserted by the commissioners in their report, which we have quoted, and which, of course, was made a part of the decree when the report was in all respects confirmed (*Bull v. Pyle*, 41 Md. 421), the right of action to enforce payment of the charge would have been deemed to have accrued prior to August, 1868, if section 136 of the Code had not been repealed by Acts 1891, p. 102, c. 113, as to actions begun after January 1, 1893. This proceeding was begun in 1903. If the right of action had accrued prior to August, 1868, and section 136 of the Code had not been repealed, we think the statute of presumptions would have applied to any proceeding instituted to enforce payment of such a charge upon the land by issuing execution on the judgment. In *Ruffin v. Cox*, 71 N. C. 253, it is said that certain authorities, which are cited in the opinion, hold that there is no bar, either by the statute of presumptions or the statute of limitations, in such cases; but this is not correct, as a reference to the cases cited will show, and it was not necessary to the decision of that case to pass upon the point. None of the cases cited in *Ruffin v. Cox* refer to the ques-

tion in regard to the statute of limitations or statute of presumptions, except the case of *Sutton v. Edwards*, 40 N. C. 425, which case has been erroneously cited several times, since it was referred to in *Ruffin v. Cox*, for the proposition that the statute of limitations is not a good plea in such cases. In *Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 280, the statute did not apply, because the land had already been sold under an execution, and the plea was not available to the party who relied on it, because it came too late. The question was not presented in *Wilson v. Lumber Co.*, 131 N. C. 163, 42 S. E. 565, as is stated by Clark, J., on page 167, 131 N. C., 42 S. E. 565; nor did it become necessary to decide it in the case of *In re Ausborn*, 122 N. C. 42, 29 S. E. 56, because in that case, as was said by Montgomery, J., for the court, there had been no decree of confirmation, and the statute could not bar, as the right to issue execution, or, in other words, to enforce the payment of the charge, had not accrued, and the statute, therefore, had not commenced to run. Those cases were rightly decided, and we approve them.

It has been supposed by some that, because it was said in one or two of the older cases, decided before 1868, that "there is no statutory limitation as a bar, by which proceedings of the kind are governed," it followed that lapse of time could not affect the right to issue execution upon such a judgment. This expression was used by Nash, J., in the leading case of *Sutton v. Edwards*, 40 N. C. 425, at page 428; but immediately afterwards he explains what is meant, namely, that there was no statute of limitations applicable to judgments at that time, as they were subject only to the statute of presumptions, under and by virtue of which there was a presumption of payment or satisfaction of all judgments and decrees within 10 years after the right to enforce them accrued. Rev. Code, c. 65, § 18. He discusses the case with reference to the statute of presumptions, and strongly intimates that it would have defeated the plaintiff's suit, but for the fact that the charge rested upon the lot of an infant, and, by the provision of the statute, the sum charged was not due and payable until he attained his majority.

We must infer from the language of the court in *Sutton v. Edwards* that, if the sum charged upon the lot of greater value had been due at the time the judgment was rendered, the plea of payment or satisfaction would have been sustained, under the statute of presumptions in force at that time. The failure to distinguish clearly between the old law, and the new in this respect, or between the statute of presumptions and the statute of limitations, has caused some apparent confusion in the cases upon this important subject; but we think they can all be easily explained and reconciled, when this distinction is kept steadily in view, and when each decision is restricted to the par-

ticular facts upon which it was based. In the case of *In re Walker*, 107 N. C. 340, 12 S. E. 136, the question was discussed by Merrimon, C. J., who wrote the opinion of the court; and, while the court held that prior to 1868 there was no statute of limitations that could operate as a bar in such cases, it strongly intimated that the statute of presumptions applied, though in that case it was found as a fact that the charge upon the land had not been paid or satisfied, and the point, therefore, was only incidentally presented. But in *Herman v. Watts*, 107 N. C. 646, 12 S. E. 437, the question under discussion was directly involved; and the court held that, as the partition had been made and the charge imposed upon the land prior to 1868, the decree was subject to the statute of presumptions, and that, as the plaintiff in the case had failed to rebut the presumption raised by the law, the court should have instructed the jury to find in favor of the party who pleaded the payment. It was also held that the proper remedy for enforcing such charges is by execution, and formerly by venditioni exponas, to be granted upon motion or petition in the original proceedings. *Waring v. Wadsworth*, 80 N. C. 345; *Turpin v. Kelly*, 85 N. C. 399; *Halso v. Cole*, 82 N. C. 161. It was intimated in *Rice v. Rice*, 115 N. C. 43, 20 S. E. 185, and decided in *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513, that the statute of limitations will bar an action or proceeding to enforce payment of a charge by will upon land devised, if sufficient time has elapsed for the purpose. It having been decided in *Herman v. Watts* that the statute of presumptions applied when the decree was made prior to 1868, it necessarily follows that the statute of limitations, which is but a substitute for the statute of presumptions, must now be a valid plea; and, if the time fixed by the statute has elapsed, it will be a good and effectual bar to the motion for execution. The two statutes are couched in substantially the same language; the only difference being that one raises a presumption, merely, of payment or satisfaction, while the other furnishes a complete bar.

We have already seen that the right to move for execution in this case accrued in 1878, according to the terms of the report and decree, as the sum charged upon the land was not due until the death of Mrs. Martha Hamilton. *Terrell v. Cunningham*, 70 Ala. 100. And, even if this provision had not been inserted in the report, the result would not have been different, as the act of 1891, p. 102, c. 113, repealed section 136 of the Code, so that, while the statute of presumptions formerly applied, the statute of limitations now takes its place (*Nunnery v. Averitt*, 111 N. C. 394, 16 S. E. 683), provided the action or proceeding was commenced since January 1, 1893, which is the fact in this case. If either statute, therefore, applies, it must be the statute of limi-

tations. We cannot see why the statute should not apply. It is true, the charge rests upon the land alone, and it has been said that the land is the debtor, and that there is no personal liability of its owner. But how can this affect the question one way or another? The statute, whether of presumptions or limitations, operates against the actor or the party who must seek to apply the remedy, and it affects only the remedy. If, therefore, he who has the right to enforce the charge against the land delays in doing so for the time limited by the statute, the bar operates, without regard to the particular nature of the charge or lien which is to be enforced, or even to the form of the remedy. It is a familiar principle that the statute of limitations affects, not the right, but the remedy. Besides, so far as the nature of the lien or charge is concerned, if we consider the matter with reference to that alone, and without regard to the remedy, the case comes not only within the spirit, but within the letter, of the statute, which provides that an action on a judgment or decree shall be barred if it is not brought within 10 years from the date of the rendition of the same, and this is a motion that an execution be issued upon a judgment or decree. The words of the statute are broad enough to include judgments or decrees in rem, as well as those in personam. The charge or lien is created by the judgment, and, when the judgment is barred or satisfied in fact or by presumption from lapse of time, it is gone, and the charge for owelty, which is merely an incident of it, ceases also to exist.

One question remains to be considered. Does the word "action," which is used in the statute, include a proceeding of this kind, which is a motion for leave to issue execution upon a judgment charging land with the payment of money for equality of partition? We think it does, and it has been so decided. In *McDonald v. Dickson*, 85 N. C. 248, the question was directly presented, and the court held that the motion for leave to issue execution was a substitute for the ancient writ of scire facias, and that, while the latter, in the main, was regarded as a continuation of the old suit, it was for some purposes a new action. The defendant is bound by the judgment, of course, as to all matters determined thereby, and as to which he is finally concluded; but to the motion for an execution upon it he can set up any defense which has arisen since the judgment was rendered, and among the defenses so available is the statute of limitations, if a sufficient time has elapsed since the rendition of the judgment to create a bar. In *Lilly v. West*, 97 N. C. 279, 1 S. E. 834, the court says: "But not less fatal is the objection founded on the limitation put upon the remedy. The bar is as effectual when it can be interposed by plea or answer to a motion to revive a dormant judgment, that

execution may issue, as to an independent action upon the judgment itself." This principle has been repeatedly recognized and enforced by this court. *Berry v. Corpening*, 90 N. C. 395; *Williams v. Mullis*, 87 N. C. 159; *Johnston v. Jones*, 87 N. C. 393; *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129; *Bank v. Swink*, 129 N. C. 255, 39 S. E. 962. It can make no difference whether section 152, subsec. 1, or section 158, of the Code, applies. The result will be the same in either case. The provisions of section 158 are very broad and comprehensive, and embrace any and all actions for relief not otherwise provided for in the Code.

The views we have expressed are sustained by decisions in other states upon statutes similar to ours. *B. & O. Railroad v. Trimble*, 51 Md. 99; *McQueen v. Fletcher*, 4 Rich. Eq. 152; *Leibert's Appeal*, 119 Pa. 517, 13 Atl. 461; *Terrell v. Cunningham*, 70 Ala. 100. The case of *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726, is, in its facts, very much like the one under review; and the court, in discussing the question involved, reached the same conclusion that we have in this case, and correctly, as we think, differentiated the cases heretofore decided in this court, and which were cited in the opinion delivered in that case.

The decision of the court below was, in our judgment, free from any error. No error.

(124 N. C. 503)

RODMAN et al. v. ROBINSON.

(Supreme Court of North Carolina. March 29, 1904.)

SPECIFIC PERFORMANCE—CONTRACTS TO CONVEY LAND—RIGHTS OF WIFE—AGREEMENT ON SUNDAY—VALIDITY—CONSIDERATION—REMEDIES.

1. Where a wife is not a party to an action for the specific performance of a contract to convey land executed by the husband, and his solvency and ownership of other land sufficient for the allotment of homestead is admitted, he cannot avoid a decree for the conveyance by asserting that his wife was entitled to dower and homestead in the land, and the decree did not sufficiently guard her interest, as she was not affected by the decree.

2. Code, § 3782, forbidding labor, work, or business of one's ordinary calling on Sunday, does not invalidate a contract entered into on Sunday for the conveyance of land, which was not an act done as a part of a usual business.

3. A promise to pay a certain sum as purchase money is a sufficient consideration for a contract to convey land.

4. Where a contract for the conveyance of land is accepted, an attempted repudiation by the vendor without the consent of the purchaser is of no effect.

5. A contract for the conveyance of land entered into on Sunday is not invalid as against public policy.

6. A purchaser of land, on breach of the contract of sale, may sue for specific performance, and is not bound to bring an action at law for damages.

7. Where no fraud or mistake is averred, an allegation that the vendor made a bad trade does not exempt him from specific performance of a contract to convey land.

8. In a suit for specific performance of a contract to convey land, describing the land by metes and bounds is sufficient.

Appeal from Superior Court, Pender County; W. R. Allen, Judge.

Action by J. F. Rodman and others against J. W. S. Robinson for specific performance of a contract to convey land. From a judgment in favor of the plaintiffs, defendant appeals. Affirmed.

J. D. Kerr, F. R. Cooper, and Shepherd & Shepherd, for appellant. Connor & Connor and E. K. Bryan, for appellees.

CLARK, C. J. On Sunday, September 14, 1902, the defendant, who then was and still is the owner in fee and possession of the land described in the complaint, contracted in writing dated September 13, 1902, with plaintiff Rodman to sell him said land, possession to be given the 1st of January, 1903, and deed to be delivered the 1st of April, 1903, at which time the purchase money was to be paid. In December, 1902, defendant informed Rodman that he would not deliver possession nor accept the purchase money, and repudiated the contract. Nevertheless Rodman did tender the \$4,200, the agreed price, in money, on 1st of April, 1903, or as soon thereafter as defendant could be found, and demanded the deed, but defendant refused to accept the money or deliver the deed. The contract is admitted in the answer, and judgment for specific performance was rendered upon the pleadings, and defendant appealed.

The first assignment of error is: "Because it appears from the answer that defendant was at the time of signing said alleged contract to convey a married man, and his wife is still living, and entitled to dower and homestead right in said land, and the judgment does not sufficiently guard and protect such right." The wife has an inchoate right of dower, but she has no present right to the property, nor to its possession, nor any dominion over it. She has only a right therein contingent upon surviving her husband, which may not happen. *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318. The Code, § 2103, expressly provides that upon the death of the husband the widow shall be entitled to dower. Besides, this is an objection which the plaintiff alone could make. The wife is not a party to this action, and the decree in no wise affects her contingent interest. Having taken the contract without the wife's signature, the plaintiff could not obtain a decree compelling her to join in the deed. *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1; *Fortune v. Watkins*, 94 N. C. 304. The Code, § 2106, recognizes the right of the husband to alien without the joinder of the wife, the conveyance having no effect upon the wife's contingent right of dower. *Fleming v. Graham*, 110 N. C. 374, 14 S. E.

¶ 3. See *Specific Performance*, vol. 44, Cent. Dig. § 363.

922; *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Mayho v. Cotton*, 69 N. C. 289. As to the homestead right, it was not necessary for the wife to join in the contract, because the answer admits that no homestead had been allotted in this land. *Mayho v. Cotton*, supra, approved in *Joyner v. Sugg*, 132 N. C., at page 569, 44 S. E. 122. Besides, the answer further admits the solvency of the defendant, that there is no judgment docketed against him, and that he owns other lands more than sufficient in value for the allotment of the homestead. *Hughes v. Hodges*, supra. The conveyance or contract is valid, subject to the contingent right of dower. *Gatewood v. Tomlinson* and *Scott v. Lane*, supra. The wife is not a party to this action, and not estopped by the judgment if the above admissions should prove untrue. The wife not being a party, the exception that her "rights are not protected by the decree" has no place here.

The second assignment of error is: "Because the contract to convey was entered into and signed upon Sunday, and, no consideration being passed, and the defendant having repudiated the contract the week following, said contract is not enforceable, and the judgment should have declared said contract to be void." The promise to pay \$4,200 purchase money was a sufficient consideration. *Puffer v. Lucas*, 101 N. C., at page 284, 7 S. E. 734; *Worthy v. Brady*, 91 N. C. 265; *a. c.* 108 N. C. 440, 12 S. E. 1034; *Clark on Contracts*, pp. 149, 169; 9 Cyc. 323. The contract having been accepted by plaintiff, the attempted repudiation thereof by the defendant without the consent of the plaintiff has no effect. *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447. So this exception hinges upon the question whether the contract is invalid because entered into and signed on Sunday. This point has been settled in this state by repeated decisions. A contract entered into on Sunday is not invalid at common law. *Clark on Cont. p.* 393; *Drury v. De Fontaine*, 1 Taunton, 131 (in which it was held that a vendor could recover the price of a horse sold on Sunday); *Benjamin on Sales*, § 552. Our statute—Code, § 3782—is copied almost verbatim from the first part of the statute 29 Car. II, c. 7 (1678). The other part forbidding service of process on Sunday is omitted from our statute, which merely provides that "on the Lord's Day, commonly called Sunday, no tradesman, artificer, planter, laborer or other person shall * * * do or exercise any labor, business or work of his ordinary calling * * * upon pain that every person so offending * * * shall forfeit and pay one dollar." This part was construed by Lord Mansfield in *Drury v. De Fontaine*, supra, not to invalidate a sale of a horse on Sunday, where the sale was not a part of the vendor's ordinary calling. This statute

is the foundation of nearly all the Sunday legislation in this country. It is not alleged in the answer that this contract was made and entered into by either the plaintiff Rodman or the defendant, Robinson, in pursuance by either of his ordinary calling. In *Melvin v. Easley*, 52 N. C. 350, the court said: "The statute in its operation is confined to manual, visible, or noisy labor, such as is calculated to disturb other people; for example, keeping open shop or working at a blacksmith's anvil. The Legislature has power to prohibit labor of this kind on Sunday on the ground of public decency. * * * But when it goes further, and * * * prohibits labor which is done in private, the power is exceeded, and the statute is void." In that case it was held that selling a horse on Sunday was not forbidden by the statute, as dealing in horses was not Melvin's "ordinary calling." Again, it is said in *State v. Ricketts*, 74 N. C. 192: "In this state every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day." This has been cited and approved in *White v. Morris*, 107 N. C., at page 99, 12 S. E. 80 (in which Davis, J., calls attention to the fact that prior to the Code civil process could not legally be served on Sunday, but now the restriction applies only to forbid arrests in civil actions on that day), approved also in *State v. Penley*, 107 N. C. 810, 12 S. E. 455; *Ashe, J.*, in *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90, and *State v. Howard*, 82 N. C., at page 626; *Merrimon, C. J.*, in *State v. Moore*, 104 N. C. 749, 10 S. E. 183; *Taylor v. Ervin*, 119 N. C. 276, 25 S. E. 875—all these last holding that it was not illegal to hold court on Sunday if the judge deemed it necessary, though out of considerations of propriety it ought not to be done unless necessary. In *State v. Brooksbank*, 28 N. C. 73, *Ruffin, C. J.*, held that it was not indictable to sell goods in open shop on Sunday, and in *State v. Williams*, 20 N. C. 400, the court, through the same judge, held it not indictable to work on Sunday, it not being indictable either at common law (citing *Rex v. Brotherton*, 1 Str. 702; *Rex v. Cox*, Bur. 785) or by our statute, adding (page 400): "It is clear that the making of bargains on Sunday was not a crime against the state, for contracts made on that day are binding. It has often been so ruled in this state, and after elaborate argument and time to advise." *Covington v. Threadgill*, 88 N. C. 189, is obiter merely, and *Waters v. Railroad*, 108 N. C. 349, 12 S. E. 950, is a construction of section 1632, Gen. St. S. C. 1862, which is a part of the statute 29 Car. II, which has been omitted in our statute.

Counsel for defendant contend that Christianity is a part of the law of the land, and hence, independent of any statute, the contract is invalid. If the observance of Sunday were commanded by statute as an act of religion or worship, such statute would be

absolutely forbidden. The founder of the Christian religion said that his "kingdom was not of this world," and under our Constitutions, both state and federal, no act can be required or forbidden by statute because such act may be in accordance with or against the religious views of any one. The first amendment to the federal Constitution provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;" and the Constitution of this state (article 1, § 26) reads: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should in any case whatever control or interfere with the right of conscience." If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons, the statute could not be maintained. The Seventh Day Baptists, and some others, as well as the Hebrews, keep Saturday, and the Mahomedans observe Friday. To compel them or any one else to observe Sunday for religious reasons would be contrary to our fundamental law. The only ground upon which "Sunday laws" can be sustained is that, in pursuance of the police power, the state can and ought to require a cessation of labor upon specified days to protect the masses from being worn out by incessant and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection, but a convenience. Yet such statute cannot be construed beyond its terms so as to make the signing of a contract on Sunday invalid when the words prohibit only "labor, business, or work of one's ordinary calling." It is incorrect to say that Christianity is a part of the common law of the land, however it may be in England, where there is union of church and state, which is forbidden here. The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law, which expressly denies religion any place in the supervision or control of secular affairs. As a cotemporary construction of the federal Constitution, it may be well to recall that one of the first treaties of peace made by the United States—that with Tripoli—which was sent to the Senate with the signature of George Washington, who had been president of the convention which adopted the United States Constitution, began with these words, "As the government of the United States is not in any sense founded on the Christian religion." This treaty was ratified by the Senate. If it was presumption in Uzza to put forth his hand to stay the tot-

tering ark of God at the threshing floor of Chidon, it is equally forbidden under our severance of church and state for the civil power to enforce cessation of work upon the Lord's Day in maintenance of any religious views in regard to its proper observance. That must be left to the consciences of men as they are severally influenced by their religious instruction. Churches differ widely, as is well known, on this subject; the views of Roman Catholics and Presbyterians, for instance, being divergent, and the views of other churches differing from both. Even if Christianity could be deemed the basis of our government, its own organic law must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or, indeed, any day. The Master's references to the Sabbath were not in support, but in derogation, of the extreme observance of the Mosaic day of rest indulged in by the Pharisees. The Old Testament commanded the observance of the Sabbath, but that was an injunction laid upon the Hebrews, and it designated Saturday, not Sunday, as the day of rest, prescribing a thoroughness of abstention from labor which few observe, even of the people to whom the command was given. Sunday was first adopted by Christians in lieu of Saturday long years after Christ, in commemoration of the Resurrection. The first "Sunday law" was enacted in the year 321 after Christ, soon after the Emperor Constantine had abjured paganism, and apparently for a different reason than the Christian observance of the day. It is as follows: "Let all judges and city people and all tradesmen rest upon the venerable day of the Sun. But let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence the favorable time should not be allowed to pass, lest the provisions of heaven be lost." Codex Just. lib. 3, tit. 12, lex 2. Evidently Constantine was still something of a heathen. As late as the year 409 two rescripts of the Emperors Honorius and Theodosius indicate that Christians then still generally observed the Sabbath (Saturday, not Sunday). The curious may find these set out in full in Codex Just. lib. 1, tit. 8, lex 13. Not till near the end of the ninth century was Sunday substituted by law for Saturday as the day of rest by a decree of the Emperor Leo (Leo, Cons. 54). The subsequent development of Sunday laws will be found in Lewis' "Sunday Legislation." This legislation has differed in different Christian countries, and still differs, and the divergence is very great, even in the legislation of the states of this Union. The Saxon laws, under Ine (about A. D. 700), forbade working on Sunday, but under Alfred (A. D. 900) and Athelstane (A. D. 924) the prohibition was merely against marketing on Sunday, and there seems to have been no statute against

working on Sunday (whatever the church may have enjoined) until the above-cited statute 29 Car. II, c. 7 (1678), the first part of which is almost verbatim our statute (Code, § 3782). See 4 Blk. Com. 63. Indeed, it appears from the records of Merton College, Oxford, that at its manor of Ibstone, in the latter part of the thirteenth century, contracts with laborers provided for cessation from work on Saturdays and holidays, but it was stipulated that work should be done in regular course on Sunday. Thorold Rogers, "Work and Wages," c. 1. Indeed, it seems that this was usual in England till the time of the Commonwealth and the rise of the Puritans to power, but the change was not enacted into law till the above-cited statute of Charles II in 1678. The first Sunday law in this country was enacted in Virginia in 1617 (three years before the landing at Plymouth), and punished a failure to attend church on Sunday, with a fine payable in tobacco. This was re-enacted in 1623. Henning's Statutes at Large Va. 1619-1660, vol. 1, p. 123. Plymouth Colony (Records, vol. 11, p. 214) made it punishable by imprisonment in the stocks to go to sleep in church; and on June 10, 1650, the same colony made it punishable by whipping to do "any servile work or any such like abuse" on the Lord's Day. "So any sin committed with an high hand, as the gathering of sticks on the Sabbath Day, may be punished with death, when a lesser punishment might serve for gathering sticks privily and in need." Records of Massachusetts Bay, vol. 2, p. 93. Publicity did not then have the virtue attributed to it as now, but the reverse. Hutchinson's History of Massachusetts, vol. 1, p. 390, says: "Divers other offences were made capital, viz., profaning the Lord's Day in a careless or scornful neglect or contempt thereof (Numbers 15, 30-36)." The New Haven Colony Records, 1653-1655, p. 605, contain a similar provision that profaning the Lord's Day by "sinful servile work or unlawful sport, recreation or otherwise, whether willfully or in a careless neglect, shall be duly punished by fine, imprisonment, or corporally, according to the nature and measure of such sin and offense"; providing further that, if "the sin was proudly, presumptuously and with a high hand committed," such person "shall be put to death." On May 19, 1668, after the union of New Haven and Connecticut in one colony, unnecessary travel or playing on Sunday, or keeping out of the meeting house, was made punishable by imprisonment in the stocks; adding, "The constables in the several plantations are hereby required to make search for all offenders against this law and make return thereof." Colonial Records of Connecticut, 1665-1667, p. 88. Similar laws, but of less severity, were enacted in some other provinces. While the statutes of the several states still differ on the subject of Sunday legislation, all of these enactments are now based upon

the police power, that some rest may be guaranteed to the workers, and to avoid offense by the noise and tumult of traffic and labor to the great majority who desire a day of quiet and peace for their devotional services. Bishop on Contracts, § 536, says: "It is abundantly settled that a Sunday contract is good when it does not come in conflict with any statute." We do not deny the constitutionality of a Sunday law based on the police power, which is well settled. *Judfine v. State*, 22 L. R. A. 721, and notes. We hold that our statute does not make void the contract here sued on. In the language of Caldwell, J., in *Swann v. Swann* (C. C.) 21 Fed., at page 305: "It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's Day." And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday.

Among the authorities elsewhere which hold in accordance with our decisions that a note or contract made on Sunday is valid are *Barrett v. Applington*, Fed. Cas. No. 1,045; *More v. Clymer*, 12 Mo. App. 11; *Glover v. Cheatham*, 19 Mo. App. 656; *Sanders v. Johnson*, 29 Ga. 526; *Dorough v. Mort Co.* (Ga. 1903) 45 S. E. 22; *Ray v. Catlett*, 51 Ky. 532; *Hazard v. Day*, 14 Allen, 487, 92 Am. Dec. 790; *Geer v. Putnam*, 10 Mass. 312; *Kaufman v. Hamm*, 30 Mo. 388 (which held valid a promissory note made on Sunday); *Foster v. Wooten*, 67 Miss. 540, 7 South. 501; *Horacek v. Keebler*, 5 Neb. 355; *Fitzgerald v. Andrews*, 15 Neb. 52, 17 N. W. 370; *Swisher's Lessee v. Williams' Heirs*, Wright, 754; *Bloom v. Richards*, 2 Ohio St. 387; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684 (which holds a mortgage executed on Sunday to be valid); *Mills v. Williams*, 16 S. C. 598; *Lucas v. Larkin*, 85 Tenn. 355, 8 S. W. 647 (privy examination on Sunday valid); *Gibbs v. Brucker*, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534; *Allen v. Gardner*, 7 R. I. 22; *Moore v. Murdock*, 26 Cal. 514; *Johnson v. Brown*, 13 Kan. 529; *Birks v. French*, 21 Kan. 238; *Boynnton v. Page*, 13 Wend. 425; *Miller v. Roessler*, 4 E. D. Smith, 234; *Batsford v. Elvery*, 44 Barb. 618; *Merritt v. Earle*, 29 N. Y. 515, 86 Am. Dec. 292; *Eberle v. Mehrbach*, 55 N. Y. 682; *Amis v. Kyle*, 2 Yerg. 31, 24 Am. Dec. 463; *Beham v. Ghio*, 75 Tex. 87, 12 S. W. 969; *Schneider v. Sansom*, 62 Tex. 201, 50 Am. Rep. 521; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67; *Raines v. Watson*, 2 W. Va. 371; *Clark, Contracts*, 395; and there are others to same purport. There are decisions to the contrary, but they will be found almost entirely in states where the statute, unlike ours, is not restricted to "labor, business, or work done in one's ordinary calling," but is extended in its terms so as to embrace

the prohibition of contracts of all kinds on Sunday. In such cases, as is said in *Swann v. Swann* (C. C.) 21 Fed. 299: "Contracts made on the Lord's Day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act—no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute." The execution of a will on Sunday seems to be held valid everywhere. The Pennsylvania court in 1850 was evenly divided on the question whether "a marriage contract executed on Sunday was such worldly employment or business as was forbidden on that day" (In re Gangwere's Estate, 14 Pa. 417, 53 Am. Dec. 554); but better advised later, in 1882 they held that a contract of marriage entered into on Sunday was valid (*Markley v. Kessering*, 2 Penny. 187).

To sum up the whole matter, the validity, in the courts, of any act done on Sunday, depends not upon religious views, but upon the statute of each particular state, and our statute only forbidding "labor, work, or business of one's ordinary calling" does not invalidate a contract, as here, which was not an act done as a part of the plaintiff's usual business or calling. *Bishop, Contracts*, § 538, and cases cited. As was said in *State v. Ricketts*, supra: "What religion and morality permit or forbid to be done on Sunday is not within our province to decide."

The third exception is that the agreement to convey was void because without consideration and against public policy. Both these points have been disposed of. See, also, *Dowdy v. White*, 128 N. C. 17, 38 S. E. 129, as to mutual promises being sufficient consideration, and on public policy see note at end of opinion in *Swann v. Swann* (C. C.) 21 Fed. 308.

The fourth and last exception is that the decree is "for specific performance, while the plaintiff at most is entitled only to damages for breach of contract." In *Bryson v. Peak*, 43 N. C. 310, it is held: "In case of breach of contract of sale, the injured party is entitled at his election to a bill for specific performance, and is not bound to bring an action at law for damages." To same purport, *Springs v. Sanders*, 62 N. C. 67; *Young v. Griffith*, 84 N. C. 715; *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16; *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Whit- ted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Hennessey v. Woolworth*, 123 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500.

The allegation that the defendant made a bad trade, there being no fraud or mistake alleged, does not exempt him from specific performance. *Stamper v. Stamper* and *Whit- ted v. Fuquay*, supra; *Moore v. Reed*, 37 N. C. 580. If, as the defendant admits, he is liable to damages for the difference between the contract price and the value of the land, then he is not hurt, because he would have

to pay the difference, and there would be no reason for a refusal to decree specific performance. There is no fraud or mistake as alleged. The land is described by metes and bounds, and that is sufficient. *Laws 1891*, p. 524, c. 465; *Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267; *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910; *Farthing v. Rochella*, 131 N. C. 563, 43 S. E. 1. The decree should have directed the defendant to make reasonable effort to get his wife to sign the deed. *Swepson v. Johnson*, 84 N. C. 449; *Welborn v. Sechrist*, 88 N. C., at page 292. But that was error against the plaintiffs, who are not appealing.

No error.

WALKER, J., concurs in result. CON- NOR, J., having been of counsel, did not sit on the hearing of this case.

(134 N. C. 498)

TEW v. YOUNG et al.

(Supreme Court of North Carolina. March 29, 1904.)

TRIAL—ISSUES—RESPONSES OF JURY—VERDICT.

1. A complaint alleged that defendant sold plaintiff an interest in a certain machine, representing that the whole machine, including a certain crank connected therewith, was patented; that the crank was in fact not included in the patent; and that he was unable to sell the machine on account of threats by the owner of a superior patent, including the crank. Defendant denied the alleged representations, and denied that there was any superior patent. Issues were submitted to the jury as to any fraud, whether the patent covered the crank, and whether the patent was worthless without the crank, on all of which the jury found for plaintiff; but the jury answered that they could not say as to whether the machine, in all its parts, was covered by an older patent, or as to whether plaintiff was prevented from selling the machine by reason of a patent covering the crank. There was no evidence as to the existence of any other patent. *Held*, that a verdict for plaintiff on the responses was error, since they covered immaterial matters, but failed to cover the material issues under the pleadings.

Appeal from Superior Court, Cumberland County; Bryan, Judge.

Action by L. J. Tew against E. F. Young and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

D. T. Oates, W. A. Stewart, and J. C. Clifford, for appellants. T. H. Sutton and N. A. Sinclair, for appellee.

MONTGOMERY, J. The theory upon which this case appears from the record to have been tried was inconsistent with the cause of action set out in the complaint; and the jury, failing to respond to the particular issues raised by the pleadings, answered certain others which seem to us immaterial. The allegations in the complaint upon which the plaintiff founds his action are that the defendants sold to him an interest in a certain machine or cabinet for the

preservation of fruit, which the defendants represented to him at the time of the sale was protected by a patent; that, connected with the model of the patented machine exhibited to the plaintiff, there was represented, as included in the patent, a crank or handle to be used in connection with a cylinder attached to the cabinet; and that this crank was not in fact included in the patent. No damage was alleged by the plaintiff to have been sustained by him because of the alleged fraudulent statement that the crank was covered and protected by the patent, but the plaintiff alleges that his damages grew out of his inability to sell the machine within the territory in which he was allowed to operate by virtue of his purchase, on account of a threat made of legal prosecutions by the owner of an older and superior patent of a like machine, including the crank, and that, believing that there was an older and superior patent, he abandoned the sale of his machine after spending a good deal of time and money in preparation for its sale. The defendants deny that there were any fraudulent representations made by them to the plaintiff at the time of the sale of the patent to the plaintiff, and denied that there was any older and superior patent of the machine. His honor submitted several issues to the jury—one upon the question of fraud in the sale of the patent, one as to whether the patent covered the crank or not, one as to whether the patented device was worthless without the crank or handle—all of which the jury answered in favor of the plaintiff. But the two material issues, to wit, "Was the fruit preserver, cabinet, or casket, as exhibited, in its essential parts, covered by older or superior letters patent?" and "Was the plaintiff prevented from selling the fruit preserver, cabinet, or casket by reason of an older and superior patent right covering the crank or cylinder?" were both answered, "Cannot answer." Upon the trial not one word of an older or superior patent was said in the evidence. There was no attempt to show that there was an older or superior patent, or that any person had claimed such patent, or had interfered with the plaintiff in his attempt to make sales of his property. The defendants' exception, then, to the judgment pronounced on the verdict, was well taken.

New trial.

(234 N. C. 516)

WEEKS v. WILKINS et al.
(Supreme Court of North Carolina. March 29, 1904.)

STATE GRANTS — REGISTRATION — INFANTS — DEEDS — DISAFFIRMANCE — REASONABLE TIME.

1. The registration of a grant from the state, which described the land by metes and bounds, and stated that the grant was in the same form as another named registered grant, was not defective because of the failure to copy the entire grant.

2. By analogy to the statute giving an infant three years after majority to bring action against a disseisor, three years after majority should be regarded as a reasonable time within which an infant may disaffirm his deed; and this is so even though the deed passes only a remainder, and the life tenant is still living when the infant attains majority, and continues to live for more than three years thereafter.

Appeal from Superior Court, Sampson County; Peebles, Judge.

Action by S. M. Weeks against J. T. Wilkins and others. From a judgment for plaintiff, defendants appeal. Reversed.

J. D. Kerr and J. L. Stewart, for appellants. F. R. Cooper, for appellee.

CONNOR, J. This action is prosecuted by the plaintiff against the defendants for the recovery of the land described in the complaint. The defendants, in their answer, denied the plaintiff's title. The plaintiff introduced the original entry book of Sampson county, containing the following entries: "May 12, 1791. No. 256. Arch Carraway enters 200 acres of land on Rye Branch, joining Elizabeth Bass' line." Grant from the state to Arch Carraway, Grant Book B, p. 27, reading as follows: "No. 417. Arch Carraway 200 acres. This grant to Arch Carraway for 200 acres of land are in same form as the aforesaid registered grant in this book, page 1 and 2, only the persons' names and the various courses of the same, to-wit. [Then follows a description of the land by metes and bounds.] At Newberne, the 1st day of January, in the seventeenth year of our independence, and in the Year of Our Lord one Thousand, seven hundred and ninety three. [Then follows the signature of the Governor and Secretary of State.] This grant is registered March 10, 1798." Defendants objected upon the ground that the registration was imperfect; that the registrar should have copied the entire grant, instead of a part of it, and referring to the registry of other grants for the evidence. Plaintiff then offered in evidence the grant referred to in the Carraway grant, which is the first grant in said book, and registered in full. The others are registered, like the Carraway grant, by reference to said first grant. Said first grant was admitted to be correct in form and correctly registered. The objection was overruled, and the defendants excepted. We think the objection was properly overruled, and that the registration was sufficient.

The plaintiffs then introduced deeds showing a chain of title from Carraway to Richard Warren, and the will of Richard Warren, devising the land to Hester Weeks and her children. It was in evidence that Hester Weeks and her children resided on the land in controversy until the execution of the deed to Brittain A. Edwards, June 1, 1863.

The plaintiff, by way of estoppel, and for the purpose of attacking the same, offered in evidence a deed from Hester Weeks and her children to Brittain A. Edwards, dated June 1, 1863. This deed is signed by Hester Weeks and all of her children except Betsy Ann Raynor. At the time of executing said deed, Susan Catherine Williford, Phoebe Williford, and Mary J. Jones were married women. They were not privily examined touching their execution of the deed. Minta Tew was a widow, and more than 21 years of age. The jury found upon the issues submitted to them that Martha Weeks and Hester O. Weeks were also minors at the time of executing said deed. It was admitted that the plaintiff, Sampson Weeks, was a minor at the time he signed said deed. This deed was probated and registered upon the oath and examination of the subscribing witnesses thereto. There was evidence tending to show that the defendants claimed portions of said land under Brittain A. Edwards. The complaint does not set out what portions of said land were claimed by the several defendants, nor does their answer throw any light upon this question. Much confusion grows out of the indefinite allegations in the pleadings. The complaint should have set out in full the tracts of land of which the several defendants were in possession.

We are not sure that in the confused condition in which this record is sent to us we have been able to fully understand and pass upon the large number of exceptions. As the case must be sent back for a new trial, we think, upon the pleadings being properly amended, many of the exceptions now in the record will not again be presented. For the purpose of deciding such questions as are fairly presented, we understand the condition of the title to be as follows: The land in controversy belonged to Hester Weeks for life, with remainder to her eight children, by virtue of the will of Richard Warren, as construed by the court in partition proceedings. On June 1, 1863, Hester Weeks and seven of her eight children executed a deed for said land to Brittain A. Edwards; one daughter—Betsy Ann Raynor—not joining therein. At the time of the execution of this deed three of her daughters were married women, and as to them, no privy examination being taken, the deed is void. Two of the daughters were minors; one daughter—Minta Tew—a widow, more than 21 years of age. Her interest, therefore, passed under the deed, and need not be considered. The plaintiff, Sampson Weeks, was a minor. The three undivided shares of the married women are eliminated, the deed being as to them void.

It appears from the record that Hester O. Weeks has since the date of the deed intermarried with Asher McCullen. Her age at the time of her marriage does not appear. Martha Weeks is still a feme sole. Upon these facts Brittain A. Edwards took the life

estate of Hester Weeks and the one-eighth undivided interest of Minta M. Tew. As to the married women, the deed was void. In respect to the shares of Sampson Weeks, Martha Weeks, and Hester O. McCullen, the deed was voidable upon their arriving at full age. Hester Weeks, the life tenant, died July 10, 1896. On the 1st day of June, 1899, all of the living children, together with the heirs of Susan Williford, deceased, executed a deed conveying the land to plaintiff, Sampson Weeks. We find in said deed the following language: "And the parties of the first part do hereby disaffirm and repudiate a certain paper writing purporting to be a conveyance of a portion of the land described in said will to one Brittain Edwards, dated June 1, 1863, and registered in Book 35, p. 898, in the registry of Sampson county." The plaintiff testified that he was 35 years old at the date of the deed made to the defendant J. T. Wilkins, October 1, 1891. He was asked if he knew about that and other trades in regard to the land, and whether he ever objected or warned purchasers. These questions were asked with a view to showing that plaintiff's disaffirmance of the deed of 1863 to Edwards was not in a reasonable time, and with a due regard to the rights of purchasers. The court intimated that it would hold that mere silence on the part of those in remainder during the continuance of the life estate did not amount to an affirmance. The plaintiff was asked if he knew of any acts done on the land in the nature of waste. He replied that he thought McPhail cut some sawmill logs, and that he hauled some of these logs by team, and that Daughtry cleared some of the land, but that clearing up the land improved it; that he never objected to such acts. The defendants contended that the deed from the children of Hester Weeks to the plaintiff was void as to two of them upon the ground of fraud in the factum. His honor ruled that upon all of the testimony there was no evidence, competent to be considered by the jury, to sustain this allegation, and we concur with him therein. The only question which we are enabled to decide from this record is presented by his honor's instruction, as follows: "As to the share of Sampson M. Weeks, the plaintiff, it being admitted that he was not twenty-one years old at the time he signed said deed, the plaintiff's right to recover that share depends upon his affirmance of said deed after becoming of full age. If the plaintiff, by acts, conduct, or words, affirmed or ratified said deed after becoming of full age, then, of course, he cannot recover; but mere silence on the part of a remainderman, unaccompanied by acts or words tending to show affirmance during the continuance of a life estate, will not of itself amount to an affirmance; and failure to bring suit against parties in possession during the continuance of a life estate is not an affirmance; and the court charges you that a delay of less

than three years, as in this case, after the termination of the life estate, unaccompanied by acts, conduct, or words, is not an affirmation. * * * An act of disaffirmance must be clear, positive, and unequivocal, and must indicate clearly their intention to disaffirm and repudiate said deed. The commencement of an action to recover the land, as in this case, is such an act of disaffirmance, and the subsequent conveyance of the land described in the original deed with knowledge of its purpose and effect is likewise such an act of disaffirmance." We take it to be well settled in this state that the deed of an infant, operating as it does, under our registration laws, by transmutation of possession, is voidable, and not void. *Hogan v. Strayhorn*, 65 N. C. 279; *McCormic v. Leggett*, 53 N. C. 425; *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933; *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108; *Kent, Com. 236*; 1 *Devlin on Deeds*, 86. We do not find in the record any evidence of acts on the part of Sampson Weeks amounting to an affirmation, and his honor would have been justified in so saying to the jury. The institution of this action is a clear disaffirmance, as his honor told the jury. The defendants, however, asked the court to instruct the jury that such disaffirmance must be within a reasonable time after the plaintiff reached his majority. He was of the opinion, and so instructed the jury, that, in view of the existence of the outstanding life estate of Hester Weeks, the action brought within three years after her death was within the time prescribed by law. The defendants excepted, and this exception presents the question which must be decided by us.

This court has not, so far as the brief and argument of counsel and our own investigation show, decided the question as to when an infant, after arriving at his majority, must disaffirm his deed. The only case approaching it is *Dewey v. Burbank*, 77 N. C. 260, in which it is said that after his reaching his majority he may avoid or confirm it, and that continuing to reside on the land and paying a part of the purchase money (he being in that case the purchaser) amounts to an election to ratify. The author of *Devlin on Deeds*, vol. 1, § 91, after discussing the authorities, says: "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time, after he reaches his majority, to determine whether he will abide by his conveyance, executed while he was a minor, or will disaffirm it.

And it is no more than just and reasonable that, if he silently acquiesces in his deed, and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it." We think this is a just and reasonable rule. It is sustained by a large number of well-considered cases. *Kline v. Beebe*, 6 Conn. 494, in which Hosmer, C. J., says: "A ratification of the contract has often been inferred from the silence of the infant after his arrival at full age, coupled with his retaining possession of the consideration, or availing himself in any manner of his conveyance. * * * The omission to disaffirm a contract within a reasonable time has been held sufficient evidence of a ratification." *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 272, 26 Am. Rep. 837. In *Blankenship v. Stout*, 25 Ill. 132, it is held that a conveyance of real estate by an infant must be disaffirmed within three years after his arrival of full age; *Caton, C. J.*, saying: "It is of the greatest importance that the common assurances of the country be rendered as certain as possible. Purchasers should be able to know, after ascertaining the facts, whether they can purchase a good title or not. * * * This end is essentially promoted by fixing a definite limit within which a conveyance made by an infant shall be repudiated after he attains his majority. Although the tenth section of the statute * * * does not in terms apply to such cases, yet we are disposed to adopt the limitation there prescribed for the bringing of an action by an infant after he attains his majority as a reasonable time within which he should repudiate a conveyance of real estate executed by him while an infant." *Tyler on Infancy*, 70. In *Bigelow v. Kinney*, supra, it was held that disaffirmance 11 years after majority was not within a reasonable time. *Drake's Lessee v. Ramsay*, 5 Ohio, 252. While we have no statute fixing the time within which an infant is required to disaffirm his conveyance, we think that, upon the reason of the thing, and in consonance with the policy of the law, which seeks to quiet titles and encourage improvement of real estate, the infant should exercise his election within a reasonable time. The statute gives him three years after arrival at majority within which to bring his action against a disseisor. It seems to us that the same time, by analogy, should be fixed as the period within which he should determine whether he will disaffirm his deed.

But it is said that Mrs. Hester Weeks owned the life estate, and that pending such estate he had no right of action to sue for the possession of the land. We do not think this material. His right to disaffirm his deed was entirely independent of his right to the possession of the land. He could easily have disaffirmed by returning the purchase mon-

ey, or by some other unequivocal act which would have put innocent purchasers on notice. He could have brought his action to remove a cloud from his title under Acts 1893, p. 37, c. 6. He was, according to his testimony, 34 years of age in 1894, and therefore reached his majority in 1881. At the time of the institution of this action he was 39 years of age. He should, we think, have disaffirmed his deed within three years after he arrived at his majority.

The record before us illustrates the injustice which may be done by permitting an infant to remain quiescent for an unlimited time before doing some act which puts innocent purchasers on notice of a defect in their title. This land has been divided into five parcels, and as many persons have purchased, paid for, and it seems some of them, with the knowledge of the plaintiff, have cleared and improved it. Eighteen years after his majority, the plaintiff, for a nominal consideration, buys the interests of his brothers and sisters, and brings this action; thus disturbing the rights of innocent purchasers, and recovering, not only the land, but the rents and profits in excess of the amount paid by him for it. A stronger illustration of the wisdom of the law, which seeks to quiet titles, can hardly be found. His honor should have charged the jury that the plaintiff, Sampson Weeks, could not recover in respect to his one-eighth undivided interest.

There is no evidence in the record in regard to the age of Martha Weeks. Her conveyance to Sampson is a clear disaffirmance. Whether it was made within the three years after reaching her majority we are unable to see. It does not appear when Hester Weeks was born, or when she married. Whether her disaffirmance is in time will depend upon these facts. If she became covert before reaching majority, she is not barred of her right.

The record contains a number of admissions which should be incorporated in the judgment. As a new trial must be had, we think that the complaint should be reformed so as to contain "a plain and concise statement of the facts constituting the cause of action," and the defendants be permitted to answer. It would seem that, in view of the number of parties and interests involved, and the complicated questions of fact to be settled, a reference would expedite the final determination of the controversy.

We have not noted and decided many of the exceptions, because upon a new trial they may not and should not arise. There seems to be no doubt that the title vested in Mrs. Weeks for life remainder to her children, and that all of the defendants claim under them through Brittain Edwards. It seems equally clear that the defendants own the share of Minta M. Tew, and, under our decision, of Sampson Weeks, and that the plaintiff owns the shares of Betsy Raynor and the married sisters who signed the Ed-

wards deed, but of whom no privy examination was had. This leaves the shares of Martha Weeks and Hester McCullen open for adjustment upon the facts as they may be shown, according to the principles we have attempted to lay down. We think that the judgment against the defendants for rents and profits should be reversed. The facts are not found upon which the amount of their liability depends. The case, it would seem, should go to a referee to settle these questions. When the rights of the parties are ascertained, a decree should be so drawn that it will quiet the title. *Weeks v. McPhail*, 128 N. C. 180, 38 S. E. 472. Let this be certified to the superior court of Sampson.

Error.

(124 N. C. 526)

MCGOWAN v. DAVENPORT et al.

(Supreme Court of North Carolina. March 29, 1904.)

EVIDENCE — HEARSAY — WITNESSES — TRANSACTION WITH DECEDENT — PARTIES CLAIMING UNDER DECEDENT — SURETIES.

1. In an action to foreclose a trust deed, testimony that the deceased grantor had told witness that the debt secured was not paid was incompetent, as hearsay.

2. Code, § 590, provides that no person interested in the event of an action shall testify against one deriving his title or interest from a deceased person as to any personal transaction with the decedent. *Held* that, in a suit to foreclose a trust deed given by a decedent, testimony of plaintiff that the debt was not paid was within the statute, as relating to a transaction with deceased.

3. A married woman who joins in a trust deed of her land to secure the husband's debt is a mere surety.

4. In a suit to foreclose a trust deed given by a man and wife on the wife's property to secure the husband's debt, the wife was a party defendant, but the representative of the deceased husband was not. *Held*, that plaintiff might not, under Code, § 950, testify that the debt had not been paid, since the wife, as a surety, was within the protection of the statute.

5. A surety on a prosecution bond could not, under Code, § 950, as an interested party, testify against defendants as to a personal transaction with deceased, under whom they claimed.

6. The representative of a deceased trustor, who joined with his wife in giving a trust deed on the wife's separate property, is a necessary party to a suit against the widow and trustee for foreclosure of the trust deed.

Appeal from Superior Court, Pitt County; Moore, Judge.

Suit by E. L. McGowan against J. R. Davenport and others. From a judgment for plaintiff, defendants appeal. Reversed.

Skinner & Whedbee, for appellants.

WALKER, J. This action was brought for the purpose of recovering a debt of \$156 alleged to be due by G. A. McGowan to the plaintiff by open account, and of foreclosing a deed of trust given by G. A. McGowan and his wife, the defendant L. A. McGowan, to secure the payment of the same; the defend-

§ 3. See *Husband and Wife*, vol. 26, Cent. Dig. § 682.

ant J. R. Davenport being named in the deed as trustee. The deed of trust had been canceled on the margin of the registry by the trustee, in accordance with the statute. The plaintiff demanded judgment against Mrs. L. A. McGowan for the amount of the debt; that the cancellation of the deed of trust be set aside; that a foreclosure of the trust be ordered, and the property sold for the payment of the debt. The defendants pleaded that the debt had been fully paid and satisfied, and that therefore the cancellation had been properly entered, and they introduced evidence to establish their plea. The jury, under the evidence and instructions of the court, found (1) that the debt was contracted by G. A. McGowan, and not by L. A. McGowan; (2) that it had not been paid; (3) that L. A. McGowan at the time of the execution of the deed was the wife of G. A. McGowan; and (4) that the land conveyed by the deed was her separate property. The defendants moved for a new trial, upon exceptions stated. The motion was overruled, and the defendants excepted. Upon the verdict, the court adjudged that G. A. McGowan owed the debt, and that the cancellation of the deed was wrongfully made, and is not valid as against the plaintiff, and that the land be sold by a commissioner of the court for the purpose of paying the debt. The court further adjudged that the costs of the action be taxed against the defendants. To this judgment the defendants excepted and appealed.

In order to prove that the debt had not been paid, the plaintiff introduced as a witness John C. McGowan, who was permitted, over the defendants' objection, to testify that G. A. McGowan, who was then dead, had told him that he had not paid the debt. The testimony of the witness, to which exception was duly taken, was hearsay, and nothing else, and its admission was error. *Lawrence v. Hyman*, 79 N. C. 209; *Gidney v. Moore*, 86 N. C. 491; *Henry v. Willard*, 73 N. C. 35. This entitles the defendant to a new trial, but, as the case goes back, and as the other questions discussed before us upon the exceptions may again be presented, we will consider and pass upon them.

The plaintiff was permitted to testify that the debt had not been paid. It must be conceded that this testimony necessarily related to a personal transaction with the deceased, who was principal in the note, as it involved the idea that the deceased had not paid the debt to the plaintiff. *Simpson v. Simpson*, 107 N. C. 552, 12 S. E. 447. But it is said that the representative of G. A. McGowan, who was the principal, is not a party to the action, and the other defendants do not derive any title or interest from, through, or under him. While G. A. McGowan had no title to the land, the defendant Davenport, who is the trustee in the deed, could not have acquired any right, title, or interest unless G. A. McGowan had executed the deed with his wife.

His execution of the deed, in other words, was required in order to convey the title to Davenport. The latter, therefore, within the spirit and meaning, if not within the letter, of section 590 of the Code, derived his interest from, through, or under him. But this court has decided that testimony like this is incompetent for another reason, closely allied to the one we have just stated. The defendant L. A. McGowan, wife of G. A. McGowan, was but a surety for her husband. *Shinn v. Smith*, 79 N. C. 810. And, if a recovery is had against her, she will have her action over against her husband's estate for exoneration. *Lewis v. Fort*, 75 N. C. 251. Any testimony, therefore, which makes against her, will, in a material respect and in the same degree, though indirectly, affect her husband's estate. The plaintiff, being a party and directly interested in the result, was incompetent to give this testimony. This has been expressly decided. In *Bryant v. Morris*, 69 N. C. 444, the plaintiff sued the surety of a deceased constable on his official bond, and proposed himself to testify as to communications and transactions between himself and the constable, whose representative was not a party to the action, for the purpose of charging the defendant, the surety. He was held to be incompetent, under section 343, Code Civ. Proc. (now section 590 of the Code), on account of the relation of the parties. The court said: "If the plaintiff had sued the administrator of the dead constable, he could not have testified as to any transaction between him and the deceased, so as to affect his estate. Code Civ. Proc. § 343. But the defendant is not sued as administrator, but as surety to the dead constable, and the question is whether the plaintiff can testify as to transactions between himself and the deceased which affect the defendant as his surety. It is said that he ought not to be allowed to do this, because, whatever he recovers of the defendant as surety, the defendant can recover of the estate of the deceased constable. This would seem to be so, and therefore to allow the evidence against the surety is to allow it indirectly against the principal, which is the evil meant to be guarded against by the exception in the statute. So that, while the objection to the evidence is not within the letter, it is within the spirit, of the statute." No two cases could be more alike in their essential features than the one we have cited and the case at bar. The principle underlying the decision in *Bryant v. Morris*, supra, was recognized and applied in *Lewis v. Fort*, supra, where it is held that a judgment against the surety is at least evidence against the principal for the surety. The rule to be deduced from these authorities is that the surety, who comes not within the letter, but within the intentment, of the law, stands in the same position, and is entitled to the same protection, under section 590 of the Code, as the representative of his deceased principal,

when sued. *Hawkins v. Carpenter*, 85 N. C. 484. The case of *Bryant v. Morris* had careful consideration by a court of exceptional ability, one of the justices having been a member of the commission which prepared and framed the Code of Civil Procedure. It was decided some time after section 343 (now 590) became a law, and at a time when that section had frequently been under consideration by this court, and when it was, as we are inclined to think, quite as well understood as it is now. The case has never been overruled or questioned as a precedent, but, on the contrary, has been cited with approval, as we will presently show. The principle it lays down being a just and reasonable one, we do not see why the case should not continue to be accepted as an authority.

It is well settled, we are told, that a party to an action is a competent witness, under section 590 of the Code, as to a transaction or communication with a deceased person, when the personal representative of the deceased, or any person who derives a title or an interest through or under him, is not a party to the action. This is true in some cases, but not in a case like the one at bar, and the authorities cited do not sustain the proposition as to such a case. In *Shields v. Smith*, 79 N. C. 517, which is much relied on, Hyman, the deceased, was not the principal of any of the defendants, and his estate was not liable over to them, or any of them. There was no such privity or connection between them and Hyman as would affect his estate by the judgment in the action. Besides, Mr. Justice Reade wrote the opinion of the court in *Shields v. Smith* and also in *Bryant v. Morris*, and we can hardly presume that he was inadvertent to the decision in the latter case, and intended to overrule it without even referring to it in *Shields v. Smith*. In *Hawkins v. Carpenter*, 85 N. C. 482 (decided some time after *Shields v. Smith*), the court expressly recognizes the decision in *Bryant v. Morris* as authority, upon the facts therein disclosed, and distinguishes it from the case then under consideration by the fact that the transaction was not with the person since deceased, but with an heir at law. Besides, the case of *Hawkins v. Carpenter* is clearly not in point for the purpose of sustaining the proposition, because the defendants had opened the door by proving a transaction with Durham, and the plaintiff was merely permitted to reply in regard to the same transaction. This came within the exception in the statute. The case is really an authority for the view we have taken of the testimony of the plaintiff, McGowan, and has already been cited in this opinion as sustaining it. In *Gidney v. Moore*, 86 N. C. 484, the defendants proved a transaction, not with the person since deceased, but with his agent; and in *Morgan v. Bunting*, Id. 66, the defendant proved a transaction, not with the intestate of the plaintiff, but with her father, who was in

no way connected with the action, and had no interest, near or remote, therein. In *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043, the witness by whom it was proposed to prove the transaction with the person since deceased was not a party to the suit, nor interested in the event of it, nor did she ever have any such interest. The facts of *Ledbetter v. Graham*, 122 N. C. 753, 29 S. E. 1035, are substantially like those in this suit; but that case was disposed of by a per curiam order, without a written opinion, upon the authority of *Shields v. Smith* and *Bunn v. Todd*, neither of which, as we have seen, sustains the ruling, as the facts in the last two cases were materially different from those in *Ledbetter v. Graham*. We have never regarded a decision by per curiam order as a binding precedent. It merely declares the law of the particular case, and surely it should not have the effect of overruling a previous decision based on a well considered opinion, and especially when the latter was not commented on or even cited by the court.

We are of the opinion that the witness John C. McGowan was disqualified, under section 590, to testify that the principal in the debt, G. A. McGowan, then deceased, had admitted to him that the same had not been paid. The witness was a surety on the prosecution bond in this case, and was, by every authority upon the subject, interested in the event of the action. One who is a surety for the prosecution has a certain legal interest, which might be affected by the event or result of the action, being liable for costs if the plaintiff fails to recover; and this interest renders him incompetent to testify as to any transaction or communication with the party deceased, the same as if he were himself a party to the action. This principle was settled in *Mason v. McCormick*, 75 N. C. 263, which has repeatedly been affirmed. *Peebles v. Stanley*, 77 N. C. 243; *Mason v. McCormick*, 80 N. C. 244. In *Peebles v. Stanley* the witness was a co-obligor, and testified against his own interest. It is suggested that the witness was not incompetent, because, as surety on the prosecution bond, he could in no event be liable to the estate of the deceased for the costs of the action. This is a misconception of the true reason for the disqualification of the witness. The question is not whether he is liable to the representative of the deceased, who is not a party, or to any particular person, but whether the suit may so eventuate as to make him liable for the costs to anybody who is a party, and against whose interest he testifies. If the plaintiff fails, the witness will be liable as surety to the defendant for the costs, and is for that reason interested, and he testifies against the defendant, and consequently in favor of his own interest. It is further suggested that the defendant L. A. McGowan was permitted to testify as to the payment, and it would be unfair not to let the plaintiff

do likewise. But the question must be decided according to the law, and without regard to any principle of fairness; and in the statute it is plainly and explicitly provided that, when one party testifies to a transaction or communication with the deceased, the other party may also testify, but only concerning the same transaction or communication. To permit the witness to go beyond this would be a distinct violation of the statute. *Kesler v. Mauney*, 89 N. C. 369; *Sumner v. Candler*, 92 N. C. 634; *Burnett v. Savage*, Id. 10; *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043; *Clark's Code* (3d Ed.) § 590, p. 850, and cases cited.

It may be well to refer to the other question mentioned in the case, namely, whether the representative of a deceased mortgagor or trustor is a necessary party to a suit for foreclosure. It would seem, on reason and principle, if not on authority, that he is. In *Averett v. Ward*, 45 N. C. 192, it was held that he was a proper, but not a necessary, party. A case precisely like this in its facts is *Mebane v. Mebane*, 80 N. C. 34, in which it appeared that the wife had joined with her husband in conveying her land in trust to pay his debt. The husband died, and a suit to foreclose the mortgage was brought by the creditor against the widow. The court referred to and criticised the case of *Averett v. Ward*, and practically overruled it, by holding that the representative of the deceased husband was a necessary party. In the later case of *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159, it is said that the administrator of the mortgagor is not a necessary party, but the court simply refers to *Averett v. Ward*, without noticing the case of *Mebane v. Mebane*. In the face of the decision in *Fraser v. Bean*, the case of *Mebane v. Mebane* may yet be sustained upon its peculiar facts, namely, that the wife, as in our case, was but a surety for the husband, and, if her property should be taken to pay his debt, she would be entitled to recover over against his estate, and to have his property first subjected to its payment; and, upon these facts, the court laid much stress in *Mebane v. Mebane*, though it also stated broadly, and as a general principle, that the representative of the mortgagor is a necessary party. The facts in *Averett v. Ward* and *Fraser v. Bean* were not the same as in *Mebane v. Mebane* and the case at bar.

There was error in the rulings of the court as herein stated, for which there must be another trial. New trial.

CLARK, C. J. (concurring in result). G. A. McGowan and wife, L. A. McGowan, 6th October, 1897, executed a deed in trust to J. R. Davenport upon the land in question, the property of L. A. McGowan, to secure certain indebtedness therein recited to be owing by G. A. McGowan and L. A. McGowan—among them, this indebtedness to the plaintiff by open account for \$156.60 for borrowed money,

as stated in said deed in trust. G. A. McGowan has died, and all the other indebtedness secured in the trust deed has been paid. This is an action alleging nonpayment of this debt; that the trustee has refused to foreclose the said trust, but has canceled the deed in trust on the margin of the registration thereof; and asks for a judgment against L. A. McGowan, and to set aside the attempted cancellation, and for foreclosure, and payment of the debt out of the proceeds. The jury having found that the indebtedness was owing by G. A. McGowan, and that it had not been paid, the court gave no personal judgment against L. A. McGowan, but ordered a foreclosure of the trust deed, and payment of the sum therein secured to the plaintiff out of the proceeds of sale.

It is well said in the opinion of Mr. Justice WALKER, "The question must be decided according to the law, and without regard to any principle of fairness," or, as Judge Daniel said long ago, "We cannot be wiser than the law." The law is explicit. It provides (Code, § 589), "No person offered as a witness, shall be excluded by reason of his interest in the event of the action." Section 590 excludes a party, etc., to the action, in his own behalf, etc., only when testifying as to a personal transaction with a person deceased, and then only "against the personal representative of the deceased person," or against the person succeeding to the title of the deceased. Here the personal representative of the deceased is not a party to the action, nor does the defendant succeed to his title. Q. E. D. The deceased never had any title to be conveyed. Had he survived his wife, he might have been tenant by the curtesy if she had not devised the property away. It was barely a possibility, certainly not a vested interest. The deceased was expressly inhibited by the Constitution from having, *ex jure mariti*, any interest in the property of his wife, which "shall be and remain the sole and separate estate and property of such female * * * as if she were unmarried." The joinder of the husband was not to convey his title and estate, for he had none, but was merely the "written assent" required to authorize the wife's conveyance. In *Bryant v. Morris* it is stated that the court read into the statute what was not there, for it says that it was "not within the letter" of the law. Accordingly that opinion has been distinguished, and never cited and affirmed as a precedent, and the law for the last 26 years has been uniformly held in accordance with the plain letter of the statute. *Shields v. Smith* (1878) 79 N. C. 517, affirmed since in *Ledbetter v. Graham*, 122 N. C. 754, 29 S. E. 1035, which is "on all fours" with this case, and *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043, which last analyzes the statute, and points out that no person is disqualified unless he is a party to the action, and then only as to a personal transaction with the deceased, and in such cases only when the

other party is a personal representative of the deceased or holds his title, neither of which is the case here. *Shields v. Smith*, 79 N. C. 517, is also cited with approval on this point in *Morgan v. Bunting*, 86 N. C., at page 69, citing several cases; *Gidney v. Moore*, 86 N. C., at page 491, also citing numerous cases; *Hawkins v. Carpenter*, 85 N. C. 484. No point in section 590 has been better settled. *Morris v. Bryant* was a decision made when the Code was new, and which stated therein that it was contrary "to the letter of the law." As above stated, it has not been directly affirmed since in any case, but has been disregarded and effectually overruled by above decisions.

If, however, the express provision of the law is not to govern us, but our own conceptions of fairness, we must remember that the defendant L. A. McGowan testified at length as to the whole matter, and there is no provision of law disqualifying her. The burden was upon her to prove payment, and it would be manifestly unfair, were she to be competent, and the plaintiff incompetent against her, the real defendant, and against Davenport, her codefendant, when the plaintiff is seeking no relief against the estate of the deceased, and the estate is not a party to the action.

What effect the judgment may have against the estate of the deceased in any future action against it by the defendant is not before us. The plaintiff has no interest in that matter which can be served by his testimony here, and it is his interest only in this action which can disqualify him, and then only in the cases prescribed by the statute. The execution of the deed in trust and its registration are admitted in the answer, and, besides, those acts were not a "personal transaction" between the plaintiff and the deceased. *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225; *Thompson v. Onley* (N. C.) 1 S. E. 620.

John C. McGowan, surety on the prosecution bond, was a competent witness for the same reasons above given as to the plaintiff. There was error, however, in permitting him to prove the declarations of G. A. McGowan, for the very reason that, his personal representative not being a party, such declarations were mere hearsay. For this reason, there should be a new trial.

There was no offer to make the personal representative of G. A. McGowan a party, and no exception that he was not a necessary party to this action, and that point is not before us. In *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159, it was held that the administrator is not a necessary party, even when the land on which the mortgage is to be foreclosed belonged to the intestate; affirming *Averett v. Ward*, 45 N. C. 192. Here the intestate had never had any interest in it, but merely gave his marital assent to the mortgage by his wife, as above stated. It would seem, however, that, as a surety may be sued without joining the principal, the

property put up as security may be subjected without such joinder, especially when, as here, the surety does not ask that the principal be made a party.

(124 N. C. 591)

VOORHEES, MILLER & CO. v. PORTER et al.

(Supreme Court of North Carolina. April 5, 1904.)

ACTIONS—RELIEF—APPEAL—CONTRACTS—AGREEMENT TO PAY ANOTHER'S DEBT—ACTION BY CREDITOR—GUARANTY.

1. On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief they will not be restricted to that demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings and the facts proved.

2. Where the purchaser of a stock of goods agreed, in consideration for the transfer, to pay the debts of the seller, and subsequently the purchaser made an assignment of all his property for the benefit of his creditors, a creditor of the seller was entitled to have the assignee account with him, and entitled to recover from the assignee if he had sufficient assets under the assignment for that purpose.

3. Where the purchaser of goods agreed, in consideration of the transfer, to pay the debts of the seller, and a third person covenanted that the purchaser should faithfully perform the contract, such person was an absolute guarantor of payment, and a creditor of the seller might sue him without first proceeding against the principal.

Appeal from Superior Court, Buncombe County; E. B. Jones, Judge.

Action by Voorhees, Miller & Co. against J. A. Porter, as trustee, and others. From a judgment as of nonsuit in favor of defendant Porter, plaintiffs appeal. Reversed.

Action to recover a debt due to the plaintiffs by O. D. Blanton, and, for that purpose (1) to set aside an assignment by him to J. D. Brevard alleged to be fraudulent, (2) to enforce a trust as to certain funds in the possession of Brevard under a contract with Blanton that he would pay the same to Blanton's creditors, and (3) to recover against J. A. Porter and J. B. Bostic the amount of plaintiffs' debt upon their covenant given to Blanton by which they guaranteed a performance of said contract by Brevard and the payment of the money by him to the creditors. In November, 1892, Blanton was indebted to the plaintiffs in the sum of \$3,445.50 for goods sold and delivered, and for which Blanton gave the plaintiffs his two several promissory notes, with Cobb, Bostic, and W. M. Blanton as sureties. Plaintiffs obtained judgment on these notes in the federal court, but were unable to collect any part of the amount due upon the judgment, because of the insolvency of the defendants. On December 30, 1903, Blanton executed to J. D. Brevard an instrument in writing, by which he sold and conveyed to him his stock

of goods, wares, and merchandise at their cost, less 12½ per cent., and, in consideration thereof, Brevard agreed that, after retaining \$3,000 to pay a debt due to him from Blanton, he would hold the purchase money, and apply the same to the payment of (1) all debts due by Blanton on which Brevard is surety or indorser, and (2) all the other debts owing by Blanton upon which Bostic or Cobb is surety. It was then provided that the surplus, if any, should be paid to Blanton. On the same day Bostic and Porter executed their guaranty, by which they agreed that Brevard should "faithfully keep and perform all the covenants and agreements to be by him kept, done and performed according to the terms of the foregoing contract, dated this day, between him and Blanton," and "that he will pay faithfully the price of the goods sold to him by said contract according to the terms thereof and as therein stated," and they did "jointly and severally guaranty such performance and payment." There was a provision in the contract between Blanton and Brevard that the goods sold and conveyed to Brevard should be inventoried so as to describe and identify the goods more definitely, and so as to ascertain the exact amount of the purchase price to be held by Brevard for the creditors and to be paid to them. An inventory was accordingly made, and the net amount of the purchase money ascertained to be \$18,158.47. On March 3, 1904, J. D. Brevard made a general assignment to J. A. Porter of all his property for the benefit of his creditors. There was evidence tending to show the execution of the several instruments above mentioned, and also to show that Cobb, Bostic, C. D. Blanton, and W. N. Blanton are insolvent. The plaintiffs allege that Porter had received the property assigned to him by Brevard, and sold it, and had failed to execute his trust by paying the proceeds of the sale or the price of the goods to the creditors of Brevard as required to do by the assignment, and "that neither the said Brevard, the said Bostic, nor the said Porter has ever paid anything to the plaintiffs, although the plaintiffs were entitled to be paid by virtue of the terms of said contract, and although they have repeatedly demanded payment," and that, while the assets received by Porter under the assignment amounted to \$30,000, he has not paid out exceeding \$5,000 to the creditors of Brevard, nor has he accounted for the proceeds of sale received by him, as it was his duty as assignee to do. The defendants in this suit are Bostic, Cobb, and Brevard, and J. R. Porter, individually and as assignee of J. D. Brevard. The prayer of the complaint is as follows: "(1) That the deed of assignment from the defendant J. D. Brevard to the defendant J. A. Porter be declared to be fraudulent and void, and that the said Brevard and Porter account for the said assets and proceeds thereof. (2) For judgment against the said Porter and the defendant J.

B. Bostic upon the contract mentioned in paragraph 7 of the complaint. (3) For such other and further relief," etc. At the close of the plaintiffs' evidence, the defendant Porter, individually and as assignee of Brevard, moved to dismiss the complaint, and for judgment as in case of nonsuit. Motion granted, and plaintiffs excepted and appealed from the judgment.

Merrimon & Merrimon, for appellants. F. A. Sondley and Tucker & Murphy, for appellees.

WALKER, J. (after stating the case). It appears in the record that the court below was of the opinion the plaintiffs could not recover because they were not in privity with the parties to the contract of December 30, 1902, by which Blanton conveyed his stock of goods to Brevard, and the plaintiffs therefore could not sue upon the contract, but were excluded from doing so by the rule laid down in *Morehead v. Wriston*, 73 N. C. 398, and *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550, and much of the argument in this court was addressed to this feature of the case. It is also stated in the record that in the argument of the motion to nonsuit in the lower court the plaintiffs' counsel admitted that there was no cause of action for subrogation, nor was any such equity claimed by the plaintiffs under the contract between Blanton and Brevard of December 30th, and that counsel further argued that while said contract was a bill of sale it constituted Brevard a trustee of the purchase price for the purpose of paying it to the creditors of Blanton, and that the plaintiffs had a primary equity to have it so applied, and that to enforce that equity they could sue Brevard and Porter directly, and also sue Porter on his guaranty hereinafter mentioned. It was argued by the defendants' counsel in this court that "there is no allegation in the complaint of any contract between Blanton and Brevard to any extent for the benefit of the plaintiffs," and that the plaintiffs in their pleading simply assert the right to follow the goods in the hands of Brevard as trustee, and do not aver that Brevard is individually the creditor of the plaintiffs.

We simply mention these matters for the purpose of stating that we are not bound here by any argument that counsel made below. We hear the case upon the facts alleged in the pleadings, and if the plaintiffs have set forth in their complaint such facts as entitle them to relief they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional and different relief which is not inconsistent with the facts so alleged in their complaint, it being the pleadings and the facts proved which determine the measure of relief to be administered. *Knight v. Houghtalling*, 85 N. C. 17. In this case, it makes no difference, if such is the fact, that the plaintiff does not

distinctly claim that the contract between Blanton and Brevard was for the benefit of the plaintiffs, and that he does claim only that Brevard held the goods in trust, and makes no claim against Brevard individually. He simply sets forth the facts of the case according to his version of them, which is the proper way to do, and upon those facts he prays for an accounting from Brevard and Porter "for the said assets and the proceeds thereof," meaning the assets received under the contract and assignment, and for judgment against Porter and Bostic as guarantors of the performance by Brevard of the contract, and for such other and further relief as they may be entitled to have in the premises. We cannot, therefore, agree with the learned counsel for the defendants that the plaintiffs are not entitled to call for a showing from Brevard and Porter as to the administration of their several and respective trusts under the contract and assignment, if the facts justify such relief, even though the plaintiffs may not have made any special or particular claim for that relief; but it is our opinion that the facts are sufficiently set forth in the complaint to entitle them to such relief, and, if Brevard and Porter have committed a breach of their trusts, they are further entitled to judgment against them respectively for any damages they have sustained by reason thereof.

The case, in one aspect of it, turns upon the question whether the plaintiffs can sue Brevard for failing to pay over to them their share of the price he agreed to pay for the property sold to him by Blanton, and we are unable to see why he cannot do so. The case is not like *Morehead v. Wriston*, supra. In that case the substance of the agreement was that Wriston, the incoming partner, would indemnify the old firm against the payment of its debts, and this view of the case is fully explained and made clear by Smith, C. J., in *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550, in which he says: "The agreement is in substance one for the indemnity of the owner of the property against its being subjected to the asserted lien, and is solely between the parties to it, with whom the plaintiff is not in privity. Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment." It will be observed that the distinction between the cases arises out of the particular nature of the contract, whether it be one strictly of indemnity, or one in which there is a direct and express promise to pay to the creditor the amount of his claim out of the funds placed in the hands of the party who is sought to be charged, or which are held by him for that specific purpose. This doctrine, that the creditor may himself sue directly the party so holding the funds which have been dedicated by the debtor to the payment of the claims of his creditors, is recognized in *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362,

as is also the creditor's right to proceed in equity to have the fund applied, according to the intention of the debtor and the agreement of the party who holds it, to the uses for which it was created, whether the right can be enforced at law or not. It is true the court held in that case that the action was in form *ex contractu*, and that, as the guaranty of Ray to Settle and Bostic was not assignable, even to the plaintiff, Mrs. Woodcock, the plaintiff could not recover; but there is a strong intimation that she could have recovered if she had properly pleaded her equity, or set forth facts upon which equitable relief could be based. When the court said in that case, "she cannot have equitable relief, because she has prayed for none," it simply meant that there was no sufficient allegation of an equity upon which a prayer for such relief could be predicated, for we find it to be well settled by the decisions of this court that, if the plaintiff in his complaint states facts sufficient to entitle him to any relief, this court will grant it, though there may be no formal prayer corresponding with the allegation, and even though relief of another kind may be demanded. *Knight v. Houghtalling*, supra; *Gillam v. Insurance Co.*, 121 N. C. 369, 28 S. E. 470. In the case last cited. Clark, J., for the court, says: "Under the Code the demand for relief is immaterial, and the court will give any judgment justified by the pleadings and proof,"—citing numerous cases. *Clark's Code* (3d Ed.) p. 584, and notes to section 425.

In the case at bar, all the facts which in our opinion are necessary to constitute a good cause of action, even in equity, are set forth, and, besides the prayer for special relief, there is a prayer for general relief, or, to be more accurate, for other and further relief than that specially demanded. If the plaintiffs by their pleadings and proof are entitled to recover against the defendants Brevard and Porter, even by way of subrogation, we would direct that relief to be administered, notwithstanding that in the argument below the particular equity was not claimed but disclaimed, because we act, in the adjudication of rights, not upon arguments, but upon the pleadings and evidence, when there has been an involuntary nonsuit as in this case, or upon the pleadings and findings of the jury when there has been a verdict, the arguments of counsel being only intended to aid us in understanding the case, and not being in any sense an estoppel upon counsel or the party whom he may represent. Parties are bound by admission of facts, but not by arguments or admissions as to the law. Arguments of counsel are exceedingly valuable in enabling us to ascertain the true principles of law upon which the decision of the cause in its last analysis must rest, and especially so when they are as searching, able, and exhaustive as they were in the case at bar, and exhibit

such a complete mastery by counsel of the facts and law of the case, but parties must not be concluded or prejudiced by any mistaken view of the law presented during the course of the argument in the lower court or in this court. A contrary course would result in our deciding the case not according to the law but according to the argument. We do not intend to imply, for we do not think, that any admission has been made in this case in arguendo calculated to prejudice the plaintiffs, whose counsel may have chosen wisely and well among the several grounds of action open to him, and who may have selected the strongest one upon which to base his claim for relief.

It is not necessary that the plaintiffs should show in this case any right to equitable relief by way of subrogation. They contend that their equity, or, more properly speaking, their cause of action, whether legal or equitable, is a primary and not a secondary one; that Brevard, as the consideration for the purchase of the goods, promised and agreed, not merely to indemnify Blanton against any and all claims of his creditors, but to pay directly and immediately to his creditors who are named in the contract, and in the order and according to the classification therein stated, all of the said claims. This, the plaintiffs' counsel argued, impresses a trust upon the purchase price of the goods in the hands of Brevard. Conceding this to be so, we do not see how the condition of the plaintiffs is improved by reason of it. If Blanton had placed in the hands of Brevard a fund for the payment of his debts, or if Brevard, when he purchased the goods, had set apart a certain fund in payment of the purchase price of the goods and for the purpose of paying Blanton's creditors, and if either of the funds, being capable of identification, had gone into the hands of Porter as assignee, the plaintiffs, or any other creditor of Blanton mentioned in the contract with Brevard could follow the fund in the hands of Porter and subject it to the payment of his claim. But such is not the case here. The purchase price of the goods consisted merely in the promise of Brevard to pay the claims of creditors, which he failed to do, and, while he is liable to Blanton or to his creditors for this breach of his contract, he did not assign to Porter any part of his property which can be said to represent a trust fund, and which can be applied to the claims of Blanton's creditors in preference to the claims of other creditors secured by Brevard's assignment. In other words, the law will not compel the assignee to set aside, for the benefit of Blanton or his creditors, an amount equal to the inventoried value of the goods received by Brevard under the contract in payment of the purchase price of the goods.

But the plaintiffs are entitled to relief in another aspect of the case. In the first place, they are creditors of Blanton, and are entitled

to receive payment of their claims from Brevard under the provisions of the contract by which the latter purchased the goods and agreed to pay Blanton's debts, and being thus secured, and Brevard having failed to pay them the share to which they are entitled under the contract, they have the right to call on Brevard for an account of the debts and liabilities of Blanton secured by the contract, and of the amount of the purchase price applicable thereto, so as to ascertain the amount due from Brevard to them, and this amount they can recover from the assignee of Brevard if he has received any assets which should be applied to the payment of this debt. They acquired no priority by reason of the peculiar nature of Brevard's liability to them, but they occupied the same position that they would have held if they had been general creditors of Brevard at the time of the assignment. They are entitled, though, to have the assignee of Brevard account with them, so that it can be ascertained whether there are any assets in his hands which should be devoted to the payment of their claims against Brevard.

The plaintiffs are also entitled to recover from Porter, as guarantor, the amount due them from Brevard under the contract with Blanton, and Porter may absolve himself from this liability if he has sufficient assets for that purpose, or reduce the amount thereof, if he sees fit to do so, by voluntarily paying the plaintiffs whatever is due them under the assignment; and, if the plaintiffs cannot make the full amount due them under the Brevard contract out of Porter, they can recover the balance out of any assets in the hands of Porter, as assignee, which are applicable to the payment of their claims; and, conversely, if the assets in the hands of the assignee are not sufficient to pay their claims, then Porter, as guarantor, will be liable for the balance. But the plaintiffs may proceed against Porter in the first instance for the recovery of the entire amount, or against the assignee for an account and settlement of his trust and the payment of the amount due to them, or they may proceed against both, as they may be advised. See *Brown v. Bank*, 79 N. C. 244, as explained and distinguished in *Bank v. Alexander*, 85 N. C. 852. As Porter covenanted that Brevard should faithfully perform the stipulations of his contract with Blanton, and "faithfully pay the price of the goods sold to him by said contract according to the terms thereof," he is an absolute guarantor of payment as distinguished from a guarantor of collection, and the plaintiffs have the right to sue him immediately upon his default, without first proceeding against and exhausting the principal. *Jones v. Ashford*, 79 N. C. 172; *Jenkins v. Wilkinson*, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911; *Hutchins v. Bank*, 130 N. C. 285, 41 S. E. 487; *Cowan v. Roberts* (at this term) 46 S. E. 979.

We have stated the general principles

which we think are applicable to this case, and which, as we will now proceed to show, are sustained by recent decisions of this court.

In *Shoaf v. Insurance Co.*, 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804, it appeared that the plaintiff had received a policy of fire insurance from the Merchants' Insurance Company, and while the policy was in force the defendant, the Palatine Insurance Company, reinsured all the outstanding risks of the Merchants' Company. By the contract of reinsurance it was provided that no holder of a policy in the Merchants' Company should be entitled to enforce the contract against the Palatine Company, but that they should sue the Merchants' Company alone, and the Palatine Company agreed to pay all claims legally arising and duly proved against the Merchants' Company, and all costs and expenses of litigation. In that case the court held that the plaintiff, whose property had been destroyed by fire, and who had complied with the terms and conditions of his policy, was entitled to recover against the Palatine Company. The court thus states the reason for its decision: "The plaintiffs were neither a party to nor in privity with said contract. The question is, have they an interest in or arising out of the contract? The defendant is bound to indemnify the reinsured for all risks and loss, and the reinsured at the same time is bound to indemnify the plaintiffs for risks and loss. Does the defendant's liability inure to the benefit of the plaintiffs, and, if so, can the plaintiffs directly enforce their claim for loss against the defendant? The unearned premium at the date of the contract was a part of the consideration passing to the defendant for its risk and liability assumed. In this unearned premium the plaintiffs had an interest at the time of the reinsurance. The principle sanctioned by several respectable authorities is this: If A., on receipt of a good and sufficient consideration, agrees with B. to assume and pay a debt of the latter to C., then C. may maintain an action directly on such contract against A., although C. is not privy to the consideration received by A. The case before us seems to come within the same principle. Our Code (section 177) provides that every action must be prosecuted in the name of the real party in interest. In all the cases close attention is given to the language of the agreement. In the present case the defendant expressly assumes the liability in case of loss, but agrees to pay to the Merchants' Company only after claims have been duly proved in an action against the Merchants' Company. We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. The defendant suggests no such danger, but relies solely upon the ground that it has no contract with the plaintiffs."

Our case is stronger than the one just cited, for Brevard expressly promised to pay to the creditors of Blanton, and his promise was based upon a good and sufficient consideration.

In *Gorrell v. Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, the plaintiff sued the defendant, the water supply company, for damages to property alleged to have been caused by the negligent failure of the defendant to furnish water and a sufficient pressure at its hydrants for the purpose of extinguishing a fire which destroyed her property, the defendant having previously entered into a contract with the city of Greensboro, where the property was situated, to supply said city with water for extinguishing fires and for other purposes. In passing upon a demurrer to the complaint, this court, through the present Chief Justice, said: "One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere"—citing numerous cases from other states. 124 N. C., at page 333, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.

But still more to the point is the case of *Gastonia v. Engineering Co.*, 181 N. C. 863, 42 S. E. 858, in which it appeared that one of the defendants, the engineering company, undertook to construct for the plaintiff the town of Gastonia "a waterworks, sewerage, and lighting system," and the other defendant, the American Surety Company, by a bond given for the purpose, guaranteed the performance of the contract by its codefendant. The plaintiffs, other than the town of Gastonia, sued the defendants for work and labor performed for and materials furnished to the engineering company in the construction of the works under their contract. The court held that the contract of the engineering company was made for the benefit of the persons who performed the labor and furnished the material, and, as there was an express provision for the payment of their claims, they were the beneficiaries of the contract, and that they either singly or collectively could sue the engineering company and its surety, and recover the amounts due to them respectively. The court distinguishes the case of *Morehead v. Wriston* from the case then under review, by the fact that in the former case there was no indication of any intent of the parties that the creditors of the old firm should have any benefit under the contract, the contract in that case being one strictly of indemnity. In *Lacy v. Webb*, 180 N. C. 545, 41 S. E. 549, it is said: "If the state had been nothing more than the beneficiary of the bonds, it could maintain this action," and "it is not the case either of subrogation or substitution." The party, in other words, for whose benefit the contract is made, is the real party in interest under the Code, and sues in his own right, and not in another's right to which he is subrogated by any

principle of equity; and especially is this true when the money due under the contract is made payable directly to him.

But we think the case of *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612, is directly in point. The doctrine there stated is that if a third person promises the debtor to pay his antecedent debts in consideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise or for money had and received, "for although," says the court, "the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action"; and it is immaterial, as is further said by the court, whether the liability of the original debtor is continued or not, the promise being an independent and original one, founded upon a new consideration, and binding upon the promisor. In our case, though the property was not received for the purpose of being converted into money in order to pay the debt out of the proceeds, the promise to purchase it at a fixed price, and to pay the amount of that price to the creditors of the vendor, amounts to the same thing, and brings our case within the principle of the third class mentioned in *Mason v. Wilson* (which authorizes the creditor to sue directly), namely "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties." In such a case the creditors may sue the promisor, whether his debtor remains liable to him or not. *Threadgill v. McLendon*, 76 N. C. 24; *Stanly v. Hendricks*, 35 N. C. 86. In *Draughan v. Bunting*, 31 N. C., at page 13, *Pearson, J.*, for the court, says that a new and distinct cause of action of the creditors against the third person, who receives money or the proceeds of property from the debtor to pay his debt, arises out of the promise, which is implied by law from the receipt of the money or the proceeds of the property to pay the debt, and that the creditor may sue directly on this promise. In our case, *Brevard* bought the property, and expressly promised, as the consideration of the purchase, to pay the debts of *Blanton*, and the two cases are therefore in principle the same. In *Threadgill v. McLendon*, supra, *Pearson, J.*, for the court, says substantially that, when a party receives property for another upon a promise to pay that other's debt, the creditor can sue and recover, not on any promise implied from the receipt of the property, but on the direct and express promise to pay the amount of the debt. The promise is binding, and inures directly to the benefit of the creditor, because the promisor has received the consideration, and in justice should be made to perform his undertaking.

It was suggested on the argument by the plaintiffs' counsel that the goods bought by *Brevard* from *Blanton* were charged with a trust in the hands of *Brevard* in favor of *Blanton's* creditors, and it seems that some courts have so held the law to be. *Kaiser v. Waggoner*, 59 Iowa, 40, 12 N. W. 754; *Hamilton v. Barricklow*, 96 Ind. 398. We do not know to what extent the courts, in making those decisions, were influenced by the doctrine of the vendor's lien, which is an equity not recognized by this court.

Again, it may be that, if *Brevard* was insolvent when the sale to him was made, it would be void as against *Blanton's* creditors, and his assignee in that case would have to account for the goods to such of *Blanton's* creditors as are mentioned in the contract, if the goods went into his hands. But there is no evidence of *Brevard's* insolvency at that time. It is not necessary, though, that we should pass upon those two questions, even if they were distinctly raised in the record, as the plaintiffs may be able to recover the amount of their claims from *Porter* upon the principles already stated, and the other matters may not be presented if the case should come back to us again.

We are of the opinion, upon a review of the whole case, that the plaintiffs have stated in their complaint a good cause of action against *Brevard* and *Porter*, and that there was evidence to sustain it. The court erred in its ruling. The judgment of nonsuit must be set aside, and a new trial awarded.

New trial.

(134 N. C. 698)

STATE v. CLARK.

(Supreme Court of North Carolina. April 5, 1904.)

HOMICIDE—SELF-DEFENSE—MURDER IN SECOND DEGREE—DEGREE OF PROOF—REASONABLE DOUBT—FELONIOUS INTENT—INSTRUCTIONS—PREJUDICIAL ERROR.

1. In a prosecution for murder, an instruction that if the jury were satisfied beyond a reasonable doubt that the defendant slew deceased with a deadly weapon, and were left in doubt as to the circumstances of mitigation or excuse offered by defendant or derived from the state's evidence, they should convict of murder in the second degree, is erroneous, as it required him to establish the facts and circumstances in mitigation or excuse, not merely to the satisfaction of the jury, but to the exclusion of any doubt.

2. In a prosecution for murder, an instruction that the jury must convict defendant of murder in the second degree, if they were left in doubt as to whether the deceased was making a felonious assault on him, and as to whether the defendant believed or had reasonable ground for believing that the deceased was making an assault on him, was erroneous, as it required defendant to prove that deceased was actually making a felonious assault, and also that defendant at the time had reasonable grounds to believe that he was making such an assault.

3. In a prosecution for murder, an instruction that, if the jury were left in doubt as to the circumstances of mitigation or excuse offered by defendant or derived from the state's evidence, they should convict of murder in the sec-

and degree, is prejudicial to defendant, though he was convicted of murder in the second degree, as it directs the jury that they cannot acquit if the defendant has not removed every doubt as to matters in excuse.

4. In a prosecution for murder, an instruction that if the deceased advanced on defendant with a drawn knife in such manner as to cause him reasonably to apprehend, and he did actually apprehend, that he was about to be slain or to receive enormous bodily harm, the defendant had the right to stand his ground, and, if necessary, to take the life of deceased, without retreating, provided the assault made on defendant was felonious or with felonious intent, was erroneous, without explanation of the meaning of "felonious" or "felonious intent," especially where the jury had been charged that, if defendant reasonably apprehended that he was about to be slain or receive great bodily harm, he had a right to kill his assailant, without retreating, provided he acted in good faith and with ordinary fairness.

5. The instruction was erroneous because it was not necessary that the assault on defendant should have been felonious or committed with a felonious intent.

6. The instruction was erroneous because the jury could not have acquitted defendant if they had found that he had a well-grounded apprehension that the deceased was about to assault him with the intent to kill him or to do him great bodily harm, unless they further found that an assault had been actually committed with a felonious intent.

7. Under Code, § 413, requiring the court to state in plain and correct manner the evidence and declare and explain the law arising thereon, the duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them.

8. Where an instruction states that, in order to justify the use of a deadly weapon in self-defense, it must appear that the danger was so urgent and pressing that to save his own life or to prevent his receiving great bodily harm the shooting by defendant was absolutely necessary, the error as to the existence of the absolute necessity to kill was not cured by a subsequent instruction explaining what kind of reasonable apprehension that he was about to be killed or to receive great bodily harm would have justified defendant in acting on the facts and circumstances as they appeared to him.

9. Where deceased was attempting to kill another or to do him great bodily harm, or defendant had a well-grounded belief or apprehension that he was attempting to do so, he had the right to interfere to prevent deceased from executing his intention, and if, while engaged in the interference for such lawful purpose, deceased advanced on him in such manner as to induce defendant to reasonably apprehend, and defendant did actually apprehend, that he was about to be killed or receive great bodily harm, he was justified in killing deceased to save his own life or to prevent great bodily harm to himself.

Clark, C. J., dissenting.

Appeal from Superior Court, Ashe County; Long, Judge.

Garfield Clark was convicted of murder, and he appeals. Reversed.

R. A. Doughton, R. Z. Linney, and Geo. L. Park, for appellant. The Attorney General, for the State.

WALKER, J. The defendant was indicted for the murder of Charles Stanberry. The evidence tended to show that Stanberry and Asa Miller, both being under the influence

of liquor, were cursing each other in the public road, when Stanberry grabbed Miller and threw him to the ground, and held him down while he brandished his knife over him, and with an oath threatened to cut his throat or to cut his head off. Miller begged Stanberry not to cut him. The defendant interfered for the purpose of preventing Stanberry from cutting Miller, and as he did so Stanberry cursed him and asked him what he had to do with it, at the same time advancing on him with a knife drawn, and in a threatening attitude. The defendant retreated, and when he was near the fence on the side of the road, and not more than four feet from Stanberry, the latter "grabbed at the defendant with his left hand and tried to strike him with his right," and the defendant thereupon fired at him with his pistol and inflicted a wound from which Stanberry died about a month afterwards. Before the defendant fired the pistol he warned the deceased not to advance on him with the knife. While it appeared that deceased was drunk, there was evidence tending to show that "he had good use of himself." A constable who was present told the bystanders not to let the deceased hurt Miller. Without reciting any more of the testimony, it is sufficient to say that it tended to show that the deceased was in the act of cutting Miller, with the present ability to do so, when the defendant interfered to prevent it.

At the request of the state the court gave the following instructions: "(2) If the jury are satisfied beyond a reasonable doubt that the defendant slew the deceased with a deadly weapon, to wit, a pistol, and are left in doubt as to the circumstances of mitigation or excuse offered by the defendant or derived from the state's evidence, they should convict of murder in the second degree. (3) If the jury are satisfied beyond a reasonable doubt that the defendant slew the deceased with a deadly weapon, to wit, a pistol, and are left in doubt from the whole evidence as to whether the deceased at the time he was slain was making a felonious assault upon the defendant with a knife, either because he did not then have the knife, or because he was too drunk to be capable of making such assault, and are left in doubt as to whether the defendant at the time he slew the deceased believed and had reasonable ground for believing that the deceased was making such felonious assault upon him with a knife, then they should convict of murder in the second degree." Defendant excepted to each of said instructions. The defendant's counsel requested the court to give the following instruction: "If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller, and was attempting to cut said Miller with a knife in the presence of the defendant, it was his duty to endeavor to suppress and prevent the same; and if, in attempting to do so, the deceased left off his difficulty with Miller, and made

upon the defendant with a drawn knife in such a manner as to cause the defendant to apprehend, and he did apprehend, that he was about to be slain or to receive enormous bodily harm, then the defendant had a right to stand his ground, and, if necessary, to take the life of the deceased, without retreating."

The court refused to give the instruction as asked, but in response thereto charged the jury as follows: "If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller, and was attempting to cut said Miller with his knife, in the presence of the defendant [and the deceased was then capable of executing such a purpose], it was his duty to endeavor to suppress and prevent the same; and, if in attempting to do so, the deceased left off his difficulty with Miller, and made upon the defendant with a drawn knife in such manner as to cause the defendant to [reasonably] apprehend, and he did [actually] apprehend, that he was about to be slain or to receive enormous bodily harm, then the defendant had a right to stand his ground, and, if necessary, to take the life of the deceased without retreating [provided the assault made upon the defendant was felonious or with felonious intent]." Defendant excepted. The parts of the instruction in brackets indicate the modifications of the defendant's prayer made by the court.

We are of opinion that the court erred in the instructions given in response to the state's second and third prayers. Those instructions required the defendant to establish the facts and circumstances in mitigation or excuse, not merely to the satisfaction of the jury, but to the exclusion of any doubt. We have recently said in *State v. Barrett*, 132 N. C. 1005, 43 S. E. 832, that the defendant is required to satisfy the jury of the existence of the mitigating circumstances in order to reduce the offense from murder to manslaughter, or of the matters in excuse in order to sustain his plea of self-defense, not beyond a reasonable doubt, nor even by a preponderance of evidence. It is well said in *State v. Brittain*, 89 N. C. 502, that: "The principle of reasonable doubt has no application to the doctrine of mitigation. The rule in regard to that is that the jury must be satisfied by the testimony that the matter offered in mitigation is true;" citing *State v. Ellick*, 60 N. C. 450, 86 Am. Dec. 442; *State v. Willis*, 68 N. C. 20; and *State v. Vann*, 82 N. C. 632. In *Asbury v. Ry. Co.*, 125 N. C. 574, 34 S. E. 654, the court held that a charge substantially like the one given in this case imposed upon the party having the burden the duty of making out his case beyond any doubt.

We have seen that the doctrine of reasonable doubt does not apply to the case of a defendant indicted for murder, when he is attempting to establish the mitigating circumstances necessary to reduce the grade of the homicide; and, if he is not required to prove them beyond a reasonable doubt, how can it

be said that he must remove every doubt from the minds of the jury? This would include not only a reasonable doubt, but any kind of doubt, and therefore the burden upon him would be much lighter if the simple doctrine of reasonable doubt alone applied. This court has repeatedly said that the law does not require such strict proof from the defendant, but it is sufficient to reduce the homicide from murder to manslaughter, or to make out a plea of self-defense or other affirmative defense, if the jury are merely satisfied of the existence of the facts necessary for that purpose. We are aware that expressions like that used by the learned judge in this case may occasionally be found in our Reports, and they may seem to have received the tacit approval of this court; but when the cases are examined—and they are very few—it will be seen that they are mere dicta, or were inadvertently used, and we have not been able to find a single case in which the question has been presented and it has been decided that any doubt in the minds of the jury, as to the matters in mitigation or excuse, is sufficient to turn the scales against the defendant, and to convict him of murder or manslaughter, as the case may be, when the killing with a deadly weapon is admitted or proved. We would hesitate to follow a decision to that effect, because, as we think, it would be contrary to many cases where the question has been directly involved, and in which the principle which we have already stated has been laid down as a reasonable and just one. It imposes a greater burden than the defendant should be required to carry. Surely it cannot be that the state is required to exclude only a reasonable doubt in order to convict, and the defendant must exclude every doubt in order to reduce the grade of the homicide or to acquit himself of so serious a charge.

But the court also told the jury, in response to the state's third prayer for instructions, that they must convict the defendant of murder in the second degree if they were left in doubt as to whether the deceased, at the time he was slain, was making a felonious assault upon him, and as to whether the defendant, at the time he slew the deceased, believed or had reasonable ground for believing that the deceased was making a felonious assault upon him. This charge required the defendant to prove, not only that the deceased was actually making a felonious assault, but also that the defendant at the time had reasonable grounds to believe, and did believe, that he was making such an assault. Whether a felonious assault was being made or not, if the defendant, from the circumstances and surroundings as they then appeared to him, reasonably apprehended that the deceased was assailing him with the intent to kill him or to do him great bodily harm, he had the right, if he was not himself already in fault, to stand his ground and defend himself, and, if necessary, to take the life of his assailant, and this would be true though it afterwards

appeared that the deceased did not in fact intend to commit a felonious assault. *State v. Matthews*, 78 N. C. 532; *State v. Barrett*, supra, and cases cited. The defendant is to be judged, not by what the deceased actually intended, but by the reasonable apprehension excited in his own mind by the acts of the deceased as to what the latter intended to do, provided the defendant acted in good faith and with ordinary firmness. But while he could thus act upon appearances, he must have judged, at his peril, of the grounds of his apprehension to this extent, that on his trial for the homicide, while the jury are bound by the law to pass upon the defendant's act according to the facts and circumstances as they appeared to him at the time he committed the homicide, they must be the sole judges of the reasonableness of the grounds of his apprehension. We stated this principle fully in *Barrett's Case*, and sustained it by the citation of authority, not only from the decided cases, but from the great writers upon the criminal law, and, without reproducing it, we are now content to refer to what we then said as applicable to the particular instruction of the court in this case. *State v. Dixon*, 75 N. C. 275.

It is said, though, to be a complete answer to those exceptions that the defendant was convicted of murder in the second degree, and could not therefore have been prejudiced by them. This is very far from being the case. The court plainly referred in both of the instructions, not only to "matters in mitigation," but to "matters in excuse," and told the jury that if they were in doubt as to either they should convict of murder in the second degree; that is, if they were in doubt as to the matters in excuse, which tended to acquit the defendant, they should convict him of murder in the second degree. It would be difficult to conceive of a charge more prejudicial than this one. If the jury entertained any sort of doubt as to the matters in excuse, they could not, under this instruction, acquit the defendant, for they were directed not to do so. If they entertained no doubt, it was as much their duty to acquit as it was in the other case put to convict, and yet they convicted of manslaughter instead of acquitting. It is true that if there has been error the defendant must show that he has been prejudiced before he is entitled to a new trial, but, when the court tells the jury that they cannot acquit if the defendant has not removed every doubt as to the matters in excuse, the prejudice to the prisoner is perfectly manifest. One of the fallacies in supposing otherwise arises from not giving heed to the fact that both instructions referred not only to matters in mitigation but to matters in excuse, and therefore to instruct the jury that, if they had any doubt as to the matters in excuse, they should convict of murder in the second degree, was the same as telling them that in such a case they could not acquit.

It is very true that when the killing with a deadly weapon is either admitted or proved, and nothing else appears, the presumption is that the defendant is guilty of murder in the second degree, and every matter of excuse or mitigation must be shown by the defendant, but only to the satisfaction of the jury, and there the rule stops, and it is unsafe to substitute any new, untried, and unnecessary formula for this simple principle, which has been approved in all cases, and especially commended by this court as the only safe and correct one. We said in *State v. Barrett*, 132 N. C. 1012, 43 S. E. 832: "It is well not to depart from established forms and precedents which are the products of the wisdom and wide experience of the sages of the law. It is said, in the cases just cited, that the prisoner must satisfy the jury, neither beyond a reasonable doubt nor yet by a preponderance of testimony, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense. We are not prepared to say whether the jury can become satisfied of the existence of a fact unless the evidence in favor of its existence is stronger [than] or preponderates over that against its existence. But what we do say is that it is best to follow settled forms in the trial of causes." In the case of *State v. Byers*, 100 N. C. 512, 6 S. E. 420, the expression now objected to appeared in the charge of the judge in the lower court, but there was no exception taken to it, and the language of the court in the opinion did not make the slightest reference to it. The case of *State v. Potts*, 100 N. C. 457, 6 S. E. 657, would seem to be clearly against the state's contention in this case. The instructions as to the burden of proof in regard to insanity was there rejected because of the use in them of the very expression "if the jury are left in doubt," etc., and the court expressly recognizes the rule to be that the defendant is required only to satisfy the jury. In *State v. Smith*, 77 N. C. 488, the objectionable words are used by Faircloth, J., inadvertently, and without the slightest reference to the facts of the case, or the exceptions, which did not present the question at all; and the same may be said of the cases of *State v. Jones*, 98 N. C. 651, 8 S. E. 507, and *State v. Rollins*, 113 N. C. 722, 18 S. E. 394. The case of *State v. Mazon*, 90 N. C. 676, is an authority against the state, for in that case the principle which the court, by Smith, C. J., referred to as "settled and put at rest by judicial decisions," is the rule established by *State v. Willis*, 63 N. C. 26, and a long line of cases ending with *State v. Barrett*, 132 N. C. 1005, 43 S. E. 832, namely, that the defendant is only required to show matters in mitigation or excuse to the satisfaction of the jury. It is not necessary to review each of the cases cited by the state. We have carefully examined them, and have not

been able to find a single one among them, or indeed any other case—for we have diligently searched everywhere—in which such an instruction was held to be correct, when exception was taken to it, as in this case. In *Pool v. State*, 87 Ga. 526, 13 S. E. 556, the court held that a request to charge that, if there is any doubt, the jury should acquit, required that the jury should be satisfied beyond all doubt, and was therefore erroneous. It is conceded by the state that the defendant is not required to satisfy the jury beyond a reasonable doubt as to the mitigating circumstances, and, if so, how can he be required to satisfy them beyond all doubt by excluding "any doubt" which may be in their minds, as said in *Pool v. State*, supra?

When it is said that the jury cannot be "satisfied" that the plea of self-defense is true if "they are left in doubt about it," nothing more or less is meant or can be intended than that the defendant must exclude from the minds of the jury not only every reasonable doubt, but every other kind of doubt, which is directly opposed to all authority. The true principle is stated in *State v. Byrd*, 121 N. C. 684, 28 S. E. 353, as follows: "Facts offered by the prisoner in excuse or mitigation need not be proved beyond a reasonable doubt, but only to the satisfaction of the jury," and this is all of it. Referring to the rule (as thus stated) in *State v. Mazon*, 90 N. C. 683, Smith, C. J., said: "If anything can be settled and put at rest by judicial decisions, this principle has been, and we cannot now permit it to be drawn in question without impairing the confidence which ought to be reposed in the integrity and stability of the judicial administration of the law."

The suggestion that, if we follow this established precedent of the law, unrestrained violence and lawlessness may ensue, is one to which we can give no heed. If we take our eyes from the law and give attention only to consequences, or if we stop to consider who is morally right or wrong, without regard to right or wrong as judicially ascertained, we will soon have a government not of law but without law, and the lawlessness which is sought to be avoided will follow as an inevitable result. We must apply the law as we find it to be, and not as we think it should be, for to do the latter would be to legislate, and not to expound.

But we think the court inadvertently fell into error when it responded to the defendant's prayer for instructions, and told the jury that, if the deceased advanced upon the defendant with a drawn knife in such manner as to cause him reasonably to apprehend, and he did actually apprehend, that he was about to be slain or to receive enormous bodily harm, the defendant had the right to stand his ground, and, if necessary, to take the life of the deceased, without retreating. Thus far the charge was correct,

but the court added to this instruction the following: "Provided the assault made upon the defendant was felonious or with felonious intent." As the court superadded these words to the prayer of the defendant, or, rather, to its own response to that prayer, it certainly became necessary that some explanation should be made to the jury as to the meaning of the term "felonious or with felonious intent." The word "felonious" is a technical one, and not supposed to be understood by laymen, of whom juries are composed. In *State v. Gaither*, 72 N. C. 458, it is said to be the duty of the judge to explain to the jury what is meant by felonious intent, and that it is error not to do so. In *State v. Coy*, 119 N. C. 908, 26 S. E. 120, the court says: "What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say," citing several cases. It was all-important in this case, because of the connection in which the words were used, that such an explanation should have been made. The jury had already been told that, if the defendant reasonably apprehended that he was about to be slain or to receive great bodily harm, he had a right to kill his assailant, without retreating, provided he acted in good faith and with ordinary firmness. This was the true principle, and was sufficient to impart to the jury a correct idea of what was required to constitute the right of self-defense. Why, then, add the proviso that the assault must have been made by the deceased with a felonious intent? This clearly implied that more than a mere intent of the deceased to kill or to do great bodily harm was necessary to justify the defendant in taking the life of his assailant, whereas the murderous intent of the deceased in assailing the defendant was itself a felonious intent, and all-sufficient as the intent required in order that the defendant might rightfully use such force as was necessary to defend himself, even to the taking of his assailant's life.

But the addition to the defendant's prayer for instructions was in itself erroneous. It was not necessary that the assault upon the defendant should have been felonious or committed with a felonious intent. If the assault was made with the purpose of inflicting great bodily harm, or even if the defendant had a reasonably well-grounded apprehension that such was the fact, he had the right to act in defense of himself. An assault with an intent to kill is not a felonious assault. It was a felony at one time (Acts 1868-69, p. 406, c. 167), but the law making it a felony was repealed by Acts 1870-71, p. 94, c. 43, and since the date of the passage of that act it has been a misdemeanor. It is true that an assault with intent unlawfully to kill would be an assault with a felonious intent, but the court did not only say that it must have been

committed with a felonious intent, but that it must have been so committed, or the assault itself must have been felonious. We have seen that neither was required in order to give to the defendant a perfect right of self-defense.

We cannot for a moment think that the right of a defendant to a correct statement of the law by the court to the jury can in any case depend upon the mere possibility, and a very remote one, of there being some member of the jury with sufficient intelligence and knowledge to explain clearly the meaning of technical words to his fellows. That, as we understand it, is the peculiar office and function of the judge. We doubt if any layman could give a correct definition of the word "felonious" as now used in the law of this state, this court itself having had at least some difficulty in stating its exact meaning. The law presumes that the jurors do not know the law, and for this very reason enjoins upon the judge to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." Code, § 413. This duty is not even perfunctory, and much less can it be omitted upon the mere chance that the jury, or, at least, one of them, may know the law.

There is another objection to the proviso which was added to the instruction by the court. The court had charged the jury virtually by this instruction that an actual assault, with the intent to kill or to do great bodily harm, was not necessary, as he told the jury that, if the defendant apprehended upon reasonable grounds that the deceased was about to assault him with that intent, "he had the right to stand his ground, and, if necessary, to take the life of his assailant, without retreating"; and yet by the proviso the jury, in order to give the defendant the benefit of that instruction, were required to find that there was a felonious assault or an assault with a felonious intent. Under this instruction the jury could not have acquitted the defendant if they had found that he had a well-grounded apprehension that the deceased was about to assault him with the intent to kill him or to do him great bodily harm, unless they further found that an assault had been actually committed with a felonious intent. We think that this instruction given in response to the prayer of the defendant was calculated to mislead the jury as to the true principle upon which the defendant's right of self-defense was founded, and it therefore necessarily prejudiced him. In this connection it may be well to notice an expression of the court in the general charge. The jury were instructed that, in order "to justify the use of a deadly weapon in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the shooting by the defendant was absolutely necessary; and

it devolves upon the prisoner to make it appear to you that the deceased was the assailant and at fault, and that he, the prisoner, was not at fault, or that he, the prisoner, had really and in good faith endeavored to decline a struggle before the shot was fired." It is true the court afterwards, in a very clear and forcible manner, explained to the jury what kind of reasonable apprehension that he was about to be killed or to receive great bodily harm would have justified the defendant in acting upon the facts and circumstances as they appeared to him; but the fact, as we pointed out in *Barrett's Case*, supra, that the court afterwards gave this correct instruction, did not cure the error of the charge as to the existence of the actual or "absolute" necessity to kill. In this respect the charge in *Barrett's Case* and the charge in this case were substantially alike. The error was not corrected by the subsequent charge, nor was it intended to be, but the two instructions conflicted, and the jury were thereby left in doubt and uncertainty as to which of the two was right. What we said in *Barrett's Case*, upon the same state of facts substantially, is applicable here, namely: "It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly or when incorrectly. We must assume, in passing upon the motion for a new trial, that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous"—citing *Edwards v. Railroad*, 132 N. C. 99, 43 S. E. 585; *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 480; and *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217.

While the exception to this part of the charge is not very specific, we have noticed it in order that attention may again be called to the correct principle upon which a charge in such a case should be based. It is true that an actual necessity to kill in order to save the defendant's own life would have justified the killing of his assailant, if the defendant himself was not in fault (*State v. Dixon*, supra), but it is not true that actual necessity is the only ground upon which the defendant can claim that he killed in self-defense; for, if there was this actual necessity, or if the defendant had a reasonably well-grounded apprehension of death or great bodily harm if he did not kill his assailant, his right of self-defense was complete. If *Stanberry* was attempting to kill *Miller* or to do him great bodily harm, or if the defendant had a well-grounded belief or apprehension that he was attempting to do so, he had the right to interfere to prevent *Stanberry* from executing his intention, and if, while engaged in the act of interference for that lawful and commendable purpose, *Stanberry* advanced upon him in such a manner as to induce the defendant rea-

sonably to apprehend, and defendant did actually apprehend, that he was about to be killed or receive great bodily harm, he was justified in taking the life of Stanberry in order to save his own or to prevent great bodily harm to himself, for, when he interfered, he was in no fault, but was performing a legal duty, and therefore had a perfect right to stand and defend himself against the threatened attack. *Clark's Criminal Law*, § 65, p. 164; *State v. Matthews*, supra; *State v. Ruth-erford*, 8 N. C. 458, 9 Am. Dec. 658.

There was error in the rulings of the court in the respects we have stated, and it will be so certified to the end that there may be another trial. New trial.

CLARK, C. J. (dissenting). The court gave the following prayers at the request of the state: "(2) If the jury are satisfied beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon, to wit, a pistol, and are left in doubt as to the circumstances of mitigation or excuse offered by the prisoner or derived from the state's evidence, they should convict of murder in the second degree. (3) If the jury are satisfied beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon, to wit, a pistol, and are left in doubt from the whole evidence as to whether the deceased, at the time he was slain, was making a felonious assault upon the prisoner with a knife, either because he did not then have the knife or because he was too drunk to be capable of making such assault, and are left in doubt as to whether the prisoner, at the time he slew the deceased, believed and had reasonable ground for believing that the deceased was making such felonious assault upon him with a knife, then they should convict of murder in the second degree."

It is a complete answer to these exceptions that the prisoner was acquitted of murder in the second degree, and could not have been prejudiced thereby. Besides, the charge was warranted upon all our authorities. When the killing with a deadly weapon is admitted or proved, the presumption is that the prisoner is guilty of murder in the second degree (*State v. Hicks*, 125 N. C. 636, 34 S. E. 247; *State v. Booker*, 123 N. C. 713, 31 S. E. 376; *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722), and every matter of excuse or justification must be shown by the prisoner (*State v. Johnson*, 48 N. C. 266; *State v. Ellick*, 60 N. C. 451, 36 Am. Dec. 442; *State v. Brittain*, 89 N. C. 481; *State v. Rollins*, 118 N. C. 722, 734, 18 S. E. 394, where several cases are cited; *State v. Barrett*, 132 N. C. 1006, 43 S. E. 832). From the foregoing cases it will appear that the doctrine is well established that the burden devolved upon the prisoner to prove all matters of excuse or mitigation, and this he must do to the satisfaction of the jury. *State v. Whitson*, 111 N. C. 695 (Syl., point 9, p. 696), 16 S. E. 332; *State v. Willis*, 63 N. C. 26; *State*

v. Locklear, 118 N. C. 1154, 24 S. E. 410; *State v. Barrett*, supra. It was incumbent on the prisoner to satisfy the jury as to the circumstances offered by him in evidence to rebut the presumption of malice and to reduce the crime to manslaughter or self-defense. If the evidence left the jury in doubt it fell below the required standard, and therefore the charge was not erroneous. In *State v. Potts*, 100 N. C., at p. 463, 6 S. E. 657, the court below refused instructions "to the effect that, if upon the evidence the minds of the jury are left in doubt as to the sanity of the prisoner or of his malicious intent in taking the life of the deceased, it should be resolved in his favor, leading in one instance to acquittal, and in the other to the reduction of the grade of the offense to manslaughter." The ruling of the court below was affirmed by this court. In *State v. Byers*, 100 N. C. 512, 6 S. E. 420, the following charge, at page 517, by the judge below, was affirmed by this court, Chief Justice Smith delivering the opinion: "That when the killing was proved to have been done with a deadly weapon, or admitted by the prisoner, the burden of showing the mitigating circumstances shifted to the prisoner, and this he must show, not by a preponderance of testimony or beyond a reasonable doubt, but to their satisfaction, and if the jury were left in doubt as to the mitigating circumstances it would be a case of murder." In *State v. Smith*, 77 N. C., at page 488, Faircloth, J., also says: "Homicide is murder unless it be attended with mitigating circumstances, which must appear to the satisfaction of the jury, and if the jury are left in doubt on this point it is still murder." This is quoted verbatim, and approved by Davis, J., in *State v. Jones*, 98 N. C. at p. 657, 8 S. E. 507, as well as by Smith, C. J., in *State v. Byers*, 100 N. C. 518, 6 S. E. 420; and it is again held in *State v. Rollins*, 113 N. C. p. 733, 18 S. E. 394. *State v. Smith* on this point is also cited as authority, but without verbatim quotation, in *State v. Brittain*, 89 N. C. 502, *State v. Mazon*, 90 N. C. 683, and *State v. Whitson*, 101 N. C. 700, and by Douglas, J., in *State v. Byrd*, 121 N. C. 686, 28 S. E. 353. In *State v. Carland*, 90 N. C., at p. 674, Ashe, J., says: "A bare preponderance of proof will not do to show matters of mitigation or excuse, unless it produces satisfaction of their worth in the minds of the jury." Certainly the jury cannot be satisfied of the truth of such defense when "they are left in doubt about it."

When counsel, in zeal for their clients, have sought to change this rule, whose maintenance the court has heretofore deemed necessary for the prevention of murders, the court has always refused, and Smith, C. J., citing and approving *State v. Smith*, 77 N. C. 488, and other cases, says, in *State v. Mazon*, 90 N. C. 683: "If anything can be settled and put at rest by judicial decisions, this principle has been, and we cannot now

permit it to be drawn in question without impairing the confidence which ought to be reposed in the integrity and stability of the judicial administration of the law." These are wise words of one of the ablest and most distinguished of our predecessors, and the principle there followed has not till now been shaken in any subsequent case. The state, always at a gross and unfair disadvantage, by reason of the disparity in the number of challenges and other causes, in any effort to enforce the law in this state against homicides, has been reduced almost to a state of impotence, except when the killing has been by lying in wait, by the late statute and the construction placed upon it in *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477, and similar cases. In view of the vast increase in the number of murders in this state which has followed, and which now amount almost to an epidemic, and the consequent increase in the number of attempts by the people themselves outside of the law to repress crime by lynchings, I view with regret the overruling of another long and unbroken line of precedents which our learned and able predecessors thought just and necessary that murders might less abound. There has been no statute and no decision impeaching the uniform and hitherto unanimous decisions of this court to the above effect. As the burden was upon the prisoner to prove the matter in mitigation to the satisfaction of the jury, it inevitably follows that, if the jury had been left in doubt, the matter in mitigation was not proved to their satisfaction, and their verdict should have been rendered guilty of murder in the second degree. But their verdict establishes that they were so satisfied.

The prisoner requested the court to charge the jury that: "If they believed from the evidence that the deceased was engaged in a difficulty with Asa Miller, and was attempting to cut said Miller with his knife, in the presence of the prisoner, it was his duty to endeavor to suppress and prevent the same; and if, in attempting to do so, the deceased left off his difficulty with Miller, and made upon the prisoner with a drawn knife in such a manner as to cause the prisoner to apprehend, and he did apprehend, that he was about to be slain or to receive enormous bodily harm, then the prisoner had a right to stand his ground, and, if necessary, to take the life of the deceased, without retreating." This prayer was certainly defective in leaving out the word "reasonably," which the judge supplied in the following instruction which he gave in lieu of that asked: "If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller, and was attempting to cut said Miller with his knife, in the presence of the prisoner, and the de-

ceased was then capable of executing such a purpose, it was his duty to endeavor to suppress and prevent the same; and if, in attempting to do so, the deceased left off his difficulty with Miller, and made upon the prisoner with a drawn knife in such a manner as to cause the prisoner to reasonably apprehend, and he did actually apprehend, that he was about to be slain or receive enormous bodily harm, then the prisoner had a right to stand his ground, and, if necessary, to take the life of the deceased, without retreating, provided the assault made upon the prisoner was felonious or with felonious intent." This was asked by the prisoner (except the additions), and was fully as favorable to the prisoner as he was entitled to under *State v. Gentry*, 125 N. C. 733, 34 S. E. 706; and the addition, "provided the assault made upon the prisoner was felonious or with a felonious intent," was too plain and intelligible to require a translation of the word "felonious" to the jury. Twelve men of ordinary intelligence could not be impaneled who would not have at least some man upon it who could instruct those upon the jury who were so illiterate (if any) as not to understand the meaning of the judge in that context. If, however, they could have understood the judge to mean an assault with a lesser intent than homicide, then the error was in favor of the prisoner, and he cannot complain. If the failure to explain the word "felonious" was error, it being prejudicial to the state only, it could not possibly be error against the prisoner.

The evidence was that the deceased, who was a lame man, was "perfectly drunk" and "wild drunk," and there was direct evidence that he was not trying to hurt Miller, and that they were in a drunken squabble; and there were other circumstances which would have justified the jury in drawing the inference that the deceased was not capable of harming Miller or of executing any purpose to harm the prisoner, if the latter had retreated, as he should have done, after the deceased left Miller, if he (the prisoner) could do so with safety, and thereby have avoided taking the life of a human being. "The dead are always wrong," says the proverb truly, and the deceased is not here to give his version of the slaying; but if upon this evidence the condition of the deceased was such that the prisoner could have retreated with safety, but he preferred rather to stand his ground and kill the deceased, without overpowering necessity to prevent injury to himself, then the verdict of manslaughter and the short term in the penitentiary imposed should not be complained of by him. Human life ought to retain something of its former sacredness in the eye of the law.

(134 N. C. 589)

STATE v. LIPSCOMB.

[Supreme Court of North Carolina. April 5, 1904.]

HOMICIDE — PREMEDITATION — MURDER IN SECOND DEGREE — INSTRUCTIONS — REBUTTING PRESUMPTION OF MALICE—MINORITY OF JUBOR—WAIVER OF OBJECTIONS.

1. In a prosecution for murder, evidence considered, and held sufficient to warrant the jury in finding the fact of premeditation and deliberation.

2. Where, in a prosecution for murder, defendant admitted having killed deceased with a gun, and the testimony tended to show premeditation and deliberation, and there was no evidence of provocation, nor of any fact which could be considered in mitigation, excuse, or justification of the killing, it was not error to instruct that, defendant having admitted that he killed deceased with a deadly weapon, there were not in evidence any facts or circumstances sufficient to rebut the presumption of malice from such killing with a deadly weapon, and that defendant was guilty at least of murder in the second degree.

3. Where the jury found that defendant killed deceased intentionally and willfully, and with premeditation and deliberation, the instruction, if erroneous, was not prejudicial.

4. The refusal of the court to set aside the verdict in a criminal case because a juror was under 21 years old is not reversible error, as the objection was too late.

Appeal from Superior Court, Granville County; Cooke, Judge.

Archie Lipscomb was convicted of murder in the first degree, and he appeals. Affirmed.

The defendant was indicted in the superior court for the murder of Caswell Merrett, and, having been convicted of murder in the first degree, appealed.

Mary Merrett, a witness for the state, testified: "I am the wife of the deceased, Caswell Merrett, who was about forty years old. He lived on W. L. Umstead's place, in this county. Arch Lipscomb lived about one-quarter of a mile from us. On Friday night, the 10th of January, it being dark and cloudy, and about one hour after dark, Arch Lipscomb came to our house. He came in. My husband was sitting near the fireplace, near the bed, and I was plaiting my hair. My husband was sitting about 12 or 15 feet from the door. Arch came in and sat down in the corner. Arch and my husband got to arguing about the Scriptures. They did not seem to be angry, and Caswell said something Arch did not like. I do not remember what. Arch jumped up and said, if his best friend was going back on him for somebody else, that was all right. And he stepped out of the door at once and came back, and before I had turned my head he had shot. He did not have the gun in the house, but got it outside of the door. Caswell was sitting down, with his legs crossed, and his head hanging down. He had not gotten up from the chair. It was a shotgun, and the load went into my husband's throat, and he died at once, without ever speaking. I went up the lane and halloed for Mr. Umstead, and he came. My husband was still sitting in the chair,

but dead. As soon as Arch shot, he left there. There was a lighted lamp on the table near Caswell, and the shot broke that to pieces. There are two rooms in our house. They had just a religious argument about the Bible, but I never heard my husband making threats. I did not have anything against the defendant, and I have not got anything against him now."

W. P. Wheeler, a witness for the state, testified: "I arrested the defendant next morning after the killing, and, without any word of inducement or threat, he told me he killed the deceased. He said the deceased had threatened him and his wife's life and they were afraid of him, and that he carried his gun over and shot him and killed him that night. I never heard that deceased and his wife were 'conjurers' until after the killing. I did not know of any ill feeling between the parties. The defendant did not try in any way to escape. He was dressed up when I got him, and said he was waiting for the officers."

The defendant, in his own behalf, testified: "I shot and killed Caswell Merrett on the night of January 10th last. I left home about one-half hour by sun to go hunting. I went down on Mr. Williams' land and Mr. Eugene's [Umstead's]; and then, when I got to the deceased's house, I set my gun down by the door and went inside the house. Caswell Merrett had before been threatening mine and my wife's life several times. He said he had given my wife three weeks in the way he was going to do, and that was to kill her—I understood it. I have seen him run up and take hold of her with both hands. I was afraid of the deceased. He and I got to talking together at his house that night, and we both seemed to get mad. I thought he was a conjurer, and I am afraid of a conjurer. It was not my intention to kill the deceased when I left home. I went hunting. I went up and halloed at his house. He halloed out and invited me in. I went in. I had been before that time so wrought up on account of the threats he had made that I could not work in my field. We first commenced talking about arithmetic, and then we got on the Scriptures. I arrived at the deceased's house about dark, and remained about an hour, and then shot him, and left immediately. I did not like the way he had been fooling around my wife. It looked like he had been trying to get between me and my wife. During Christmas my wife was at his house, and she said he caught her in his arms and hugged her. I did not kill any birds that hunt."

Mary Lipscomb, a witness for the defendant, testified: "I am the wife of the defendant. I was at home that afternoon. I was sick in bed, and had been for about a week. Arch left home before night. He did not tell me what he was going out for. The deceased sometimes visited us."

Eugene Umstead, a witness for the de-

defendant, testified: "I live near the parties. My attention was first attracted when, a little before ten o'clock, my attention was directed to Caswell Merrett's house by his wife's hallooing. When I reached the house, Caswell was sitting up in the chair, dead, with his legs crossed, and his head fallen to one side, and his hand hanging down by his side."

There was evidence to the effect that the general character of the defendant is good.

"The court instructed the jury as to what constituted murder in the first and second degrees and manslaughter, and also instructed them fully as to the law of malice, explaining to them the difference between general malice and particular malice, and further instructed them that, to constitute murder in the first degree, there must exist on the part of the slayer towards the deceased express malice, and that, in order to convict the prisoner of murder in the first degree, the jury must be satisfied beyond a reasonable doubt that he slew the deceased with particular or express malice, and that he did it with premeditation and deliberation. The court also called the attention of the jury to the evidence, and gave the contentions of the parties."

First exception: There was no exception to the charge of the court, save to the following instruction: "The defendant having admitted that he killed the deceased with a deadly weapon, there was not in evidence any facts or circumstances sufficient to rebut the presumption of malice from such killing with a deadly weapon, and that the defendant was at least guilty of murder in the second degree." The jury rendered a verdict of murder in the first degree. The defendant moved for a new trial for error in the charge as above pointed out by his exception. The motion was overruled, and the defendant excepted.

Second exception: "The defendant then moved to set aside the verdict, and for a venire de novo, on the ground that it had been discovered since the verdict that B. F. Blackwell, one of the jurors in the case, was under 21 years of age. The court found as a fact that the said juror would not be 21 years old until next July, and that the fact was unknown to the defendant or his attorney, or the solicitor of the state, or any other officer of the court. The court also overruled this motion of the defendant, and the defendant excepted. The court then pronounced judgment upon the verdict as contained in the record, and the defendant appealed to the Supreme Court, and was allowed to appeal without giving security."

The Attorney General, for the State.

WALKER, J. (after stating the case). There was no exception taken to the charge so far as it related to murder in the first degree. In this respect the instructions of the

court to the jury were full and explicit, and sustained by all of the authorities. *State v. Gilchrist*, 118 N. C. 673, 18 S. E. 819; *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *State v. Norwood*, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498; *State v. McCormac*, 116 N. C. 1033, 21 S. E. 698; *State v. Gadberry*, 117 N. C. 811, 23 S. E. 247; *State v. Covington*, 117 N. C. 834, 23 S. E. 337; *State v. Thomas*, 118 N. C. 1113, 24 S. E. 431; *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722; *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128; *State v. Spivey*, 132 N. C. 989, 43 S. E. 475; *State v. Cole*, 132 N. C. 1069, 44 S. E. 391. There was ample time for deliberation and premeditation by the defendant, according to any rule that has been laid down upon the subject. No particular time is required for this mental process of premeditation and deliberation. The question always is whether, under all the facts and circumstances of the case, the defendant had previously and deliberately formed the particular and definite intent to kill, and then and there carried it into effect. This is a question for the jury to determine. *State v. Johnson*, 47 N. C. 247, 64 Am. Dec. 582. The facts of our case are substantially like those in *State v. McCormac*, 116 N. C., at page 1034, 21 S. E. 693.

The testimony of the witness W. P. Wheeler as to the confession made to him by the defendant was sufficient in itself to warrant the jury in finding the fact of premeditation and deliberation, if they believed it, and if, after weighing the testimony, they inferred and found the fact therefrom; but this testimony was re-enforced by that of the defendant himself at the trial, which tended to show not only premeditation and deliberation at the time of the killing, but preconceived malice and a spirit of revenge.

The exception to the charge of the court is not well taken. There is no principle better settled in the law of homicide than the one stated by the court to the jury. When a killing with a deadly weapon is shown or admitted, the law presumes malice, and, if nothing else appears, it is murder in the second degree, just as it would have been murder at common law, and would still be, if it were not for the act of 1893 requiring the state to prove premeditation and deliberation in order to establish a case of murder in the first degree, and in this respect leaving murder in the second degree as defined by that statute, just as was murder at the common law. If there is no proof of premeditation and deliberation, and there is a killing with a deadly weapon, the law presumes malice, and it is murder in the second degree, under the statute. *State v. Wilcox*, 118 N. C. 1131, 23 S. E. 928; *State v. Capps* (at this term) 46 S. E. 780. This being so, the conviction should be of murder in the second degree unless the defendant can satisfy the jury of the existence of such facts as will, in law, rebut this presumption

of malice which is raised when the killing is with a deadly weapon. What facts are sufficient to rebut the presumption has always been held to be a question of law, which the court must decide. Whether there is any evidence to rebut the presumption is also a question of law. Whether, if there is any evidence sufficient for the purpose, the presumption is repelled in the particular case, is a question for the jury, under proper instructions from the court. *State v. Matthews*, 78 N. C. 523; *State v. Capps*, *supra*; *State v. Craton*, 28 N. C. 164. To illustrate: If A. assault B., giving him a severe blow, or otherwise making the provocation great, and B. strikes A. with a deadly weapon and kills him, or if, on a sudden quarrel, the parties begin the fight without deadly weapons, and, after blows pass, one uses a deadly weapon and kills the other, or if, on a sudden quarrel, the parties fight by mutual consent, at the instant, with deadly weapons, the fight being on equal terms, and no undue advantage being taken, the implication of malice in either of the cases stated is rebutted, and the law mitigates the offense, out of indulgence to the frailty of human nature, and adjudges the killing to be manslaughter. *State v. Ellick*, 60 N. C. 452, 86 Am. Dec. 442. And, if the first assault is committed under such circumstances as to induce the party assaulted reasonably to believe that he is about to be killed or to receive enormous bodily harm, and he kills his adversary, the law excuses the killing, because any man who is not himself legally in fault has the right to save his own life, or to prevent enormous bodily harm to himself. In each of the above cases it would be the duty of the court to charge the jury that if they found the facts to be as we have stated them, provided there is evidence to prove the facts, the implication of malice is rebutted, and the killing is either manslaughter or excusable homicide, according as the facts may be found by them. Whether the blow was given, or whether the parties fought suddenly or on fair and equal terms, so as to reduce the killing to manslaughter, or whether the assault was committed under such circumstances as to justify the fear or apprehension of the defendant that he was about to be killed or to receive enormous bodily harm, so as to reduce the killing to excusable homicide, are questions solely for the jury. The matter is fully considered in the case of *State v. Matthews*, *supra*. It was therefore proper for the court to charge the jury in this case that there was no evidence of any facts and circumstances sufficient to rebut the presumption of malice which arose from the killing with the gun, which, of course, is a deadly weapon, and the defendant was at least guilty of murder in the second degree. There was no evidence of any provocation, nor was there evidence of any fact which could be considered in mitigation, excuse, or justification of the

killing. The only question in the case was whether the defendant was guilty of murder in the first degree or of murder in the second degree, the killing having been admitted. But if there had been error in the instruction to which exception was taken, we do not see how the defendant could have been prejudiced thereby, for the jury found that he killed his victim intentionally and willfully, and with premeditation and deliberation; and it could make no difference, with that fact found by the jury from the evidence, whether the presumption of the common law as to malice, arising from the use of a deadly weapon, had been rebutted or not. Prejudice could not come from such a charge, if erroneous, unless the defendant had been convicted of murder in the second degree, and there had been evidence of facts or circumstances in mitigation or excuse of the killing. We have said there was none. The principle contained in the instruction of the court had no application to the difference between murder in the first degree and murder in the second degree. It related only to the difference between murder in the second degree and manslaughter or excusable or justifiable homicide.

The motion to set aside the verdict because one of the jurors was under 21 years of age was properly refused, or at least the refusal of it was not reversible error. The challenge propter defectum should be made when the juror comes to the book to be sworn, and before he is sworn, or the right of challenge will be deemed to be waived. No juror can be challenged by the defendant after he has been selected and sworn, without the consent of the state, unless it be for some cause which has arisen since he was chosen and sworn. *State v. Patrick*, 48 N. C. 443; *State v. Davis*, 80 N. C. 412. In *State v. Lambert*, 93 N. C. 618, a motion to set aside a verdict for a reason the same as the one now urged was held to have been properly refused. As indicated by this court in *Patrick's Case*, *supra*, there is an apt time for each and every step in all legal proceedings, and every objection must be made and every privilege claimed at the proper time, or the party who should thus have asserted his right will be considered as having waived it. The objection to the juror in this case was not presented in apt time. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830. It came too late after verdict, and could then be addressed only to the discretion of the court. *State v. Mantaby*, 130 N. C. 664, 41 S. E. 97, and cases *supra*. The exercise of this discretion adversely to the defendant is not reviewable by this court. *State v. Davis*, *supra*; *State v. Perkins*, 68 N. C. 126; *Spicer v. Fulghum*, 67 N. C. 18.

The indictment in this case, though drawn according to the precedent in use before the act of 1893, p. 76, c. 85, is in proper form, and charges the offense of murder in the first degree. *State v. Gilchrist*, *supra*.

We have considered the case and the record with the greatest care and scrutiny, and our conclusion is that there is no error in the rulings of the court below, and none in the record, and it must be so certified. No error.

(124 N. C. 540)

BURWELL v. BRODIE.

(Supreme Court of North Carolina. April 5, 1904.)

LANDLORD AND TENANT—EVICTION—SUMMARY PROCEEDINGS — RESTITUTION — DAMAGES — ITEMS — SUFFICIENCY OF ALLEGATIONS — IN WHAT ACTION RECOVERABLE — RIGHTS OF LANDLORD—FORFEITURE — CREDITS — JUDGMENTS—ESTOPPEL.

1. Under Code, § 1776, which secures to a tenant who has been ejected in summary proceedings by order of a justice, but who afterwards procures a reversal, the right to recover damages of his landlord for his removal, a tenant may demand an issue for the determination of such damages on the trial on appeal in the superior court, or he may bring a separate action for the damages sustained by the wrongful suing out of the writ and eviction.

2. The judgment is the record, and controls in respect to what is decided by the trial court.

3. A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind, and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops.

In Defendant's Appeal.

4. A judgment for a tenant on appeal in summary proceedings is an estoppel on the landlord only to the extent of what was or should have been decided, and does not operate to prevent him from showing in a subsequent action the value of the crop, and what portion of it he was entitled to retain for advancements made before the eviction.

5. A landlord, in wrongfully evicting his tenant, does not forfeit his rights which had accrued to him under the lease contract and the statute, such as the right to a credit for guano, cotton seed meal, and cotton seed furnished by him, and used in planting and making the crop.

6. The court may take judicial notice of the season for planting.

7. A landlord who has wrongfully evicted his tenant by summary proceedings, and prevented him from doing the farming work on the premises, cannot, on the tenant's being restored to possession on appeal, charge him for having the work done by another person.

Walker, J., dissenting.

Appeal from Superior Court, Vance County, Ferguson, Judge.

Action by Matthew Burwell against B. T. Brodie. From a judgment for plaintiff, both parties appeal. Reversed on both appeals.

The present plaintiff was the tenant or cropper on the present defendant's land during the years 1901 and 1902 under a farming contract, by the terms of which he was to have one-half of the crop made on the land. In May the present defendant instituted summary proceedings before a justice of the peace to eject the present plaintiff. From a

judgment against him he (the present plaintiff) appealed to the superior court. He gave no undertaking to stay execution, and was, by the constable acting under an execution issued upon said judgment, evicted, and the present defendant put in possession. At October term, 1902, the cause came on for trial upon the appeal, and the court held upon the plaintiff's (present defendant) own showing that he was not entitled to recover, and adjudged that a writ of restitution issue to put the present plaintiff in possession. The court also adjudged that the present plaintiff recover one-half of all crops raised on the land. The present defendant appealed, and had time allowed to give bond and perfect his appeal. He failed to give the bond or perfect his appeal, but remained in possession, gathered and sold the crops, receiving therefor \$366.79. The present plaintiff thereupon brought this action, alleging the foregoing facts, and alleging that the defendant's conduct in the premises was unlawful, wrongful, and tortious, and amounted to an abuse of legal process, and that by reason thereof the plaintiff "was deprived of his house and garden for shelter and support of his family; that he was greatly distressed, agitated, and troubled both in body and mind thereby, and specifically and more so on account of the condition of his wife, which was known to the defendant, and was put to great mortification and shame thereby, as well as loss of employment," etc.; for all of which he demands damages. His honor rendered judgment "that the plaintiff has not alleged in his complaint matters sufficient to constitute a cause of action for damages other than the value of the crops." He thereupon proceeded to adjudge that the plaintiff recover one-half the value of the crop—ascertained to be \$183.30. The court held that in respect to the crop the defendant was bound by the judgment rendered at fall term, 1902, and refused to allow the defendant to show the amount expended by him in making and saving the crop. From this judgment the plaintiff and defendant appealed.

T. T. Hicks and B. S. McCoth, for plaintiff. W. B. Shaw and A. C. Zollicoffer, for defendant.

CONNOR, J. (after stating the facts). We are of opinion that his honor was in error in holding that the plaintiff did not state facts sufficient to enable him to submit an issue to the jury in regard to the alleged damage sustained by him for the eviction. While he could have demanded such an issue upon the rendition of the judgment of October term, 1902, he was not compelled to do so. Section 1776 of the Code expressly secures to him the right to "recover damages of the plaintiff for his removal" in such cases as the precept. The question is settled by this court in *Woody v. Jordan*, 69 N. C. 189. It is there said that the defendant who successfully re-

sists an action of replevin may have his damages assessed in the original action, but that he is not compelled to do so, and may have his separate action on the bond or on the case for damages sustained by the wrongful suing out of the writ and eviction. Mr. Justice Rodman says: "It must be, then, that the common law gave him full indemnity by means of a separate action for the damages for the taking and detention." It seems from the statement of the case on appeal that his honor was asked by the defendant to hold that the complaint did not state facts sufficient to constitute a cause of action against the defendant "for damages for abuse of legal process, mental or physical anguish, or malicious prosecution, and that the said complaint does not allege malice or want of probable cause, or special damages because of his eviction," and moves the court to dismiss the action as to any and all such alleged causes. The motion was sustained. As we have seen, the judgment, which is the record, and controls in respect to what is decided, simply states that his honor ruled that the complaint did not allege any damage other than the loss of his crop. We cannot concur with this construction of the complaint. We think it is sufficiently alleged that he suffered damages incident to his wrongful eviction; i. e., "a shelter and support for his family," etc. We do not express any opinion in regard to the character and nature of the damages which he may recover upon the allegations. He alleges a wrongful eviction, and for this injury he may recover such damages as proximately resulted from such injury. His honor should have submitted an issue involving this inquiry, and instructed the jury in regard to the measure and kind of damages which might be recovered. This court has in *Remington v. Kirby*, 120 N. C. 322, 26 S. E. 917, announced the principle upon which punitive damages may be recovered.

We simply decide that upon the complaint the plaintiff was entitled to have an issue as to his actual damages. To this end there must be a new trial.

In Defendant's Appeal.

CONNOR, J. His honor Judge Winston, at the October term, 1902, rendered judgment that the plaintiff be restored to the possession of the land from which he had been wrongfully evicted, and recover one-half the crops made. The execution of this judgment was prevented by the appeal of the defendant, who remained in possession until the expiration of the plaintiff's term, gathered and sold the crops. While it may be that the present plaintiff may have had the value of the crops ascertained, and judgment therefor at the next succeeding term of court, the present defendant having failed to perfect or prosecute his appeal, he was not compelled to do so. In this action he relies upon the judgment as an estoppel upon the defendant. It is an estoppel to the extent of what was de-

cided, or should have been decided. It does not operate to prevent the present defendant from showing the value of the crop, and what portion of it he is entitled to retain for advancements made before the eviction under the terms of the contract. By his wrongful act in evicting the plaintiff he does not forfeit his rights under the contract and the statute, as landlord, which had accrued to him. The record shows that the plaintiff was evicted about May 1st; that the defendant furnished guano, cotton seed meal, and cotton seed used upon the crops. The date at which these articles were furnished is not given, but we may take notice of the season for planting, and find that they must have been purchased or furnished at or about the time of the eviction. We infer from the record that the crop was not planted, as the controversy grew out of a difference between them as to what crop should be planted. However this may be, the defendant should be allowed a credit for the guano, cotton seed meal, and cotton seed, used in planting and making the crop, as the use of them was necessary to the planting and making the crop, and in no way affected by the eviction. In regard to the amount paid for labor, the defendant may not have credit. Having, as the record shows—and for the purpose of disposing of this appeal conclusively so—wrongfully evicted the plaintiff, and prevented him from doing the work, he cannot charge him for having it done by some other person. This would be to take advantage of his own wrong.

We are not sure that we understand the last two items on the account for corn and hay furnished to feed the mules "over amount furnished." It does not appear when, or under what circumstances, these articles were furnished. It is possible that these questions may be adjusted under the advice of the intelligent counsel representing the parties. There are few controversies more difficult to adjust than those arising out of farming contracts. It is a subject of congratulation that they are usually settled by mutual concessions. This case would, as it seems to us, seem to offer an opportunity to do so.

There must be a new trial.

WALKER, J. I dissent in this case from the opinion and judgment of the court in the defendant's appeal. I cannot agree with the court as to the legal force and effect of the judgment awarding to the plaintiff in this case, who was the defendant in the other suit, one-half of all the crops grown on the land. The defendant, Brodie, who was the plaintiff in that suit, had his day in court, and full opportunity to show that Burwell was not entitled to one-half of the crop, but to one-half less the part to be retained by him for advancements made before the eviction. If Brodie was entitled to any deduction on account of advancements, then Burwell was not entitled to one-half of the crop; and yet that is precisely what the court decided when the

parties were at issue as to what were their respective rights in the crop. The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined, and as to every other matter which the parties, by the exercise of reasonable diligence, might have litigated in the cause, and which might have been decided or determined therein. *Clark, J., in Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144, thus states the rule: "The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject in litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it;" citing 1 *Herman on Estoppel*, §§ 122, 123. I do not think it can be successfully contended that the defendant, *Brodie*, did not have full time and opportunity to bring forward the matter of advancements, now claimed to have been made by him to *Burwell*, and to have his right to so much of *Burwell's* half of the crop as was necessary to pay them adjudicated. The point was directly presented in that action. *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 106. The judgment declares that *Burwell* is entitled to one-half of the crop, and that finding and determination preclude the other question now attempted to be raised. *Bryan v. Alexander*, 111 N. C. 142, 15 S. E. 1031.

(134 N. C. 684)

STATE v. HUNT.

(Supreme Court of North Carolina. April 5, 1904.)

HOMICIDE—INSTRUCTIONS—MURDER — EVIDENCE—PREMEDITATION.

1. On a prosecution for murder, a requested instruction that if there was an opportunity to use a deadly weapon, but none was actually used, the circumstance should be considered as strong evidence against willful and premeditated murder, was properly modified by striking out the word "strong."

2. Accused requested an instruction that if it was the intention of the accused to do serious bodily harm, and death ensued from injuries inflicted with such intention, accused could not be convicted of a higher crime than murder in the second degree; and the instruction was modified to the effect that if it was the intention of the accused to do serious bodily harm, and death ensued in consequence of injuries inflicted with such intention, the accused would be guilty of murder in the second degree. *Held*, that the modification was not error.

3. It appeared that, after an altercation between deceased and accused, accused followed deceased out of the store where it occurred, and ran around the store in search of him, and then followed deceased about 30 yards, and struck deceased and killed him. Accused requested an instruction that he could not be convicted unless the jury were satisfied beyond a reasonable doubt that deceased was killed in pursuance of a fixed and deep-rooted purpose, with actual premeditation, formed in a cool state of the blood; and the instruction was given, modified by striking out the words "and deep-rooted" before the

word "purpose," and the word "actual" before "premeditation." *Held*, that the instruction was not erroneous.

4. No particular time is necessary to constitute the premeditation requisite to the crime of murder.

5. On a prosecution for murder, where the circumstances do not bring the case within the language of the statute, the state must prove deliberation and premeditation.

6. Deliberation and premeditation on the part of accused on a prosecution for murder may be inferred from such circumstances as ill will, previous difficulty between the parties, and declarations of an intent to kill after or before the crime.

7. It appeared that, after an altercation between deceased and accused, accused followed deceased out of the store where it occurred, and ran around the store in search of him, and then followed deceased about 30 yards, and struck deceased and killed him. *Held*, that the question of premeditation and deliberation was for the jury.

8. It appeared that accused, after having an altercation with deceased, in which he assaulted deceased, followed deceased, and, while the latter was supported, and staggering from injuries previously received, he struck the fatal blow. *Held* that, though there was some provocation, the killing was brutal, and to be attributed to a malicious disposition, rendering the crime murder.

Appeal from Superior Court, Person County; O. H. Allen, Judge.

Adam Hunt was convicted of murder in the first degree, and he appeals. Affirmed.

W. T. Bradsher and F. O. Carver, for appellant. The Attorney General, for the State.

CLARK, C. J. The prisoner was convicted of murder in the first degree. The deceased was in charge of a store belonging to his brother, who employed the prisoner as a sawmill hand. It was in evidence that the deceased had no authority to settle with the sawmill hands; that the accused went to the store that Saturday night, and stated in conversation with one West, about a half hour before the homicide, that "he would have his pay, or there would be a God d—n dead nigger there that night." He left, but returned to the store about 9 o'clock, and asked for a settlement. Deceased told him he could not pay him without authority from his brother. The prisoner commenced cursing and stamping the floor. The deceased told him to hush, and started round the counter with a hammer in his hand. The prisoner jerked the hammer out of his hand and struck the counter violently, saying, "Pay me." The witness told prisoner he would go off and get the timekeeper to get prisoner's time. When he returned with the timekeeper, the prisoner had deceased down, with his knees on his breast, jumping up and down on him, and beating deceased in the face. The timekeeper told him to "stop! stop!" whereupon the prisoner assaulted him, and, in the fight that followed, knocked the timekeeper down. The witness led the de-

§ 4. See Homicide, vol. 28, Cent. Dig. §§ 20, 22.

ceased towards his house, 30 yards away, holding him up and helping him along, and they were met about halfway by the wife of deceased's brother, crying. The prisoner then came on, and made at her, but she got home without being caught by him. The prisoner then ran around the witness and knocked deceased down. The prisoner then pulled off a strip about 20 feet long and tried to strike the deceased—struck trees. The deceased staggered along, half bent, trying to get into the house. The prisoner then ran up and struck the deceased a heavy blow on the head, knocking him down; his head striking the porch. Mrs. Wilkins said, "Lord! you have killed Fleetwood." The prisoner replied, "Yes; damn him! that is what I intended to do." The deceased fell entirely unconscious. The deceased was a weakly man, weighing about 118 pounds, and 6 feet tall. The prisoner was a powerful man for his size, and weighed 160 pounds, or 165. The deceased died of his injuries on Thursday following. The prisoner testified in his own behalf, contradicting the two state's witnesses who testified to his having deceased down, beating him, when they got there, and testified that deceased assaulted him with his knife, and cut him in the back and side, and he took the knife away; that Wilkins ran to his house, as though to get his gun, and he hit him as he went into the porch, and "knocked him against the floor of the porch"; that he (prisoner) ran against the pole and knocked it down, but did not try to use it; that he hit deceased only one lick, and that was at the porch; was only trying to keep them from killing him; that he was badly cut. The wounds exhibited to the jury were a slight cut in the hand, and another, about one inch long, on the back; and a cut on nose and some cut places on clothing were also shown, all of which prisoner said were made by deceased. The prisoner says he followed the timekeeper, who fled out of the back door and lost him; that then he went round the store to the front, and overtook deceased as he was going into his house, and struck him with his fist; and that this was the only blow he gave deceased. The medical evidence was that the teeth of deceased were crushed, and his temple appeared to have been struck with a hard substance; that both blows may have been made with a hammer, though they may have been inflicted with a fist; that the breast and other parts of the body of deceased showed severe contusions; and that the cuts on the prisoner were not serious. The evidence of a broken plow point found on the floor next morning was competent. It does not appear whether the point was used or not, nor does the evidence appear to have been prejudicial to the prisoner.

The prisoner, in apt time, requested the court, in writing, to charge:

"(1) Taking the evidence offered for the state to be true, there was no evidence of a

premeditated and deliberate intent to murder, and the prisoner cannot be convicted of murder in the first degree." Refused, and the prisoner excepted.

"(2) In no view of the case, as shown by the whole testimony, is there evidence of a premeditated and deliberate intent to kill and murder; and the prisoner cannot, therefore, be convicted of murder in the first degree." Refused, and the prisoner excepted.

"(3) If the jury shall find in this case that there was an opportunity to use a deadly weapon, but that none was actually used, this circumstance should be considered as strong evidence against willful and premeditated murder." This was given—the word "strong," however, being struck out—and the prisoner excepted to the modification.

"(4) If the jury shall find that it was the intention of the prisoner to do serious bodily harm to the deceased, and death ensued in consequence of injuries inflicted with such intention, then the prisoner cannot be convicted of a higher crime than murder in the second degree." This was modified, and given as follows: "If the jury shall find that it was the intention of the prisoner to do serious bodily harm to the deceased, and death ensued in consequence of injuries inflicted with such intention, then the prisoner would be guilty of murder in the second degree." The prisoner excepted to the modification.

"(5) In the case at bar, before the prisoner can be convicted of murder in the first degree, the jury must be satisfied beyond a reasonable doubt from the evidence that the prisoner killed the deceased in pursuance of a fixed and deep-rooted purpose, with cool premeditation, formed in a cool state of the blood." This was given, but modified by striking out the words "and deep-rooted" before the word "purpose," and the word "cool" before "premeditation," and the prisoner excepted.

There was no exception to the charge of the court.

We find no error in the matters excepted to. If the prisoner's own evidence is to be believed, the only blow he struck was when the deceased was entering his house, and was felled to the floor of his porch; and, by the prisoner's testimony, there had been cooling time, for he had followed the fleeing timekeeper out of the back door, and, after "losing him," had gone round the store, and had gone 30 yards, to the home of the deceased; there being also testimony that the deceased was supported and staggering, and was helped to get that far. Besides, no particular time is necessary to constitute premeditation. *State v. Norwood*, 115 N. C. 791, 20 S. E. 712, 44 Am. St. Rep. 498; *State v. McCormac*, 116 N. C. 1033, 21 S. E. 693; *State v. Covington*, 117 N. C. 834, 23 S. E. 337; *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722; *State v. Foster*, 130 N. C. 668, 41 S. E. 284.

We may mention here that in capital cases it is according to precedent, and more appropriate to style the accused "the prisoner," and not "the defendant," as was done here, but we have substituted the proper word.

Whenever the circumstances attending the killing do not bring the case within the language of the statute, the state must prove deliberation and premeditation. This it may do in many ways. Ordinarily they are not capable of direct proof, but are inferable from various circumstances, such as ill will, previous difficulty between the parties, and declarations of an intent to kill after or before striking the fatal blow. *State v. Conly*, 130 N. C. 683, 41 S. E. 534; *State v. Covington*, 117 N. C. 861, 23 S. E. 337. The circumstances surrounding this homicide were sufficient to go to the jury on the question of premeditation and deliberation. Besides, assuming that some provocation existed, the evidence shows that the killing was done in a brutal and ferocious manner; and, where this is so, the killing will be attributed to a malicious disposition, and not to a provocation, and the homicide will be murder. *State v. Hill*, 20 N. C. 629, 34 Am. Dec. 396; *State v. Chavis*, 80 N. C. 364; *State v. Boon*, 82 N. C. 637; *State v. Coley*, 114 N. C. 879-884, 19 S. E. 705.

No error.

(134 N. C. 546)

TAPP et al. v. DIBRELL et al.

(Supreme Court of North Carolina. April 5, 1904.)

PARTNERSHIP—STATEMENT OF PARTNERS—ADMISSIONS—OFFER OF COMPROMISE—GARNISHMENT—PARTIES.

1. In an action against a firm, evidence that one of the alleged partners, who was served with summons, stated that he wanted to settle the claim, but that he would be liable on certain garnishments if he did so, was admissible, though the partnership was denied.

2. Such statements were not objectionable as an offer of compromise.

3. Where certain tobacco sued for was sold by the W. C. T. Co., a corporation, to a partnership known as D. Bros., and thereafter garnishment proceedings were issued against certain individuals trading under the firm name of W. C. T. & Co., and notice of attachment was served on "D. Bros., a corporation," as being indebted to the firm of W. C. T. & Co., payments made by the firm of D. Bros. on such garnishment constituted no defense to their liability to the corporation seller of the tobacco.

Appeal from Superior Court, Lenoir County; W. R. Allen, Judge.

Action by L. P. Tapp and another against R. L. Dibrell and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Loftin & Varser, for appellants. N. J. Rouse and Y. T. Ormond, for appellees.

CONNOR, J. The plaintiffs, L. P. Tapp and J. W. Grainger, as assignees, sued to

recover of the defendants, R. L. Dibrell and A. B. Carrington, trading under the firm name and style of Dibrell Bros., an account of \$1,120.80 for certain tobacco sold and delivered by their consignor to the W. C. Thomas Tobacco Company, a corporation duly incorporated and organized under and pursuant to the laws of this state. The defendants deny that they, as partners, purchased any tobacco of the W. C. Thomas Tobacco Company, but aver that a corporation duly incorporated and organized pursuant to the laws of Virginia as Dibrell Bros. purchased certain tobacco of a copartnership composed of W. C. Thomas and the plaintiffs, Tapp and Grainger, the price of which was \$1,111.44. They deny the assignment of the account. They further say that the Hoge-Irvin Tobacco Company, a corporation chartered and organized in the state of Virginia, attached \$215.50 of the proceeds of said tobacco in the hands of Dibrell Bros., and has obtained judgment in said attachment; that one R. R. Traxton also attached of said proceeds \$20.50, and has obtained judgment for said amount; that Dibrell Bros. have tendered to W. C. Thomas & Co. a check for the balance of the proceeds of said tobacco. The defendants also set up a counterclaim for \$400 damages for loss suffered in defending said attachment proceeding. In response to issues submitted, the jury find that Dibrell Bros. was a corporation at the time of the purchase of the tobacco; that the tobacco was not purchased for Dibrell Bros. as a corporation; that both the defendants were indebted to the plaintiffs in the amount named in the complaint. The plaintiffs introduced the articles of incorporation of the W. C. Thomas Company, to which there was no objection.

The plaintiff Tapp testified that he never knew of any such firm as W. C. Thomas & Co.; that the tobacco represented by the account sued on was sold by the W. C. Thomas Company to the defendants through A. B. Carrington, one of the defendants, and delivered to Hoge-Irvin Tobacco Company for the defendants; that he had known Dibrell Bros. since 1895; that A. B. Carrington and R. L. Dibrell were members of the firm, and that Carrington was served with summons here; that he talked with Carrington in August, 1902, and said that he wanted to settle the claim, but he would be liable on garnishment. This was objected to by the defendants, and to the admission of the testimony, exception was taken. We cannot see any valid objection to this testimony. It was the declaration of one of the defendants. It was certainly admissible against him, and, if there was a partnership, against his copartner. It was not offered to prove a partnership. The witness had testified to the partnership. While this was not conclusive, it was a sufficient basis to admit the declaration of Carrington. Of course, if the jury did not find that Carrington and Dibrell were partners in this transaction, the declaration was admis-

sible only as against Carrington. The learned counsel, in their brief, do not rest their exception upon this ground, but say that it is not admissible as an offer to compromise. It was not offered for that purpose, and was not capable of that construction. In view of the answer, we cannot see that it was of any importance, in any point of view. The witness further testified that he had about the same conversation with the defendant Dibrell; that neither of them denied that Dibrell Bros., partners, owed the claim.

The plaintiffs introduced the following: "Cable Address: Dibrell, Danville. Dibrell Bros., Leaf Tobacco Brokers. Danville, Va., U. S. A., May 12, 1902. Mess. W. C. Thomas Tobacco Co., Kinston, N. C.: Your valued favor of the 10th inst. returning our check for \$774.94 tendered W. C. Thomas & Co. is to hand. We note carefully your remarks as to the position you take in regard to the matter. We regret very much that we are not at liberty to accede to the demands of the W. C. Thomas Tobacco Co. for the money claimed to be due them by us, and we wish to assure you that it is in no spirit of vindictiveness that we refuse the demand, but only for our protection and by the advice of our attorneys. We believe we have made our position very clear to you, but we repeat that we do not know The W. C. Thomas Tobacco Company in this transaction, but only W. C. Thomas & Co. We will be compelled to pay the amount of garnishments when ordered to do so by the court and we hope that you will see fit to have some one to represent you when the case comes up in July Corporation Court. Very truly yours, Dibrell Bros." Objection was made to the manner of proving the assignment of the account. We concur with his honor's ruling in this respect.

The defendants introduced a copy of articles of incorporation of Dibrell Bros., duly certified, and a certified copy of the proceedings in attachment in the case of Hoge-Irvin Tobacco Company, issuing out of the corporation court of Danville, against W. C. Thomas, L. P. Tapp, and J. W. Grainger, copartners, trading under the firm name and style of W. C. Thomas & Co. Notice of attachment was served on "Dibrell Bros., a corporation, as being indebted to the defendant partners." The defendants also introduced the proceedings in attachment sued out by L. P. Morgan & Co. against W. C. Thomas for \$25.50, containing this indorsement: "The plaintiff herein designated R. L. Dibrell and A. B. Carrington, partners in business as Dibrell Bros., as being indebted to, or having in their possession effects of, the defendant W. C. Thomas;" also a proceeding against W. C. Thomas & Co. by R. A. Craxton, upon which is the same indorsement; also a similar proceeding by Reagan, Walton & Davis, with the same indorsement. The witness Tapp said that he received notice of the attachment through the mail. His honor held that the attachment proceedings should not be intro-

duced, and used to decrease the amount of the plaintiffs' claim. To this ruling the defendants excepted. The value of this exception is dependent upon the correctness of his honor's charge and the finding of the jury upon the second issue. He told the jury that the burden was upon the plaintiffs to satisfy them by the greater weight of the evidence that the defendants were a partnership at the time of the purchase of the tobacco referred to in the complaint; that, if they found that Dibrell Bros. was a corporation, they might consider further whether the tobacco was bought for the corporation. The jury having answered the second issue as set out in the record, it was entirely immaterial whether the attachment proceedings in Virginia were valid or not. They were against W. C. Thomas & Co., and there was not a scintilla of evidence tending to show that the plaintiffs were ever members of such a copartnership, or that any such ever existed. All the evidence was to the effect that the tobacco was purchased of the corporation, the W. C. Thomas Tobacco Company.

The defendants except to his honor's charge for that there was no evidence that there was any such partnership as Dibrell Bros. This exception presents the vital question in the case. We do not think it can be sustained. The plaintiff Tapp swore that they were partners. The letter introduced by the plaintiffs was competent to be considered by the jury upon the question. The record in three of the attachment suits shows that they were garnished as partners. In their answer they say that they have suffered loss, and set up a counterclaim. Of course, this must be as partners, because the corporation was not sued. We think there was evidence, competent and sufficient to be considered by the jury, tending to show a partnership. This having been found, the attachment proceedings against W. C. Thomas & Co. could not affect the right of the plaintiff. It is singular, in the light of the testimony of Rouse, that the defendants permitted judgment to be entered against them as garnishees, when they could so easily have defended themselves. It may be that some light is thrown upon the matter by reference to the fact that "A. B. Carrington, as agent for, and a stockholder in, the Hoge-Irvin Company," made the affidavit in the attachment proceeding. This record presents the singular spectacle of both parties supposing that they were dealing with partnerships, whereas, as the jury find, the defendants were trading as a partnership with a corporation. The confusion and litigation show the wisdom of our corporation act, requiring the names of all corporations to end with the word "company." It would safeguard persons dealing with trading or mercantile corporations to require by statute that all stationery, advertisements, and contracts should contain the word "incorporated."

We do not find any error in his honor's rulings or instructions. If the defendants have

suffered loss by the attachment proceedings, it is the result of their refusal to defend themselves on the return of the garnishment. The judgment is affirmed.

(134 N. C. 567)

LACY, State Treasurer, v. ARMOUR PACKING CO.

(Supreme Court of North Carolina. April 5, 1904.)

TAXATION—LICENSE TAXES—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE—CONSTITUTIONAL LAW.

1. Laws 1903, p. 339, c. 247, § 56, imposing a license tax on packing houses carrying on business in the state, applies to a foreign corporation engaged in the slaughtering of animals and the preparation of their carcasses for food and other purposes, though the corporation does no actual slaughtering, etc., in the state, but merely ships its food products into the state, and deposits them in warehouses, where they remain until disposed of in the course of business.

2. The tax is not an interference with interstate commerce.

3. The tax is not violative of Const. art. 5, § 3, requiring that laws shall be passed for taxing by a uniform rule.

4. The tax is not violative of the fourteenth amendment to the federal Constitution.

Appeal from Superior Court, Buncombe County; E. B. Jones, Judge.

Action by B. R. Lacy, as State Treasurer, against the Armour Packing Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. B. Felder and Pou & Fuller, for appellant. The Attorney General, for appellee.

CLARK, C. J. This action calls in question the constitutionality of section 56, c. 247, p. 339, Laws 1903, which chapter provides in schedule B, as one of the license taxes "for carrying on business" (section 26, p. 331), the following: "Section 56. Packing Houses. Upon every meat packing house doing business in this state, one hundred dollars for each county in which said business is carried on."

From the facts agreed it appears that the defendant was incorporated in New Jersey, but has its principal office and place of business in Kansas; that it has property in this state; that a meat-packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other purposes is carried on; the products thus prepared consist of fresh and cured meats, such as hams, dry salt sides, bacon, lard, beef extracts, glue, blood, tankage, etc.; that the defendant does not slaughter, dress, or manufacture its products in this state, but, after the animals are slaughtered, dressed, and prepared for food or other commercial purposes by the defendant in Kansas, such product is shipped in bulk to five points in this state (Wilmington, Greensboro, Asheville, Charlotte, and Fayetteville), where the defendant

has cold-storage plants and warehouses, and sold from such storage plants, some of such product to parties in this state and some to parties outside of this state; that part of said products shipped to the defendant's cold-storage warehouse in Asheville (whence this appeal comes) remain there until disposed of in due course of trade on orders taken and received after said products have been stored or placed in said warehouse or cold-storage plants. At such of said five points in this state, where the defendant maintains a warehouse and cold-storage plants, it has one or more employes, i. e., bookkeepers, stenographers, shipping clerks, salesmen, drivers, and laborers who box said meats, and who wrap and crate goods for delivery as they are sold. There are in said city of Wilmington, and other cities of said state, commission merchants, brokers, and butchers who sell by wholesale and retail, in competition with the Armour Packing Company (and who are not engaged in a meat-packing house business in North Carolina or elsewhere), fresh, cured, and salt meats and other products that have been manufactured from the carcasses of slaughtered animals for food and commercial purposes, and under the laws of North Carolina said commission merchants, brokers, and butchers are not amenable to the tax levied under section 56 of said revenue act of 1903. At all points in North Carolina where the Armour Packing Company is engaged in business, and at various other places in said state, there are engaged in business, as the Armour Packing Company is engaged, packing houses which pack articles of food other than meat, and offer them for sale in said state, such as peas, beans, tomatoes, corn, pumpkins, fruits, fish, oysters, etc. The products of said packing houses are articles of food and commerce, and are sold in the state of North Carolina through agents, brokers, and wholesale and retail merchants, just as the products packed by the Armour Packing Company are sold.

This is a statement of all the material facts agreed, as stated in the "action submitted without controversy." Upon these facts the defendant contends: (1) That it is not engaged in doing a packing-house business in this state. This may be true, but upon the facts agreed the packing house is "doing business" here, and the license tax is laid upon whatever business it is doing. (2) That the tax is an interference with interstate commerce. (3) That the tax contravenes section 3, art. 5, of the Constitution of North Carolina, which requires taxation "by uniform rules." (4) That the tax is forbidden by the fourteenth amendment to the Constitution of the United States. (5) That singling out "meat-packing houses" for taxation is arbitrary or class legislation, and prohibited by both state and federal Constitutions. These contentions were held adversely to the defendant, who was adjudged to pay the tax, and appealed.

If the business of the defendant was solely that of shipping food products into this state, consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate commerce, and a tax laid by the state upon such business would be illegal. But the defendant does a large business within the state—the selling of products already stored here on orders received after these products are thus stored. The tax is laid upon every meat-packing house “doing business in this state.” The evident meaning of the Legislature is to tax the agency “doing business” within this state, and not to lay any tax upon the interstate commerce of shipping products into the state, to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped. In *Express Co. v. Seibert*, 142 U. S., at page 850, 12 Sup. Ct. 253, 35 L. Ed. 1035, it is said that a tax “on business within the state cannot be made to mean business done between that state and other states.” The appellant contends that a packing house cannot be considered as doing business in this state unless it actually engages, at some point in this state, in the business of maintaining a place where the slaughtering of animals and the dressing and preparing of the products of their carcasses for food and other commercial purposes is carried on. The record shows that the appellant ships its food products into this state in car load lots, and deposits them in warehouses or cold-storage plants, where they remain until disposed of in due course of business on orders taken after the goods have thus become intermingled with property in this state. The company also maintains at various points in North Carolina, in addition to its warehouses and cold-storage plants, offices and sales places and agencies, where it has in its employment bookkeepers, stenographers, shipping clerks, salesmen, drivers, and laborers who box said meat and who wrap and crate goods for delivery as they are sold.” No question is here raised or passed upon as to the right to tax the sale of goods shipped here and resold in the original packages. The appellant is certainly “doing business” in this state, and it can only do this as a matter of comity, for the Legislature has the power to exclude foreign corporations altogether, or to prescribe such conditions as it sees fit. 3 *Clark & Marshall, Private Corporations*, § 844, p. 2695, and cases cited; 2 *Cook, Corp.* §§ 696-700; *Range Co. v. Carver*, 118 N. C., at page 335, 24 S. E. 352; *Ins. Co. v. Edwards*, 124 N. C., at page 121, 32 S. E. 404; *Commissioners v. Tobacco Co.*, 116 N. C. 441, 21 S. E. 423. This license tax is the condition upon which the defendant is permitted to do this intrastate business above recited. That this tax is not an interference with interstate commerce, we have a case exactly in point (*Osborne v. Florida* [filed January, 1897] 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 596), in which it is held that “the license tax im-

posed upon express companies doing business in Florida, as construed by the Supreme Court of that state, applies solely to business of the company within the state, and does not apply to or affect its business which is interstate in its character, and, being thus construed, the statute does not in any manner violate the federal Constitution. The construction of the state statute by its highest court is not open to review.” The present case is stronger against the defendant, for, unlike the appellant in *Osborne v. Florida*, this defendant is not a common carrier. See citations of *Osborne v. Florida*, 12 *Rose's Notes* (U. S.) 917. The defendant doing business in this state, and the license tax being exacted only by virtue of its intrastate business, the first two grounds of objection are overruled.

Nor is the third exception any stronger, which is that the tax violates section 3, art. 5, of the state Constitution, which requires that “laws shall be passed for taxing by a uniform rule.” That section has often been passed upon, and it is settled that “a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.” It has been held that the tax may be different upon a dealer in whisky by retail and a dealer in the same article by wholesale, if uniform as to each class (*Gatlin v. Tarboro*, 78 N. C., at page 122); on tobacco buyers as a specific class (*State v. Irvin*, 126 N. C. 989, 35 S. E. 430); on hotel keepers as a class, graduated in amount by the gross receipts, and exempting those whose yearly receipts are less than \$1,000 (*Cobb v. Commissioners*, 122 N. C. 307, 30 S. E. 338); on the total amount of purchases by a merchant in or out of the city, except purchases of farm products from the producer (*State v. French*, 109 N. C. 722, 14 S. E. 383, 26 *Am. St. Rep.* 590); in cities and towns, according to population (*State v. Green*, 126 N. C. 1032, 35 S. E. 462; *State v. Carter*, 129 N. C. 500, 40 S. E. 11). In *State v. Stevenson*, 109 N. C., at page 734, 14 S. E. 387, 26 *Am. St. Rep.* 595, it is said: “It is within the legislative power to define the different classes, and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation as classified by legislative enactment.” This is stated as a universal rule. 1 *Cooley, Taxation* (3d Ed.) p. 260.

The fourth exception is that the act violates the fourteenth amendment (which in these latter days it is diligently sought to construe into a quo minus and ac etiam device by which every question may be drawn within the jurisdiction of the federal courts). It has been repeatedly decided by the Supreme Court of the United States that this section of the Constitution does not forbid the classification of property or persons for the purposes of taxation, but merely compels the equal application of the law to all mem-

bers of the same class, when the classification is based upon reasonable ground, and not an arbitrary selection. *Railroad v. Ellis*, 165 U. S. 165, 17 Sup. Ct. 255, 41 L. Ed. 666; *Tel. Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725; *Railroad v. Iowa*, 94 U. S. 164, 24 L. Ed. 94; *Dow v. Biedelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841; *Ins. Co. v. New York*, 184 U. S. 606, 10 Sup. Ct. 593, 33 L. Ed. 1025; *Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Com. v. Clark*, 195 Pa., at page 688, 46 Atl. 286, 86 Am. St. Rep. 694, 57 L. R. A. 848 (held, as has been held by this court, that a separate classification of wholesale dealers from that of retail dealers is not an illegal and arbitrary classification); *Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394; *State v. Applegarth*, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812 (imposing a license tax on oyster packers).

The fifth exception cannot be sustained. The Legislature is sole judge of what subjects it shall select for taxation (other than a property tax, which must be uniform and ad valorem), and the exercise of its discretion is not subject to the approval of the judicial department of the state. A very full discussion of the whole matter, concluding as above, will be found in *State v. Packing Co.*, 110 La. 180, 84 South. 368.

No error.

(88 S. C. 192)

STATE v. SANDERS.

(Supreme Court of South Carolina. March 9, 1904.)

CRIMINAL LAW—CONTINUANCE—BREACH OF ORDINANCE—FORMER JEOPARDY—REMARKS OF JUDGE—REVIEW—SENTENCE.

1. Where the solicitor, on the day before handing out a bill of indictment, stated to defendant's attorney that a bill would not be handed out at that term of the court, but on the following day, on the request of the grand jury, handed out the bill, it was not an abuse of discretion to refuse to continue the case when called for trial the next day, there being no showing that defendant had made any effort to get her witnesses.

2. A defendant can be tried for a breach of a city ordinance relating to disorderly houses, and afterwards tried for keeping a disorderly house in the court of general sessions under the state law.

3. An exception to remarks of the judge, not set out in the case with the connections in which they were made, will not be considered.

4. Sentence within the limits fixed by law for the punishment of a violation of such law is within the discretion of the judge.

Appeal from General Sessions Circuit Court of Sumter County; Townsend, Judge.

Judy Sanders was convicted of keeping a disorderly house, and appeals. Affirmed.

L. D. Jennings, for appellant. John S. Wilson, for the State.

POPE, O. J. The appellant was tried and convicted of keeping a bawdy house at the November term, 1902, of the court of general sessions for Sumter county, and duly sentenced by his honor Judge Townsend. After judgment, the defendant (appellant) appealed from such judgment on four exceptions, as follows:

"(1) It is respectfully submitted that the presiding judge abused his discretion in forcing the defendant to trial under the circumstances and facts in this case, in that his honor would not allow the defendant time in which to get her witnesses and testimony; and in forcing her to trial when the solicitor, John S. Wilson, Esq., had informed her attorney on Wednesday night, November 6th, that he would not give out a bill at that term of court, and in forcing her to trial on Friday morning, November 8th, when a true bill had not been found until Thursday, November 7th, and she had no time in which to get ready, not expecting to be tried at that term of the court, after the state's attorney had said he would not give out a bill at said term of court, and she was taken wholly by surprise.

"(2) It is respectfully submitted that his honor committed error of law in admitting testimony relating to keeping the same kind of house prior to the conviction in the mayor's court, in that defendant could not be convicted in the sessions court for keeping the same house at the same time and for the same offense for which she had been tried and convicted in the mayor's court.

"(3) It is respectfully submitted that the circuit judge erred in using the following language in the presence of the jury: 'Yes, sir; and a house where liquor is kept. For a fact, on one occasion there was a glass of liquor sent from her house by her little son.' Mr. Jennings, on the part of the defendant, objects. The Court: 'I suppose they could get along without your whisky'—in that his honor, by such expression, intimated to the jury that the testimony was sufficient to convict without any proof of the selling of whisky.

"(4) It is respectfully submitted that his honor abused his discretion in passing sentence on the defendant, in that the said sentence for six hundred dollars or for eighteen months is oppression, unreasonable, and disproportionate to the offense for which the defendant was convicted."

We will now pass upon these exceptions in their order.

1. From the "case" it is made to appear that at night, on the 6th day of November, 1902, the solicitor stated to defendant's counsel that he would not give out a bill, though on the next day, the 7th of November, 1902, the said solicitor did give out a bill against the defendant to the grand jury, which returned a true bill on that day, and that on the next day the circuit judge overruled the defendant's motion for a continuance. It

would seem, therefore, that the defendant could not have been much put out by the remark of the solicitor on Wednesday night of the 6th of November, 1902, that he would not give out a bill of indictment against her at that term of the court. It was not likely that more than 14 hours, including the hours of nighttime of the 6th of November, 1902, had intervened between the remark of the solicitor and handing out the bill of indictment. The fact is that the grand jury insisted that the bill should be given out, and the solicitor felt it to be his duty to hand out the bill at the request of the grand jury. The solicitor, with great propriety, admitted his conversation with defendant's attorney on the night of the 6th, and that at the request of the grand jury he gave out a bill on the 7th. There was no showing made that the defendant's attorney had made any effort to get his witnesses before the court on the 8th of November, 1902, when it was called for trial, nor was it shown that such witnesses lived outside of the city of Sumter, S. C., nor was it shown that any of such witnesses lived outside of the limits of Sumter county, nor did the attorney for defendant offer to state what his witnesses would prove, so that the solicitor could admit that they would so swear. The Constitution of our state requires that the defendant "in all criminal prosecutions shall enjoy the right to a speedy trial." See section 18 of article 1. As before remarked, the circuit judge ordered the trial to proceed. This court has repeatedly held that the matter of continuance is within the discretion of the circuit judge. *State v. Way*, 38 S. C. 333, 17 S. E. 39, where it is said: "This matter of continuance is confided to the wise discretion of the circuit judge, as this court has repeatedly and uniformly held." The recent case of *State v. Judy Sanders*, 46 S. E. 769, when on trial for selling liquor under similar circumstances to the present, is full authority to this holding of the court. This exception is overruled.

2. It is entirely competent for a defendant to be tried for a breach of a city ordinance relating to keeping a bawdy house, and afterwards being tried for keeping a bawdy house in the court of general sessions, under the state law. One is an offense committed by a corporator and the other is as a citizen of the state. The one offense is breach of a corporate regulation, and the other is a breach of a general law for the whole state. This doctrine is well stated in the opinion rendered by the late Chief Justice McIver in *City Council of Greenville v. Kemmis*, 58 S. C. 433, 36 S. E. 727, 50 L. R. A. 725, where it is said: "The utmost that can be said is that the municipal corporation, under the authority vested in it by its charter, has seen fit to make an act done within the corporate limits a criminal offense which the Legislature has not seen fit to constitute an offense. Indeed, it is well settled in this state, at least, that the same act may be made an

offense both against the state and the municipal law. As that great jurist, Judge Cooley, expresses it in his work on Constitutional Limitations, at page 199 of second edition: "Indeed, the same act may constitute an offense both against the state and municipal corporation, and both may punish it without violation of any constitutional principle. * * * " And the late chief justice cites in support of his position *Rogers v. Jones*, 1 Ward, 261; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287; *State ex rel. Burton v. Williams*, 11 S. C. 288; *City Council v. O'Donnell*, 29 S. C., at pages 368, 369, 7 S. E. 593, 1 L. R. A. 632, 13 Am. St. Rep. 728; and other cases. This exception is therefore overruled.

3. This exception is overruled, because the "case for appeal" fails to show in what connection such language was used by the circuit judge. It only appears in the exception. Numerous decisions of this court have expressly ruled that the ground upon which the exception is based must be set out clearly in the "case" itself. *Lites v. Addison*, 27 S. C. 226, 3 S. E. 214; *Welch v. Gleason*, 28 S. C. 347, 5 S. E. 599; *Daniel v. Hester*, 29 S. C. 147, 7 S. E. 165; *Hodges v. Tarrant*, 31 S. C. 608, 9 S. E. 1038; *Brown v. McWhite*, 30 S. C. 356, 9 S. E. 277.

4. This exception must be overruled. Sentences within the limits fixed by law for the punishment of a violation of such law are ruled by the discretion of the circuit judge. *State v. Judy Sanders* (at this term of court) 46 S. E. 769.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 163)

MATHENY v. CITY OF AIKEN.

HARRIGAL v. SAME.

(Supreme Court of South Carolina. March 7, 1904.)

EMINENT DOMAIN — SEWERAGE — CONTAMINATING STREAMS — DAMAGES — NUISANCE.

1. Under Code 1902, §§ 2008, 2012, providing for the same remedy on the condemnation of lands for waterworks, sewerage, and lights as is provided for the condemnation of lands for railroad companies, private persons whose property outside of the city limits is damaged by reason of emptying sewerage pipes into a stream, thereby contaminating the waters, may have compensation.

2. The remedy given by Code 1902, §§ 2008, 2012, to a private person whose property outside of a city is damaged by the sewerage emptied into a stream, is exclusive, and such person cannot sue the city for tort, nor to abate the nuisance.

3. Where a city empties its sewerage into a stream, thereby damaging the property of a person outside the city limits, it is a private, and not a public, nuisance.

Appeal from Common Pleas Circuit Court of Aiken County; Gage, Judge.

Actions by John Matheny and by J. G. Harrigal against the city of Aiken. From an order sustaining demurrers to the petition, plaintiffs appeal. Affirmed.

Croft & Lamb, for appellants. Hendersons, for respondent.

POPE, C. J. The following statement is taken from appellants' argument:

"The above-entitled actions were begun by proper service of the summons and complaint in each action upon the defendant on the 17th day of September, 1901. By consent of counsel, both causes were heard together, upon demurrer in each case, before his honor Judge Gage at the special term of the court of common pleas for the county of Aiken, held at Aiken, the first Monday in January, 1903. Each action is for damages by a riparian proprietor against the city of Aiken for the pollution of a stream by city sewerage. Plaintiffs pray also for an injunction to abate the nuisance. The plaintiff John Matheny is the owner and occupant of certain premises, containing seventy-five acres, some three miles west of the city of Aiken, and outside of its city limits. This tract of land, upon which the plaintiff resides, is watered by a stream known as 'Wise Creek,' which, having its source near the city of Aiken, runs westwardly through the plaintiff's land, and empties into Big Horse creek, a short distance beyond Warrentville, and about five miles from Aiken. For a number of years prior to the year 1899 the plaintiff Matheny was engaged in a dairy business, disposing of the product of his dairy farm in the adjoining towns of Warrentville and Graniteville, not far distant from his farm upon which he resided. The stream above described flowed through his farm, and of the tract lying along Wise creek he had made a pasture for his cattle, in order that he might avail himself of the water supply thereby afforded for his stock. His cattle drank the waters of Wise creek, and his business prospered, for, as the plaintiff alleges in his complaint, before his dairy business was destroyed by the construction of a sewerage system by the city of Aiken, 'said dairy business has in times past been very profitable to this plaintiff.'

"In 1893 the General Assembly of South Carolina authorized the city council of Aiken to order an election for the purpose of issuing bonds to provide for constructing a system of waterworks and sewerage. The text of this act is as follows:

"An act to authorize the city council of Aiken to order an election for the purpose of issuing bonds for the purpose of putting in a system of water works and sewerage.

"Section 1. Be it enacted by the Senate and House of Representatives of the state of South Carolina, now met and sitting in General Assembly, and by authority of the same, that the city council of Aiken is hereby authorized and empowered, upon the presentation to them of a petition, in writing, of a majority of the freehold voters of said city, to order an election, upon two weeks' notice by advertisement in a newspaper published

in said city of the time and place of said election, to determine the question whether or not said city shall issue bonds in an amount to be petitioned for, as aforesaid, by said freehold voters, not to exceed fifty thousand dollars.

"Sec. 2. That in the event of an election being called as above provided for, the question as to whether or not said bonds shall be issued shall be determined by a majority of the qualified voters who shall vote at said election.

"Sec. 3. That if a majority of the qualified voters at said election shall be in favor of issuing said bonds, then the city council of Aiken is hereby empowered and authorized to issue bonds to the amount so voted and in such denominations and to fall due at such times, not earlier than ten years from the date thereof, as may be determined by resolution of said council: provided, said bonds shall bear no greater rate of interest than six per cent per annum.

"Sec. 4. That said city council of Aiken shall have full power to sell said bonds and to use the money arising therefrom for the exclusive purpose of erecting said water works or sewerage system, or both: provided, said bonds shall not be sold for less than their par or face value.

"Approved December 22d, A. D. 1893."

"See 21 St. at Large, pp. 544, 545.

"Thereafter, in 1899, the defendant, the city of Aiken, constructed sewers for the purpose of collecting the sewerage in said city, and all of the sewerage was collected and carried in one large main pipe to a point about two miles west of the city of Aiken, where its contents are discharged into Wise creek. The point at which the sewerage is emptied into Wise creek is above plaintiff's farm, and the effect of discharging this sewerage into said stream is to render its water unfit for use, and to cover the banks and the bed of the same with a filthy and unwholesome sediment.

"The facts set forth in the complaint for the purpose of this demurrer are assumed to be true, and it appears therefrom that the discharge of the sewerage into the stream flowing through and past the plaintiff's farm contaminates, fouls, and pollutes the waters of Wise creek, and that the said stream emits nauseous and offensive odors where it flows through the plaintiff's land. The water of the creek is now unfit and unwholesome to drink, and it has poisoned several of the plaintiff's cattle, from which they died. The plaintiff's dairy business, once flourishing and prosperous, has been broken up and destroyed. The plaintiff prays damages in the sum of five thousand dollars, and asks that the defendant, the city of Aiken, be enjoined from discharging the contents of its sewers into Wise creek, so that he may use the waters of said stream in its original purity, as accustomed by nature.

"With few exceptions, the complaint of J.

G. Harrigal sets out substantially a similar cause of action. Harrigal is the owner of a tract of land containing about twelve acres, bounded on the east by lands of John Matheny. Wise creek also runs through the land of Harrigal. The residence of Harrigal is only a few yards distant from the stream. The offensive odors from the putrid waters flowing past his home have rendered it unhealthy as a place of residence, destroyed the purity of the atmosphere about his home, and greatly depreciated the value of his property. He has been compelled to erect fences to prevent his stock from drinking the poisonous waters of the stream. The plaintiff Harrigal also alleges that the defendant committed the acts complained of wilfully and recklessly, for, before the sewers were laid, he informed the mayor of the city of Aiken that to empty the city sewerage into this stream would create a nuisance and tend greatly to depreciate the value of his property, and he protested against this being done. The plaintiff Harrigal prays for damages in the sum of three thousand dollars, and asks for relief by injunction to abate the nuisance.

"Both complaints contain allegations that the acts of the city of Aiken, in destroying plaintiff's property rights in the waters of Wise creek, as riparian owners, are in violation of article 1, § 5, of the Constitution of South Carolina, and that the plaintiffs are deprived of their property without due process of law; further that the acts of the defendant are in violation of article 5 of the amendments to the Constitution of the United States, in that plaintiffs are deprived of their property without due process of law, and that the acts of the defendant constitute a taking of their property for the public use without just compensation, and are contrary to the law of the land.

"The defendant demurs to each action upon two grounds: (1) That, in the absence of a statute authorizing such action, a municipal corporation cannot be sued in an action of tort; (2) that the nuisance complained of is a public, and not a private, nuisance, and that plaintiffs have not sustained such special injuries as would entitle them to maintain a private action for damages. The demurrers came on to be heard before his honor Judge Gage, and, as a result of said hearing, he sustained the first ground of demurrer, but overruled the second. Thereafter, on the 16th day of February, 1903, the plaintiffs appeared before his honor Judge Gary, then sitting as circuit judge for the county of Aiken, and made a motion, after notice to defendant's counsel, to amend both complaints by alleging further that defendant's acts were in violation of article 1, § 17, of the Constitution of South Carolina; also of article 1, § 23, of the Constitution of South Carolina of 1868; and also in violation of article 14, § 1, of the amendments to the Constitution of the United States; and by alleging further that the plaintiffs are citizens and residents

of the state of South Carolina and of the United States of America. Judge Gary refused to allow these amendments, upon the ground that he had no jurisdiction. From the decree of his honor Judge Gage and from the order of his honor Judge Gary plaintiffs then appealed, upon exceptions, which are as follows:

"(1) Because it is respectfully submitted that the act of defendant in fouling the stream mentioned in the complaint, and in depriving the plaintiffs of the use of the same, and in destroying the plaintiff Matheny's property, therein mentioned, violates their rights, as secured to them under amendment 5 of the Constitution of the United States, which provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for private use without just compensation, and that his honor the circuit judge erred in not so deciding.

"(2) Because it is respectfully submitted that the act of defendant in fouling the stream and depriving plaintiffs of the use of the same, and in destroying the plaintiff Matheny's property, as stated in the complaint, is in violation of the plaintiffs' rights, as secured to them by section 1 of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of his property without due process of law, and that his honor the circuit judge erred in not so deciding.

"(3) Because it is respectfully submitted that the acts of the defendant in fouling the stream, and in depriving plaintiffs of the use of the same, and in destroying the plaintiff Matheny's property, as mentioned in the complaint, is in violation of the plaintiffs' rights, as secured to them under section 5 of article 1 of the Constitution of the state of South Carolina, which provides that no person shall be deprived of his property without due process of law, and that his honor the circuit judge erred in not so deciding.

"(4) It is respectfully submitted that the acts of the defendant in fouling the stream mentioned in the complaint, and in depriving plaintiffs of the use of the same, and in destroying the property of the plaintiff Matheny, as mentioned in the complaint, is in violation of plaintiffs' rights, as secured to them by section 17 of article 1 of the Constitution of the state of South Carolina, which declares that private property shall not be taken for the public use without just compensation being first made therefor.

"(5) Because his honor the circuit judge has erred in deciding that, under the common law, a municipal corporation, like the state, was exempt from suit unless the right to sue had been expressly given by statute, whereas he should have decided that under the common law a municipal corporation was liable for any wrong done by it which deprived a person of his property without compensation.

"(6) It is respectfully submitted that his

honor the circuit judge erred in holding that the act of 1893 which authorized the city of Aiken to issue bonds for the exclusive purpose of erecting a sewerage system gave the city the right to empty its sewerage into the stream which flows through plaintiffs' land, for it appears by the complaint that the place where such sewerage is emptied is two miles west of the city of Aiken, and no authority is given in said act to empty the city sewerage outside the corporate limits; and hence, by a proper construction of such act, the city would have only had the right to empty the sewerage within the corporate limits of the city of Aiken; and his honor the circuit judge therefore erred in deciding that the city had authority under said act to discharge the sewerage beyond its limits.

"(7) Because his honor the circuit judge erred in deciding that the act of 1896 (Townsend's Code, § 2012) allows condemnation proceedings and compensation to the person whose property has been taken for the purpose of constructing a sewerage system, for it is submitted that condemnation proceedings are not allowed for sewerage purposes, but only for the purpose of waterworks and electric lights.

"(8) Because his honor erred in holding that the plaintiffs might have obtained compensation for damages sustained by them by a special proceeding, it being submitted that there is no statute in this state providing for special proceedings for compensation for property taken for the use of a sewerage system by a municipal corporation. And it is submitted that his honor further erred in holding that the plaintiffs did not rely upon section 17, art. 1, of the state Constitution, for, while it is true such section and article were not expressly pleaded in the complaint, yet they were specially referred to in the argument of plaintiffs' counsel, and they relied upon them to sustain the rights of the plaintiffs.

"(9) It is submitted that even if an action for damages cannot, under the law of this state, be sustained against a municipal corporation for destroying a person's property, that action may nevertheless be maintained against such municipal corporation to protect the property from continuous injury by such municipal corporation, and especially to enjoin such corporation from continuing and perpetuating a nuisance.

"(10) Because his honor erred in sustaining the first ground set forth in the demurrer of the defendant, for it is submitted that the complaint does state facts sufficient to constitute a cause of action.

"(11) The plaintiffs further except to the rulings of his honor Judge Gary in refusing to allow the plaintiffs to amend their complaints in the particulars set forth in the notice containing the proposed amendments, and which are as follows: 'By adding at the end of line 6 of the fourth paragraph of the

amended complaint herein the following: "And also in violation of article 1, § 17, of the Constitution of South Carolina, which provides that private property shall not be taken for the public use without just compensation being first made therefor; and also in violation of article 1, § 23, of the Constitution of South Carolina of 1868, which provides that private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation be made therefor." Also by adding at the end of the line 9 of the fifth paragraph of said amended complaint the following, to wit: "And is also in violation of article 14, § 1, of the amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." And by adding at the end of the fifth paragraph of the said amended complaint the following, which shall stand as the sixth allegation of said complaint: "(6) The plaintiff further alleges that at the times mentioned in the complaint he was, and is now, a citizen and resident of the state of South Carolina, and also a citizen and resident of the United States of America." That it is respectfully submitted that his honor Judge Gary had the power and authority to allow such amendments, and he erred in not so deciding; but, should this exception be overruled, the plaintiffs now ask leave of the Supreme Court, in the furtherance of justice, to allow the complaints to be amended as prayed for and as above stated."

This case, involving, as it does, the suabillity, so to speak, of municipal corporations for torts alleged to have been committed by them, is one of moment, and possibly it is better to have the language of the circuit judge before us. The text of that decision is as follows:

"The same issues of law are made in these two cases, so that by consent of counsel they were tried together at one and the same hearing. The issues arise upon the demurrer to the complaint, and the demurrer makes two issues, to wit, it appears on the face of the complaint (1) that the action is for tort, for the misfeasance of a municipal corporation, resulting in the fouling of the waters of a running stream, when there is no statute making a corporation liable therefor; (2) that the action is for damages as aforesaid for a public nuisance, and not a nuisance private, special, or particular to the plaintiffs, when, in law, defendant is not liable to plaintiffs for a public nuisance.

"It is settled by a line of decisions of the Supreme Court of this state that ordinarily a municipal corporation is not liable to an ac-

tion for tort except by permission of the Legislature. *White v. Charleston*, 2 Hill, 571; *Coleman v. Chester*, 14 S. C. 291; *Parks v. Greenville*, 44 S. C. 172 [21 S. E. 540]. That is not denied by the plaintiff. But the complaint charges that the acts of the defendant are in violation of the Constitution of the United States, at amendment 5, where it is provided (1) 'that no person shall be deprived of property without due process of law'; and (2) 'that private property shall not be taken for public use without just compensation.' And it further alleges that the acts of the defendant are in violation of the Constitution of this state, at article 1, § 5, where it is provided that 'no person shall be deprived * * * of property without due process of law.' The fifth amendment of the federal Constitution is a limitation on the powers of the federal government, and not the powers of the state government. *Pumpelly v. Green Bay Co.*, 18 Wall. 177 [20 L. Ed. 557]; *Thorington v. Montgomery*, 147 U. S. 492 [13 Sup. Ct. 394, 37 L. Ed. 252]. It has, therefore, no relevancy to the issues of this cause, and its consideration may be dismissed without further comment.

"There is a provision of the federal Constitution which declares that 'no state shall deprive any person of * * * property without due process of law' (fourteenth amendment, § 1), but the plaintiff has not invoked that provision by plea or argument. There is also a provision of the state Constitution which declares private property shall not be taken for public use without just compensation being first made therefor. Article 1, § 17. The plaintiff has not pleaded violation of that law. The only inquiry left, then, is to consider if the things charged against the defendant in the complaint disclose a denial to the defendant of the protection of the law of the land, or, as it is sometimes called, 'due process of law.' Article 1, § 5, Const. 1895. The complaint does not refer to the warrant of the defendant to do the things charged against it. The allegations are simply that the defendant, a municipal corporation, constructed in 1899 a sewerage system for the purpose of carrying sewerage from the water-closets in said city, which sewerage empties into Wise creek, a stream of water running through the plaintiff's seventy-five acres of land, and at a point above plaintiff's land, and 'that said sewerage emits very offensive and nauseous odors, and the same contaminates, fouls, and pollutes the water of said creek * * * where the same runs through plaintiff's farm, and also causes offensive odors and smells on said plaintiff's farm, and has destroyed the use of the same as a dairy farm, and has fouled and so polluted the water of said creek as to render the same nauseous and unfit for his cattle to drink from, and has already poisoned several of his cows, by drinking said polluted waters, and thereby caused them to

die, and has also, by polluting and fouling said water, caused plaintiff's dairy business to be broken up and destroyed, to the damage of the plaintiff \$5,000.' The plaintiff prays also for a permanent injunction to arrest the wrong. There is no allegation that the defendant's construction or operation of the sewer has been negligent. The plaintiff's property is entitled to the protection of the common and statute law of force when the first Constitution was enacted. That common and statute law is what the Constitutions of 1790 and 1895 denominated the 'law of the land,' and what the Constitution of 1895 entitles 'due process of law.' *State v. Simons*, 2 Spears, 644. If the defendant was a private corporation or a natural person, the common and statute law would declare it was liable for a willful hurt to plaintiff's property. But by the same common law, because by nothing else, a municipal corporation was exempted from such liability, for it was esteemed a part of the state, and, like the state, exempted from suit, except by consent of the state, expressed in a statute. *White v. Charleston*, 2 Hill, 571. The case is not altered if a warrant for defendant's action be disclosed and considered. As hereafter stated, the pleadings do not disclose that warrant. It was, however, fully adverted to by both sides in the argument. The General Assembly, in December, 1893, authorized the city of Aiken to issue bonds for the exclusive purpose 'of erecting a sewerage system.' 21 St. at Large, 544. The sewer in question was constructed pursuant to that authority. As was said in the argument, the power to construct the sewer implies of necessity the power to discharge its contents somewhere. If a municipality is not liable for its action independent of a statute, it is certainly not liable if its action be warranted by a statute.

"As before stated, the complaint does not rely on that clause of the Constitution of this state which declares that private property shall not be taken for public purposes without just compensation being first made therefor. Although the argument of plaintiff's counsel was full and strong to the effect that the plaintiff had a property right in the stream, and that permanently fouling its waters was a taking of property, yet the demand for compensation for the breach of the right was by the plea and argument referred to the federal Constitution. I have been strongly tempted, however, to consider the plaintiff's case under the provisions of the state Constitution, but reflection has satisfied me I had better not make a case which was not made by learned counsel.

"It yet remains to consider if the defendant, though not triable for tort, is liable to be enjoined from the continuance of a nuisance, for the complaint is one for a permanent injunction as well as for damages. The limit to which our court has gone is to hold that a municipal corporation is not liable to be

muicted in damages for tort, except a statute allow it. It has not held, so far as I have ascertained, that, if a municipal corporation creates a nuisance, the court of equity could not enjoin its further continuance. If a municipal corporation is not so liable, it is because such corporations are not amenable to judicial control, wherever their action is independent of a contract relation and the outcome of misfeasance only. The reason assigned why a city is not liable to an action for damages for misfeasance is that the city corporation 'is a mere government agency established for public purposes.' *Young v. Charleston*, 20 S. C. 118 [47 Am. Rep. 827]. The state cannot be sued in its courts on contract or tort, because it is not a corporate entity, but a sovereignty. A city is not a sovereignty. It is a corporate entity, and may be sued on its contracts, and it may, too, be restrained from other illegal actions. *Wilkins v. Gaffney*, 54 S. C. 199 [32 S. E. 299]; *Vesta Mills v. Charleston*, 60 S. C. 2 [38 S. E. 226]; *Yates v. Milwaukee*, 10 Wall. 505 [19 L. Ed. 984]. If the allegations of the complaint be true—and they are assumed to be on demurrer—the defendant has created a nuisance damaging to the plaintiff's property.

"Again, the owner of land along the banks of a running stream has a property right in the flowing water, and the fouling by a city sewer of the waters so as to permanently damage the land owner is the taking of property by the city from the citizen without compensation. *Pumpelly v. Green Bay Co.*, 13 Wall. 167 [20 L. Ed. 557]; *Cooley on Constitutional Limitations*, 544; *Yates v. Milwaukee*, 10 Wall. 504 [19 L. Ed. 984]. But if this be so, would injunction be finally allowable in a case like that at bar? The sewer was constructed in 1899 by authority of the state, granted in 1893. It is for a public purpose, for it carries off the fecal matter of a city of 4,000 people. The city had, therefore, the legal right to foul the stream, and if, in doing that, private property was destroyed, the owner thereof has a right to compensation at the hands of the city. The act of 1896 recognizes that right of the citizen, and points him to a remedy. *Townsend's Code*, § 2012. The subject-matter of that act is waterworks, sewerage, and lights. Section 2008, *Id.* The remedy prescribed by the statute is the same provided for the condemnation of lands by railroad corporations, and generally it is exclusive of every other remedy. *Tompkins v. R. Co.*, 37 S. C. 382 [16 S. E. 149]. Certainly the remedy is not injunction. It is either the special proceeding prescribed by the statute, or an action in this court for compensation. This action is not a special proceeding, nor can the complaint herein be sustained as one for compensation under article 1, § 17, of the state Constitution, first, because that article and section are not relied on; and, second, because there are no allegations that the de-

fendant has denied the plaintiff's right to compensation, or that plaintiff never consented to entry by the corporation. *Glover v. Remly*, 62 S. C. 56 [39 S. E. 780].

"Having reached the conclusion the action does not lie, the second ground of demurrer is irrelevant; but the issue has been made, and I shall consider it. The complaint does not state facts from which a public nuisance is inferable. In that particular it differs from the complaint in the case of *Baltzger v. R. Co.*, 54 S. C. 242 [32 S. E. 359, 71 Am. St. Rep. 789], cited by the defendant. If the defendant was a manufacturer, and fouled the waters of the stream with drugs, the riparian owner would have an action for damages done to him. 'If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril.' Quoted in *Frost v. Berkeley Co.*, 42 S. C. 411 [20 S. E. 283, 26 L. R. A. 693, 46 Am. St. Rep. 736]. See, also, *Threatt v. Mining Co.*, 49 S. C. 128 [26 S. E. 970]; *Spelling on Injunction*, § 313. The case is not altered because the defendant fouled the waters by means of a sewer pipe. I am therefore of the opinion that the first ground of demurrer must be sustained, and the second ground of demurrer must be overruled. It is so ordered, and the complaint dismissed."

There can be no question that the plaintiffs, respectively, have had their property rights invaded by the defendant. It may be conceded that the sewer, as authorized by the Legislature of this state to be constructed by the city of Aiken, was a necessity to the preservation of the health of its citizens; and yet such city had no right to despoil these citizens, the plaintiffs, of their property without compensation. The General Assembly, if it do so by the act of 1893, has no power in itself to disregard the plain mandates of the Constitution of this state, when it authorized the city of Aiken to take the property of these plaintiffs for its sewer. The very object of the Constitution is to protect the individual owner of property from the spoliation of his property at the hands of any person or persons or power without compensation for its injury or destruction. To say the contrary is to advocate an absurdity. I would be inclined to hold that the acts of the defendant, the city of Aiken, touching the emptying its sewerage into Wise creek, to the destruction or very great injury of the property right of these plaintiffs, without compensation therefor, was such an invasion of such property rights as immediately gave the plaintiffs a right to action, if it were not for some matter which will hereinafter be specifically set forth. It must be remembered that the complaint alleges that the city of Aiken has emptied its sewerage into Wise creek two miles beyond its corporate limits, and that this stream runs through the property of these plaintiffs, and also that there are no allegations in the

complaint which justify this action of the city council of Aiken. Certainly the act of the Legislature passed in the year 1893 gives the city no such authority, directly or indirectly. There is no allegation in the complaint that the city has had septic tanks for the attempted purification of the matter which passes through the pipe before it is dumped into Wise creek. These would be matters of defense. But now we are confined to the demurrer to the complaints, and are confined to the allegations of those complaints. The act of 1893 is pleaded at length in the complaints. Such facts appearing in the complaints, it seems to me that it is there made to appear that the defendant, the city of Aiken, for the purposes of these two actions, admits that it has caused its sewerage to be conducted for two miles beyond its city limits, and caused the same to be emptied into Wise creek at that distance from its city limits, without any effort on its part to purify the contents of its pipe before they are emptied into the said creek.

It has been held in several cases that in some instances cities may be held liable to actions for tort by individuals. As is said in *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332: "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river or a natural water course, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts. *Anthony v. Adams*, 1 Metc. (Mass.) 284, 285; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544 [66 Am. Dec. 431]; *Parker v. Lowell*, 11 Gray, 358; *Wheeler v. Worcester*, 10 Allen, 591." Also in the same case: "So, if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another, to his injury, it is liable to him in an action of tort. *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lowell*, 11 Gray, 345; *Haskell v. New Bedford*, 108 Mass. 208. But in such cases the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work." *Merrifield v. City of Worcester*, 110 Mass. 216, 14 Am. Rep. 592, was an action of tort by the plaintiff against the city of Worcester, where the complaint alleged that the (plaintiff) was seised of land lying on each side of Mill brook, and that he owned a machine shop on said brook, fitted up with a large steam engine and boilers, for the purpose of furnishing steam power to the tenants of said machine shop; that he had the right to have the water of the brook flow pure and uncorrupted, such water in a pure condition being ab-

solutely essential to the carrying on of his works; "that the defendant wrongfully and unjustly cast, carried, and deposited into said Mill brook, and the waters thereof, at points in the channel thereof above and higher than the works of the plaintiff, great quantities of filth, * * * and discharged from sewers, privies, and water-closets, * * * by which the water became greatly corrupted and unfit for use in the plaintiff's business," etc. The judgment of the appellate court was to reverse the judgment of the court below, and send for trial this question: "Whether the damage which plaintiff had suffered was attributable in any degree to the improper construction or unreasonable use of the sewers, or to the negligence or other faults of the defendant in the management of them, is a question which does not seem to have been tried. If it should be found to be so attributable, the action may be maintained. * * *" In the course of the opinion of the court in the case just cited, these words will be found: "To enable a riparian owner to maintain an action for damages, he must show not only that defendant has done some act which tends to injure the stream, and which he has no legal right to do, or which is in excess of his legal right, so as to be an unreasonable use thereof, but also that the detriment of which the plaintiff complains is the result of that cause. When he can show an appreciable detriment to himself, and connect it with such wrong by another, he may recover the damages shown to be due to that wrong. *Merrifield v. Lombard*, 13 Allen, 16 [90 Am. Dec. 172]." The comparatively recent case of *Barnes v. District of Columbia* (decided in 1875) 91 U. S. 540, 23 L. Ed. 440, which was sustained in the case of *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; also *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446. It is true, these cases were decided by a bare majority of the court, yet they have never been overruled. In *Barnes v. District of Columbia*, supra, it was held that a city or village holding a voluntary charter is responsible for its mere negligence in the care and management of its streets. While these cases have been criticised in *Hill v. City of Boston*, supra, and in our case of *Young v. City Council of Charleston*, 20 S. C. 116, 47 Am. Rep. 827, yet such is still the rule in the United States Supreme Court. We would remark just here that *White v. City Council of Charleston*, 2 Hill, 571, was the case where the city council of Charleston ordered the private dwelling house of a citizen to be blown up by powder to check the spread of a fire in that city. The case of *Black v. City Council of Columbia*, 19 S. C. 412, 45 Am. Rep. 785, was where the waterworks in the city of Columbia failed to furnish water with which to extinguish a fire which destroyed plaintiff's residence, notwithstanding he paid for such water supply. The case of *Coleman v. Chester*, 14 S. C. 291, was where the

private property of plaintiff was taken by the city council of Chester, to wit, a piece of plaintiff's land to widen a street in that city. The case of *Young v. City Council of Charleston*, supra, was where the plaintiff was injured by reason of a defective culvert on the street of that city. None of these cases fall under the class of cases cited herein from our South Carolina Reports, but all of our South Carolina cases fall under the class where there were valid laws vesting the city council with full power to do the acts complained of. As before remarked, the act of 1893 only gave the power to the city of Aiken to ordain a waterworks and sewerage system, without coupling the additional power to go beyond the city limits to lay piping for sewerage, yet the act of 1896, as amended by the act of 1897, set forth as section 2008, vol. 1, Code Laws S. C., has corrected this, and fully empowered cities in this state to construct sewerage; and section 2012 has authorized cities to lay pipes, and to condemn any property or rights of way to enable it to lay pipes, on paying to the owner thereof just compensation for such property or rights of way to be condemned; such condemnation to be determined in the manner provided by law for the condemnation of lands and rights of way by railroad corporations. Thus it will be seen that the mode of acquiring any property or rights of way has been fixed by our statutes, which includes the duty of compensation to riparian owners of property along a stream. This being so, the method prescribed for such purposes is exclusive of any suit therefor for damages. The complaint does not set up a refusal by the defendant to comply with this law. The circuit judge was not in error in holding and adopting the views herein announced.

It is not necessary to consider defendant's ground of appeal. It may be remarked, however, that we fail to see any error in that part of the circuit decree which refuses to hold that the action of the defendant was a public, and not a private, wrong. The mere reading of the complaint shows that it was a private wrong.

It is the judgment of this court that the judgment of the circuit court be, and is hereby, affirmed.

JONES, J., concurs in the result.

WOODS, J. I concur in the view that plaintiffs had an adequate and exclusive remedy under section 2012 of the Civil Code, and in affirming the judgment of the circuit court on that, as a sufficient ground. I am unable, however, to assent to the view indicated by the Chief Justice—that, but for that statute, these actions could be maintained as actions for damages for tort against the city of Aiken. That a municipal corporation cannot be held liable for damages in such an action has been often decided in this state.

White v. City Council of Charleston, 2 Hill, 571; *Coleman v. Chester*, 14 S. C. 286; *Black v. City of Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Young v. City Council of Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Chick v. Newberry County*, 27 S. C. 419, 8 S. E. 787; *Hill v. Laurens County*, 34 S. C. 141, 18 S. E. 318; *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540; *Bramlett v. City of Laurens*, 58 S. C. 60, 36 S. E. 444. As the Chief Justice has shown, these decisions are not in accord with the weight of authority elsewhere, and they could hardly be sustained on principle. For these reasons, I agree that the doctrine they maintain should not be extended. They do not go to the extent of holding that a municipal corporation may not be restrained from committing a nuisance, or wrongfully taking or damaging private property, or that property may not be recovered back when unlawfully taken by such corporation. Hence it seems to me that the opinion of the circuit judge is correct—that, but for the exclusive remedy provided by section 2012, under the allegations of the complaint the plaintiffs would have been entitled to an order of injunction, but not to a verdict for damages.

GARY, A. J., did not sit in this case.

(68 S. C. 236)

COLUMBIAN BUILDING & LOAN ASS'N
v. RICE et al.

(Supreme Court of South Carolina. March 18, 1904.)

BUILDING ASSOCIATION — MORTGAGE — CONSTRUCTION — USURY — PLEADING FOREIGN STATUTES — COMMON LAW — PRESUMPTIONS — ATTORNEY'S FEE.

1. A mortgage given to a Virginia building and loan association, providing that payment shall be made in the manner prescribed by the charter, which requires all moneys due from the members of the association to be paid in the home office in Virginia, is a Virginia contract, and to be construed according to the laws of that state.

2. Where usury is set up as a defense to a contract governed by the laws of another state, the laws of such other state should be pleaded by plaintiff in reply that the contract is not usurious.

3. The presumption that the common law prevails in Virginia raises the presumption that there is no legal limitation to the rate of interest.

4. Where a building and loan mortgage provided for attorney's fees on any litigation touching the transaction, in an action to foreclose, on judgment for plaintiff, fees should be allowed.

Appeal from Common Pleas Circuit Court of Cherokee County; Klugh, Judge.

Action by the Columbian Building & Loan Association, of Richmond, Va., against Seal Rice, Alfred Smith, and Henry Jackson, as trustees of Mt. Olive African Methodist Episcopal Zion Church. From the decree, defendants appeal. Affirmed.

Hall & Willis, for appellants. Stanyarne Wilson and J. E. Webster, for respondent.

WOODS, J. The defendants, trustees of Mt. Olive African Methodist Episcopal Zion Church, subscribed to two shares of stock in the Columbian Building & Loan Association, a Virginia corporation, and as such subscribers borrowed money from the association, giving a mortgage on the church property to secure the loan. They now plead usury as a defense to this action to foreclose the mortgage, and set up a counterclaim for the penalty of receiving usurious interest.

The first inquiry is whether the contract falls under the law of South Carolina or of Virginia, for it is conceded that, if the law of this state is applicable, the transaction must be held usurious. The master and the circuit judge both held that the contract was to be performed in the state of Virginia, and construed in accordance with the laws of that state. It is incumbent upon the defendant to overturn this finding of fact by the preponderance of the evidence. The mortgage provides that the payments shall be made to the association "in the manner prescribed by its charter, by-laws, rules and regulations." Section 7, art. 6, of the by-laws requires: "All money due from the members of the association, or from it to the members, shall be payable at the home office in Richmond, Va." Provision is made in the by-laws for the organization of local boards in towns where sufficient stock is held to make such organization desirable. Section 4, art. 11, which relates to this subject, is as follows: "Members may, if they desire, make monthly payments on stock to the local treasurer, but such local treasurer shall be the agent of the members, and not of the association." The defendants insist this is a mere subterfuge to avoid the usury laws of the state, and, even if it is not, the contract is nevertheless to be construed as a South Carolina contract. A contrary view was taken by this court in *Pollock v. Association*, 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683, *Turner v. Association*, 51 S. C. 37, 27 S. E. 947, and *Tobin v. McNab*, 53 S. C. 75, 36 S. E. 827. It is true, in *Meares v. Finlayson*, 55 S. C. 105, 32 S. E. 986, Chief Justice McIver expressed dissatisfaction with the decision of *Pollock v. Association*, supra, but expressly said that the point we are now considering was not involved in the case he had under discussion. In the later case of *Association v. Powell*, 55 S. C. 320, 33 S. E. 355, the provisions of the mortgage and of the by-laws, so far as they relate to this question, were practically the same as those involved in this case; and it was there held by a unanimous court that the contract was to be performed in Georgia, and the laws of that state must govern its validity and construction. The defendants rely upon the case of *Mortgage Co. v. Bates*, 58 S. C. 552, 36 S. E. 917, as holding a different doctrine; but in that case the facts were not the same as in this, and the circuit judge found as one of the facts that the parties

had contracted with reference to the laws of this state. This finding was sustained as not being against the preponderance of the evidence. The finding of fact was the other way in this case, and, as we have seen, this court has heretofore sustained the same finding on similar evidence. The rights of the parties to this contract must therefore be adjudicated under the laws of Virginia.

The plaintiff offered in evidence the statutes of Virginia and the decisions of the Court of Appeals of Virginia, from which it appeared that this contract would not be adjudged usurious in that state. Objection was made to this evidence on the ground that these statutes had not been pleaded. The general rule is that the existence and terms of the statute of another state cannot be proven unless alleged. *Rosemand v. Ry. Co.*, 66 S. C. 98, 44 S. E. 574. It is true, usury is an affirmative defense, and it was not, therefore, necessary for the plaintiff to anticipate it and set up the Virginia statutes in his complaint; but, when the counterclaim for usury was put in, the plaintiff was bound to set up in reply its defenses to that plea. Having failed to set out in reply the existence of Virginia statutes on this subject, or their terms, evidence as to such statutes should have been excluded. The case is to be considered, then, as if the court had before it a contract whose validity and effect as to the plea of usury were to be considered under the laws of Virginia, without any pleadings or evidence as to those laws. In such case there is certainly no presumption that the law of usury is the same in that state as in this. Such a presumption would be altogether unreasonable, for some states have no statute law on the subject, and in the others the enactments are very diverse. Virginia having been once subject to the laws of England, in the absence of proof the presumption is that the common law prevails, and that there is no legal limitation to the rate of interest in that state. *Rosemand v. Ry. Co.*, supra; *Brown v. Wright*, 21 L. R. A. 471, note. This being so, the error in admitting proof of the Virginia statutes was harmless.

In insisting that the statute law of this state must be applied, the defendant relies on *Gist v. Telegraph Co.*, 45 S. C. 370, 23 S. E. 152, 55 Am. St. Rep. 763, in which this language is used: "Again, it has been held in this state, in the case of *Allen v. Watson*, 2 Hill, 319, that the legality or illegality of a transaction depends on the law of the place where it transpires; but it is incumbent on those who would avail themselves of it to show what that law is, and, until that is done, our courts must decide that question according to the laws of this state. The same doctrine seems to have been held in *Thatcher v. Morris*, 11 N. Y. 437, which is represented in the New Jersey case above cited as holding that: 'Where the contracts of a particular kind are forbidden by the

law of the state in which they are sought to be enforced, and the party seeking to enforce them relies upon the fact that they were made in a foreign state, and are valid contracts by the *lex loci contractus*, it has been held elsewhere that he is bound to aver and prove those facts.' Now, as there is no allegation in the complaint that the law in New York is otherwise than what it is in this state, the plaintiff cannot, in the absence of any such allegation, derive any benefit from the fact that the contract was made and was to be performed in New York." It will be observed that case involved a gambling transaction. Gambling contracts and some others so offend good morals, and so contravene established public policy, that courts will presume that the laws of other states forbid them, in consonance with the laws of their own state; and, even if this presumption is rebutted by proof, they will recognize no claim of comity which would require them to give countenance to such transactions. Numerous decisions in this state have held contracts to be free from usury because they fell under the laws of other states, when such contracts would have been usurious under the laws of this state. It is therefore clear that usury is not regarded as standing on the same plane with gambling and other intrinsically immoral practices. See, also, *Bank v. Cook*, 46 Am. St. Rep. 201, note. It is true, in the case of *Meares v. Finlayson*, 55 S. C. 121, 32 S. E. 986, it was held that when the contract was proved to be usurious under the laws of North Carolina, as well as those of this state, the penalties prescribed by the South Carolina statute would be enforced, even regarding the contract as a North Carolina contract. This was on the ground that our statute expressly forbids the collection of interest or costs in a suit on a usurious contract. It is manifest, if the contract in that case had not been usurious under the laws of North Carolina, a very different question would have been presented, and the usury law of South Carolina would have been disregarded.

This is a Virginia contract. The common law, in the absence of proof to the contrary, is presumed to be of force in that state, and hence no usury statute can be applied.

The judgment of this court is that the judgment of the circuit court be affirmed.

On Rehearing.

(March 18, 1904.)

PER CURIAM. None of the appellants' exceptions were overlooked in the decision of this cause, and therefore the petition for a rehearing is refused.

The fifteenth exception assigns error to the circuit judge "in not holding that under the laws of this state, when a member of a building and loan association borrows money from

the association, and pledges his stock as security for the loan, he thereby ceases practically to be a member of the association, and his relation thereto becomes that of borrower to lender; and in not finding, under this rule, that if the contract is not usurious the association can recover only the balance of the principal, with legal interest; and that, if the contract is usurious, it can recover only the balance of principal due, without interest, cost, or attorney's fees." No special allusion was made to this exception, because it seemed to be covered by the principle controlling the opinion. It is not denied that, in ascertaining the amount due, the circuit judge followed precisely the terms of the contract made by the parties themselves. The court held that the law of Virginia was to be applied to the contract, and that the law of Virginia was presumed to be the common law. Under the common law, a contract must be enforced according to its terms. The defendants expressly agreed in the bond and mortgage that they would pay the amount found by the circuit judge, and that they would remain members of the association, as well as borrowers from it. The court could not substitute another contract, making them liable for the amount they received, and interest on it at the South Carolina rate. In *Association v. Holland*, 65 S. C. 448, 43 S. E. 978, upon which defendants rely, it does not appear that the contract was made with reference to the laws of another state. In *Bird v. Kendall*, 62 S. C. 178, 40 S. E. 142, which was held to be a Georgia contract, the contract was enforced according to its terms. See *McIlwaine v. Ellington*, 55 L. R. A. 933, and notes.

The sixteenth exception charges that the circuit judge "erred in allowing ten per cent. attorney's fees, for the reason that the contract, being usurious, attorney's fees cannot be collected." As to the application for a rehearing on this exception, it is only necessary to say that by the terms of the bond and mortgage the mortgagors obligated to well and truly pay "all fees, costs, and expenses to or for which said association may become subject or liable by reason of any litigation touching this transaction." This exception was based on the charge of usury, and fell with it. When it was held that there was no usury in this contract, it seemed to the court to follow, without special allusion to the subject, that the attorney's fees growing out of this litigation must be paid. The circuit judge, with all the pleadings, testimony, and facts before him, fixed the attorney's fee, and there was no exception as to the reasonableness of the amount allowed.

It is manifest that the court could not admit such part of the testimony as to the law of Virginia as would be favorable to the appellants and exclude the remainder. It must all be admitted or all excluded. The defendants' exceptions can bear no other interpretation than that they urged upon this court the entire stat-

ute law of Virginia upon this subject should be excluded, and the defendants cannot complain that this position was sustained.

It is ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(68 S. C. 231)

**CALVARY BAPTIST CHURCH et al. v.
DART.**

(Supreme Court of South Carolina. March 15, 1904.)

**RELIGIOUS SOCIETIES — POWER OF TRUSTEES —
SALE OF PROPERTY—APPEAL—REVIEW—
QUESTIONS OF FACT.**

1. As, under the constitution and by-laws of the Baptist Church, the trustees have no right to make any contracts affecting the real property of the church, an agreement for the sale of the church property without the consent of the congregation is invalid.

2. Where, on an issue as to whether the congregation of a Baptist church ratified the act of its trustees in selling its real estate, the evidence is contradictory, the conclusions of the master and of the circuit judge will not be disturbed.

3. A contract with the owner of real estate to purchase it at foreclosure, and resell to the original owner at the same price, which is its full value, with 7 per cent. interest, taking a mortgage as security, is lacking mutuality.

Appeal from Common Pleas Circuit Court of Charleston County; Watts, Judge.

Action by the Calvary Baptist Church and its trustees against J. L. Dart. Complaint dismissed, and plaintiffs appeal. Affirmed.

All issues were referred to Master Sassa, who filed the following report, omitting the statement of facts in part:

"So far, there is no dispute as to the facts. But with the sale to Dart the contention begins. The plaintiffs claim that the contract between Dart and the church was that Dart should go to the sale and buy the property for their benefit, and practically as their agent, and, having done so, he should reconvey the said property to the church, receiving in consideration therefor a bond for the amount paid by him, bearing interest at seven per cent., and secured by a mortgage of the property. They claim that the apparent want of mutuality in this transaction is obviated by the fact that thereby Dart obtained a good seven per cent. investment, and also increased his reputation in the Baptist denomination, to which both he and the plaintiffs belong. On the other hand, Dart alleges that while it is true that he did undertake to purchase this property, with the primary object of assisting the church in their trouble, and while he did make the purchase with that intent, he did not intend to, nor did he, bind himself to reconvey in the manner and upon the terms alleged by the plaintiffs, but intended to settle and arrange all such details after the sale had been

completed, having, however, clearly intimated to the committee of the church with whom he dealt that his purpose was to retain in his own possession that portion of the land on which the parsonage and shop stood, and to convey to the church the lot which held the church building; the valuations of the two lots to be settled after the sale in accordance with the price paid for the whole property.

"Upon the issue thus joined a great deal of contradictory testimony has been taken. It is claimed by the plaintiffs that, under the constitution and by-laws of Calvary Baptist Church, the trustees have no right to make any contracts affecting the real property of the church. If this is true, it proves too much, for in that case the very contract upon which the plaintiffs' case is based falls to the ground, and the whole substratum of the present suit is destroyed. The allegation of the complaint is that the board of trustees are charged with the duty of holding the property of the said church and administering its financial affairs; and in the fifth paragraph of the complaint is set forth the agreement, according to the plaintiffs' view of it, between Dart and the Calvary Baptist Church, which agreement, as testified to by the plaintiffs' witnesses, was entered into between Dart and certain persons claiming to represent the church, one of whom, at least (Washington), was not a trustee at the time. Of the rest, one was the pastor of the church, and the others were trustees. If the trustees 'had no power to dispose of the church's property directly or indirectly,' and could not contract with regard to it, clearly this agreement, so far as the church was concerned, was entirely illegal. No formal action of the church has been shown, authorizing or confirming the alleged agreement.

"A study of the testimony satisfies me that while Dart did undertake to buy in the property for the benefit of the church, so that the congregation should not eventually be deprived of their church building, he did not make the definite agreement contended for by the plaintiffs. Such an agreement, involving, as it does, a marked absence of mutuality, would have to be proved very fully and distinctly, and I do not think the plaintiffs have succeeded in doing this. On the other hand, the form of agreement contended for by Dart is supported, in my judgment, by the preponderance of the testimony, and is confirmed by the circumstances of the case, as well as by the strong evidence of the written contract or agreement signed by Dart, Smith, Prioleau, Albert Washington, and Reeder—the last five calling themselves 'trustees of the Calvary Baptist Church'—dated 3d September, 1901. By this paper, Dart agreed to sell and convey to the said trustees the church building, and so much of the lot of land upon which it stands as would measure seventy-eight feet on north and

1. See Religious Societies, vol. 42, Cent. Dig. § 1303.

south lines, and fifty-five feet on east and west lines, for the consideration of \$1,200, with interest at seven per cent. per annum, payable semiannually from date. Dart testifies that this was substantially the agreement made verbally between himself and the trustees prior to the sale, and that it was subsequently put in writing at the request of the trustees, and I think the weight of the testimony confirms this. Dart's conduct immediately after the sale is entirely consistent with this view of the case. On July 1, 1901, he wrote a letter (which is in evidence) to the pastor, officers, and members of the Calvary Baptist Church, in which he says: 'The Calvary Baptist Church having been purchased by me at public sale on the 25th of June last, I desire to state to them that for the present, and until I shall be able to make more permanent arrangements with them, I shall require and expect them to pay a monthly rental of \$7 to me, which shall be due on the 1st day of the month.' It is testified, though the evidence is conflicting, that this letter was read to the congregation and acceded to at a mass meeting of the church. Whether this was so or not, it is certain that at least one payment of \$42 was made to Dart under this notice. Meanwhile he himself went into possession of the other lot, and received the rents thereof. A rental of \$7 a month represents seven per cent. on a valuation of \$1,200, the amount specified in the written paper or agreement above referred to. It seems to me that these facts all cohere sufficiently to furnish a reasonable and intelligent story of this whole transaction. The plaintiffs' case has not been proved to my satisfaction, nor am I able to discern any sufficient proof of the fraud charged against the defendant. There is some conflict of testimony all through, but, looking carefully at all the evidence of all the witnesses, and at all the circumstances of the case, I am convinced that the plaintiffs' contention in this case cannot be sustained. I do not believe that the agreement set up in the complaint was ever made.

"The only other point in the case is as to the power of the trustees who signed the contract with Dart in confirmation of the verbal agreement made before the sale to bind the church to carry out the same. It is attempted to defeat this by the claim that the trustees had no power to sell the property. But this objection misses the point. They did not sell the property. It was sold by the court against their will. They were authorized to find some one to help them in this emergency, and to make the best terms with such a one as they could. Accordingly they made such terms with Dart, and I am bound to say that I do not think the bargain that he drove was an unconscionable one. There is testimony going to show that this arrangement was reported to the church, and I do not think that this positive testimony has been rebutted by the negative evi-

dence offered by the plaintiffs. In my opinion, the action of the trustees was for the best interests of the congregation, and was, at any rate, at first accepted by them. I therefore recommend that the complaint be dismissed, with costs."

The circuit decree is as follows:

"This case was heard by me at the March term of court, at Charleston, S. O., upon the pleadings, testimony taken before Master Sassa, his report, and exceptions thereto. In view of the very able and earnest arguments of the counsel engaged in the case, I have given unusual and careful consideration to the case before announcing my judgment. I am of the opinion that the master is right in every conclusion reached by him, and I cannot improve on his report. It is therefore ordered, decreed, and adjudged that the exceptions to the report be overruled, and that the report be approved, confirmed, and made the judgment of this court, and that the complaint be dismissed, with costs."

The plaintiffs appeal from the decree on the following grounds:

"First. Power of Trustees. (1) In not holding that the trustees of the Calvary Baptist Church generally had only power to hold its property and not to dispose of it, unless authorized by a mass meeting of the entire congregation, both males and females.

"(2) In not holding that the only authority that the trustees had in this case, as given by the congregation of the Calvary Baptist Church, was to get some one to buy in the church's property, viz., the church lot and parsonage lot, with the shop thereon, for the benefit of the church—the church to repay the amount so expended in a reasonable time—and that they had no power otherwise to sell or otherwise dispose of the church property.

"(3) In attributing to the plaintiffs the position that the trustees of the Calvary Baptist Church 'have no right to make any contracts affecting the real property of the church.' The contention of the plaintiffs in this regard being that while the trustees, as authorized by the congregation, had authority to get some one to buy in the church property for the church, and consequently, as effecting this object, to give a bond and mortgage to repay the amount so used, yet they had no power to sell or dispose of the property, or any part of it, absolutely.

"(4) In holding that the alleged division of the property, and the absolute sale of the parsonage and shop and lot, as enlarged by the defendant, by the moving of the fence back, was not an attempted sale of the property by the trustees, or at least a part of them, to the defendant, and were wholly beyond the power of the trustees. In not holding that the proceedings of Whaley and Hawksford against the church were a mere consent case, and consequently the act of the parties, and not of the court.

"Second. The Defendant as Trustee. That the court further erred:

"(1) In not holding that, in the circumstances developed in this case—the avowed declaration of the defendant, Dart, that he 'was buying the church [property] simply to help the people out' (Whaley's testimony), and his acting with the trustees in the negotiations with Mr. Whaley for the sale at a reduced price, and his other actings and declarations in the matter that he was buying in the property for the church, etc.—he put himself in the position of a trustee, and on him was the burden of proof (a) that he was in all things frank and fair; (b) that he paid for the property what it is worth; (c) that he held out no delusive hopes; (d) that he exercised no undue influence on the church; and (e) took no advantage of the fears or poverty of the church; and that every doubt will be resolved against him; and, further, that the preponderance of the testimony is in all these particulars directly the reverse, viz.: (a) To Washington and the other trustees and the congregation his conduct was not frank and fair, as he left them under the impression that 'from the jump everything was in favor of the church'; (b) the property (the parsonage and shop lot as enlarged by the defendant) is proved to be worth \$1,500 to \$1,800, and yet the defendant aims to get it for \$905; (c) he held out to the trustees and congregation that he was helping them, that he was the 'savior' of the church, and yet is now seeking to get the larger part of the property below its value; (d) the trustees being panic-stricken by the fear of some one buying in the church, he wrought on their fears to increase his demands on them, and took advantage of them to make them sign the contract of September, 1901.

"(2) That the influence acquired by the defendant, Dart, over the trustees of Calvary Baptist Church, especially after he had acquired the title to the property, and the confidence reposed in Dart by the Calvary Baptist Church, should have made him a trustee, without power to profit by the transaction.

"(3) In not holding that such trustee could not contract with the said church; that such contracts, even if otherwise valid, should have been held fraudulent, and have been set aside.

"Third. Mutuality of Contract. That the court erred in holding that there was no mutuality in the contract if the absolute sale of the property, worth from \$1,500 to \$1,800, for \$905, is not sustained, whereas the law is that promise for promise is always a valuable consideration, and the court has been misled by a consideration of the adequacy of consideration, in which it also erred, as to get an investment now at seven per cent. interest, payable monthly, is more than an adequate consideration. The court further erred in holding that the sale by Mr. Whaley was against the will of the church. On the contrary, it was clearly proven that it was with their full assent, and was consent by the action of Mr. Wha-

ley, Dart, and other trustees of the Calvary Baptist Church.

"Fourth. The Alleged Bid of September 1, 1901. The court further erred in this: The testimony showing that the contract of 3d September, 1901, was made after the defendant had bought in the church, and held title from the master to himself, the court erred in throwing on the plaintiff the burden of proof that the deed was made by the authority of the church. The burden was on the defendant to prove that that contract was made, not with the trustees only, but with the congregation before the sale, or ratified after the sale, of which there was an utter failure of evidence as to the congregation, and certainly not a preponderance of the evidence even as to the trustees.

"Fifth. Fraud. (1) The court erred in not holding that the defendant's 'intention [to commit a fraud] in this case may be proved or inferred from the facts whose tendency is to produce the results,' and that from the facts in the case the fraud of Dart must not simply be inferred, but is proved.

"(2) In not holding that the whole conduct of the defendant and his partisan pastor, Smith, shows a scheme to get the property of the church against the will of the congregation, and at an inadequate price; the removal as trustees of those opposed to the defendant's scheme, the appointment of others to do their work, the resignation of Outino to let Smith be appointed chairman of the trustees, the studied secrecy both by the defendant and his partisan, Smith, practiced to the congregation, showing this fraud very conclusively.

"Sixth. The Resolution of the Mass Meeting September 4, 1902. The court erred in failing to take notice of the fact of the mass meeting refusing to confirm the illegal acts of the trustees and setting them aside, and in not holding that the action of the mass meeting—the only one held on the subject, and held as soon as Dart's and Smith's plans were discovered by the congregation—was conclusive against the act of the trustees in assenting to the division of the property, and its sale at a price under its value to one who held himself forth as helping the church.

"Seventh. Facts. That the court erred in his finding:

"(1) That the defendant [Dart] did not agree with the church to buy in all its property at the foreclosure sale for the benefit of the church, and to allow the church to redeem the same by paying to him [Dart] the purchase money by him bid with interest.

"(2) That the pretended agreement made the 3d of September, 1902, and signed by Dart, for himself, and Smith, Prioleau, Reed, and Washington, assuming to act for the church, was, in substance, the agreement made between Dart and the church before the foreclosure sale, and was binding on the church.

"(3) That this last alleged agreement was not repudiated by the church at the meeting held 4th September, 1902, as soon as brought to the knowledge of the congregation.

"(4) That the bargain the defendant, J. L. Dart, attempted to drive with the plaintiff church, is not an unconscionable one; the testimony showing that such bargain, if driven, would give to Dart property worth \$1,500 to \$1,800 for an expenditure by him of \$905.

"(5) That the action of the trustees in this last-mentioned agreement was for the best interest of the congregation, and was, at any rate, at first accepted by them; it being, on the contrary, greatly to the church's disadvantage, and not as advantageous to them as that offered by Mr. Whaley and another.

"(6) That the letter of the defendant, Dart, of 1st July, 1901, and his taking possession of the enlarged parsonage and shop lot, corroborate the court's finding in the matter.

"(7) That the plaintiff's case has not been proved; the testimony proving the claims of the plaintiff, and the fraud charged against the defendant, Dart, though the burden of proof to show the fairness of the transaction was on the defendant, Dart.

"Eighth. Legal Aspect of the Case. That the court erred in not holding that the defendant should reconvey all the property of the church; that an account be taken of the amounts due to him, with interest at seven per cent., payable semiannually—the amounts received by him, with like interest; that a reasonable time be given to the church to repay the same, and that the defendant remove the buildings he has begun to build on the lot; and that he restore the former buildings to the positions from which he had removed them."

Young & Young, for appellants. W. St. J. Jerve and J. L. Mitchell, for respondent.

POPE, C. J. On the 16th day of April, 1903, his honor Judge Watts heard the report of G. H. Sasa, Esq., as one of the masters for Charleston county, S. C., together with the exceptions thereto filed, and also the testimony offered at the hearing before the master. The master had recommended that the complaint be dismissed. The said circuit judge sustained the said master in all respects, and adjudged that all the exceptions be overruled, and that the complaint be dismissed with costs. From this judgment the plaintiffs have appealed. The report of the master, the decree of Judge Watts, and the grounds of appeal should all be included in the report of this case.

We will now proceed to pass upon these grounds of appeal, and, in order that our views may be better understood, we will give a brief summary of the facts upon which plaintiffs' contention is bottomed: The Calvary Baptist Church, a body corporate under the laws of this state, was the owner of a lot of land in the city of Charleston, S. C.,

whereon was located its meeting house used for divine worship, its parsonage, and also a shop, which last building was usually rented to outside parties. In some way this corporation owed a debt which in June, 1901, amounted, principal and interest, to \$3,600. This debt was secured by a bond and mortgage of all the land of the corporation. The obligees of this bond and mortgage were W. Gibbes Whaley and Francis Hankford, as trustees. The latter was in England at the happening of the events hereinafter mentioned. The trustees above named, the holders of the bond and mortgage, notified the church that some arrangement for the payment of this indebtedness must be made. The church had elected a body called its "trustees," which trustees, under rule 7, were to "hold all property or properties of the church in possession, and shall collect such contributions that will enable them to defray all debts, such as repairing and other debts of this said church, at what time fixed by trustees." So, when the threat to foreclose the mortgage held by W. Gibbes Whaley and another, as trustees, was made, the church called upon its trustees to look after the matter. Mr. Whaley, in one of his conferences with these trustees of the church, told them he would call to his aid a Charleston broker, Capt. T. T. Hyde, who reported to Mr. Whaley that the church and lot upon which it stood was worth about \$1,000, and the parsonage and shop, together with the balance of the land, was worth about \$1,100. Mr. Whaley, as trustee, offered to take the latter at \$1,100 if the church would pay him \$1,000 for the church lot. This proposition was declined by the trustees for the church, stating that they wished to keep all the property for the church itself. Soon another element was brought into these discussions. The Reverend John L. Dart, who was then, or had been just before, pastor of what is known as the Morris Street Baptist Church, also of Charleston, S. C., attended with the trustees of the plaintiff church these conferences with Mr. Whaley. As a result of all these conferences, it was agreed that Mr. Whaley would take \$2,100 for his debt of \$3,600, and that the Reverend Dart would go \$5 better than Mr. Whaley. A foreclosure of Whaley's mortgage by due legal proceedings was had—altogether a friendly suit, consent decree. So on about the 2d July, 1901, the sale was made under the judgment in foreclosure. Mr. Whaley bid \$2,100, Rev. J. L. Dart bid \$2,105, and at that figure he was declared the purchaser. In a few days the purchase money was paid in cash by Dart, and the master delivered to him a deed for the whole property. Dart then wrote a letter to the church, asking that they pay over to him 7 per cent. on \$1,200 in monthly payments—\$7 per month. He (Dart), when asked to give papers to the church, stated that he was just then going North, and that, on his return to Charleston, papers could be prepared. So, early in the

month of September, 1901, Dart met the trustees of the church, and, after some discussion, all parties signed, sealed, and delivered the following paper, to wit:

"I hereby promise and agree to and with J. W. Smith, J. R. Pringleau, B. H. R. Reeder, R. Cuttino, A. Washington, trustees of the Calvary Baptist Church, a corporation, to sell and convey to them the building known as the Calvary Baptist Church, at the corner of Morris and Smith streets, this city, and so much of the lot of land upon which said building now stands as will measure and contain seventy-eight (78) feet on the north, also south lines, and fifty-five (55) feet on the east and west lines, on the following terms, etc.:

"(1) That the trustees of the said Calvary Baptist Church corporation shall pay to me the sum of twelve hundred (\$1,200) dollars, with interest thereon at seven (7) per cent. per annum, payable semiannually from the date hereof.

"(2) That during the time of purchasing the said corporation shall have the right to occupy the said church building; all insurances and necessary repairs to be paid for by the said corporation, and should they fail to do so, I shall pay for them and be reimbursed by the said corporation.

"(3) That this agreement shall continue and be valued for a reasonable period of time, and should the said corporation ultimately fail to purchase the said church property, I shall not be held responsible for any payments made on account.

"In witness whereof, the parties hereto have hereunto set their hands and seals, this third day of September, 1901, [L. S.] J. L. Dart, J. W. Smith, J. R. Pringleau, Robert Outtino, A. Washington, B. H. R. Reeder.

"Signed, sealed and delivered in the presence of Jos. A. Purcell, F. V. Cleckley."

The church plaintiff paid Dart \$42 as the semiannual interest, but, when the next interest became due, it refused to pay, alleging that Dart had bought the property really for the plaintiff; that he was now attempting to keep it for himself; charged that he was trustee for the plaintiff; that he was guilty of fraudulent conduct to the church; and that the trustees of the plaintiff church had no right, in law or in morals, to sign the paper with John L. Dart on the 3d September, 1901; that the plaintiff church was willing to pay Dart principal and interest on \$2,105 from July 2, 1901, but that Dart should reconvey the property to the church. An action was begun in the year 1902 by this church and its trustees to procure the relief hereinbefore specified. Dart, in his answer, denies all the material allegations. The issues of law and fact were referred to G. H. Sass, Esq., as master, who took a good deal of testimony, and sustains the defendant, and Judge Watts, in his decretal judgment, does also. We will now pass upon the exceptions in their order.

1. So far as the trustees of the plaintiff church are concerned, they do not hold any

office in the spiritual concerns of such church. The only officers of a Baptist church are the pastor and the deacons. A Baptist church "is distinct from and independent of all others, having no ecclesiastical connection with any, though maintaining a friendly intercourse with all. The government is administered by the body of the members, where no one enjoys a pre-eminence, but each enjoys an equality of rights." See Hiscor's Baptist Church Directory. But it is in the power of the plaintiff, in the administration of its temporal affairs, to employ agencies of its own choice; to give such agencies such power over its property as the church may see proper to do. In this particular instance the plaintiff, by its rule 7, which we have already quoted, saw proper to elect four trustees to manage its property. This church did not vest the title to its property in these trustees. Of course, it was at all times in the power of this plaintiff church to alter, either by enlargement or restriction, this control of its property by its trustees. Indeed, it could abolish rule 7 at any time it saw proper. It was not possible for these trustees legally to assert any rights of their own. When any step was taken or contemplated by them, it was absolutely necessary that the church should clothe them with power. By virtue of their office as trustees, they could not buy or sell church property, nor could they mortgage the same. If the church wished to clothe them with any such power, it had to proceed to do so in the way such powers are created by any other person or body. So, therefore, when these trustees signed this paper along with John L. Dart, unless the plaintiff saw proper to authorize it in the first instance, or ratified it afterwards, it was mere waste paper. The defendant, Dart, saw this; hence he introduced testimony tending to show that this church ratified the action in its behalf of these trustees, being fully informed of their conduct. This is a question of fact. The master and circuit judge have both found that the church knew what those trustees had done, and, after such knowledge, ratified it. There is contradictory testimony in the record before us. We have felt ourselves bound to adopt the conclusion of the master and circuit judge, especially in view of the payment of the \$42 as semiannual interest on the \$1,200 set out in the instrument under seal hereinbefore introduced.

2. We cannot hold the defendant, Dart, trustee for the plaintiff church, in view of our conclusion as to the paper writing referred to in disposing of the first exception. There is some ugly testimony in the record, however. We refer just here to the testimony of the Rev. D. J. Jenkins, who, on oath, says he was willing to give \$2,600 for the property, and told the pastor (Smith) of the plaintiff church of such willingness. Smith was a close friend of Dart. Smith prevailed on him not to bid for the property, as he wanted it bid in for the church. But

Dart is not convicted by the testimony with this chilling of bids, or with this statement that the property was to be bid in for the church.

3. We think the judgment is right in holding a want of mutuality in the contract alleged by the plaintiff to have been made by Dart. Interest at 7 per cent. was too precarious in purchasing property at the price of \$2,105, when that was the full market value thereof. Deterioration, possible loss by fire, etc.

4. We think our holding under the first exception virtually disposes of this exception. We agree with the appellants that it was incumbent on the defendant to show that the agreement of the 3d September, 1901, was ratified by the church. But we hold that the testimony showed that the church did ratify it.

5. The testimony does not convince us that J. L. Dart was guilty of fraud in his dealing with the plaintiff church. He certainly made a payment for the property in cash, which was more, by a little, than Capt. Hyde, as a real estate broker, said it was worth. He (Dart) wrote to the church at once after he received his deed. He met the church trustees soon after his return to Charleston in the month of September, 1901. All things were then reduced to writing. He used all the property purchased, except the church, as his own, from the date of the purchase. This was to be seen by all men. The church paid \$42 as semiannual interest thereafter. The rents of the parsonage and shop were \$156 per annum. If they represented \$905 of the \$2,105 purchase, it was far beyond 7 per cent. These people knew what these rents were.

6. The resolution adopted at the mass meeting of the plaintiff church in September, 1902, cannot throw much light on the happenings of 1901. Indeed, it is easy to fan a little dissatisfaction into a raging flame, with these excitable people.

7. The facts recited in this exception are virtually included in our previous holdings herein, and we will not go over them anew.

8. Having made our views plain as to our inability to upset this settlement of differences between Dart and the plaintiff church, we cannot order Dart to reconvey the property to the plaintiff church, as pointed out and asked for in this, the eighth exception.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 246)

J. C. STEVENSON & CO. v. BETHEA.
(Supreme Court of South Carolina. March 19, 1904.)

SEALED NOTE—RIGHTS OF ASSIGNEE.

1. Where a sealed note is assigned to a third person, he takes it with all the infirmities it has when in the possession of the original obligee.

Appeal from Common Pleas Circuit Court of Marion County; Townsend, Judge.

Action of claim and delivery by J. C. Stevenson & Co. against Philip W. Bethea. From a judgment for plaintiff, defendant appeals. Reversed.

Jas. W. Johnson, for appellant. J. M. Johnson and Junius H. Evans, for respondent.

POPE, C. J. This action is brought to enforce, by claim and delivery, a chattel mortgage, after condition broken. The circuit judge, in his charge to the jury, directed them, if they found as a fact that the note and mortgage were actually made by the defendant, then they must find a verdict for the plaintiff. Such was their finding. Hence this appeal.

It seems to us that the pleadings themselves tended to cloud the true issue. In the complaint the note is described as a promissory note, and in the answer it is admitted to be a promissory note. In the evidence furnished by the note itself when it was introduced, it is shown to have been a sealed note or single bill. There is all the difference in the world, in law, between a promissory note and a single bill, for, when the former is passed for value before maturity into the hands of a new holder, the maker loses all right to question its character. Not so as to a single bill—a sealed note—for, when it is assigned to a third person, such third person or assignee takes it with all the infirmities it has when in the possession of the original obligee. The obligor can show that the single bill or sealed note was without consideration, or is void from any cause. These matters are so fully discussed in the cases of *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831, and also in *McLaughlin v. Braddy*, 63 S. C. 438, 41 S. E. 523, 90 Am. St. Rep. 681, that it is useless to discuss them anew. We may therefore content ourselves with the bare announcement of the principles governing the two classes of notes. The note made by Philip W. Bethea, defendant here, to B. S. Ellis, was as follows: "\$1,000.00. Zion, South Carolina, June 19th, 1901. [By first day of October after date I promise to pay to the order of B. S. Ellis, of Zion, S. C., the sum of one thousand dollars for value received with interest after maturity at the rate of eight per cent. per annum. The party or parties making this note agree to pay all attorney's fees and expenses which may be incurred in its collection. P. W. Bethea. [L. S.]]" It was transferred to the plaintiffs, J. S. Stevenson & Co., a few days after it was made. No notice was given by any one to P. W. Bethea of Ellis' assignment thereof. Under the principle of law governing choses in action in this state, the foregoing note was a sealed note; it was sealed by the defendant; and whatever infirmities or equities existed in favor of P. W. Bethea as to J. B. Ellis also existed in his favor against J. C. Stevenson

& Co., as his assignee. The defendant, in his answer, sets up that this note, and the mortgage given to secure it, represented no debt due by him to B. S. Ellis, but the sole purpose of their execution was in order that Ellis might raise money for P. W. Bethea, with which Bethea was to pay a debt to a third person, and that Ellis never raised a dollar for Bethea, and also that Bethea is not indebted to J. C. Stevenson & Co., nor does Bethea owe Ellis anything. Under these circumstances, it was perfectly competent for Bethea, at the trial, to show these facts, which, if established, would have been a complete defense. But it seems the circuit judge took a different view of his power to admit such testimony. Herein he erred. This error is set up by the defendant as his third ground of appeal. We do not think there would have been any error by the circuit judge in his direction to the jury if this had been, as he supposed, a negotiable or promissory note. We have just held it was a sealed note. The trial judge was wrong in this particular also. The foregoing is the first ground of appeal.

As to the admission of B. S. Ellis' letter, dated 24th June, 1901, to J. C. Stevenson & Co., if error at all, it was harmless error. Certainly the defendant ought not to complain as to its introduction, for it shows Ellis wished to have had the cash—at least \$750—from one of the banks in Wilmington, N. C., from the discount of Bethea's note. It was an afterthought to seek to obtain groceries upon it from Stevenson & Co. This is the second ground of appeal.

We have already held that the circuit judge erred, as set out in the fourth exception, in not permitting the defendant to develop his case by offering testimony.

We have thus disposed of the exceptions of defendant by sustaining all but the second.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court for a new trial.

(55 W. Va. 320)

DRINKARD v. HEPTINSTALL

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

UNLAWFUL DETAINER—SUMMONS—PLEADING—AMENDMENTS—LEASE—CONSTRUCTION.

1. A justice's summons in a suit of unlawful detainer, defective for an insufficient description of the property, may be amended on appeal to the circuit court, when substantial justice will be promoted by such amendment.

2. On appeal from a justice the case may be tried on such pleadings as will secure substantial justice between the parties, whether such pleadings are made up in court or before the justice. The circuit court may amend the pleadings to promote the ends of justice and secure a fair trial.

3. A lease which provides that the tenant may have the refusal of the premises from month to month so long as the tenant may desire to occupy the premises is a grant of preference over other proposed tenants if the landlord continues to rent the property. Such lease terminates at the end of each month, and no notice to quit is necessary. A demand for the possession of the property is sufficient to prevent a renewal of the tenancy and give the landlord the right to sue for possession at the end of the current month.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County; J. M. Sanders, Judge.

Action by Hattie N. Drinkard against J. P. Heptinstall. Judgment for plaintiff, and defendant brings error. Affirmed.

W. Walter McClaugherty, for plaintiff in error. H. A. Ritz and Anderson & Easley, for defendant in error.

DENT, J. J. P. Heptinstall complains, on writ of error, of a judgment of the circuit court of Mercer county, rendered against him on the 29th day of May, 1902, in favor of Hattie N. Drinkard, in an action of unlawful detainer, entitling her to possession of certain property held by the defendant as her tenant.

The first error assigned is that the circuit court permitted plaintiff to amend her summons as to the description of the property after motion to quash. The court did this by virtue of section 212, c. 50, Code 1899, which reads as follows, to wit: "No such summons shall be quashed or held insufficient for any defect in the description of the premises therein mentioned, if the description be such as to enable a person of common understanding to know what is intended thereby. And if in the opinion of the justice such description is not sufficient under the provision of this section, the plaintiff may amend the summons so as to make the description sufficient." And section 169, c. 50, says: "The appeal may be tried upon the pleadings made up in the justice's court, or the pleadings may be amended before or during the trial of the appeal when substantial justice will be promoted by the amendment." It is very plain that the court committed no error in allowing such amendment. *Thorn v. Thorn*. 47 W. Va. 4, 34 S. E. 759; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

The second error assigned is because the plaintiff failed to refile her affidavit filed before the justice denying that title to real estate would come in controversy. This was wholly unnecessary, as such counter affidavit was already in the case, and the issue on the same was fully made up before the justice; and because the defendant chooses to have an order refile his affidavit in court does not destroy the issue already joined thereon before the justice. It plainly appears that the title to the property in controversy was not in question, and the defendant did not even insist on the circuit court passing on this question prior to trial, but his refile of the affidavit was regarded as the filing of a

¶ 2. See *Justices of the Peace*, vol. 81, Cent. Dig. § 665.

plea to which the plaintiff properly entered a general replication.

All the other assignments of error relate to the merits of the case and depend entirely on the construction of defendant's lease. Plaintiff purchased the property in controversy of J. H. Nash, and held a deed for it bearing date 14th August, 1901. On the 15th August, 1901, she served on the defendant the following notice: "Bluefield, W. Va., Aug. 15, 1901. Mr. J. P. Heptinstall, Bluefield, West Virginia—Dear Sir: Owing to the fact that I wish to have the rooms which you now occupy overhauled and papered, I hereby notify you to vacate said rooms at once. Should you remain in said rooms over five days from date of this notice you will be required to pay rents at the rate of twenty dollars (\$20) per month, also to pay all water rents. This August 15th, 1901. Hattie N. Drinkard."

He refused to give up the property, and wrote plaintiff a letter as follows:

"J. P. Heptinstall, Lawyer and Notary Public. Reference—First National Bank, Bluefield, W. Va., August 18th, 1901. Mrs. Hattie N. Drinkard, Bluefield, W. Va.—Dear Madam: Your notice dated August 15th, 1901, was received to-day. I beg to say that I have a rental contract with H. M. Nash who represented himself to be the owner of the property which I now occupy, and I shall still claim the rights so acquired by me and shall not comply with the terms of your notice. Respectfully, J. P. Heptinstall."

Defendant's lease is in the following words:

"This deed, made the 8th day of June, 1898, between H. M. Nash and J. P. Heptinstall, Witnesseth that the said H. M. Nash doth demise unto the said J. P. Heptinstall all of the second floor of the two-story brick building belonging to said H. M. Nash, fronting on Bland Street on the east side thereof, in Bluefield, Mercer County, West Virginia, lately occupied by V. V. Austin, and over that part of said building used by said H. M. Nash as a grocery store, and doth demise to said Heptinstall one coal house and one privy on the eastern end of said lot, with the right of ingress, egress and regress through and over said lot to said coal house and privy, from the 10th day of June, 1898, to the 10th day of July, 1898, thence next ensuing with the refusal of said premises from month to month thereafter so long as said J. P. Heptinstall may desire to occupy said premises, said Heptinstall paying to said Nash therefor the monthly rentals of fifteen $\frac{75}{100}$ dollars at the end of each rental month, said H. M. Nash to furnish water for the use of said Heptinstall, delivered on said second floor of said brick building, and to pay the water rents, to keep said premises in good repair, and to remove all deposits from said privy, and should said repair not be made or said privy not cleaned within 48 hours notice thereof, then said Heptinstall shall have the power

to have same done and deduct any necessary expense incurred thereby from the rents of said premises; and nothing shall be paid to said Nash until the rents shall make sufficient returns for payment of the expense so incurred. Witness the following signatures and seals.

H. M. Nash. [Seal.]

"J. P. Heptinstall. [Seal.]"

Defendant's objection to the introduction of plaintiff's deed in evidence because the description in the summons does not correspond with the description in the deed is not tenable for the reason that defendant only withheld a portion of the property mentioned in the deed, which undoubtedly covered the same. It is insisted on the part of the defendant that his contract made him an annual renter, and that he was entitled to three months' notice to quit; or that he was a periodical monthly renter, and entitled to one month's notice to quit. A careful examination of the lease shows that neither of these propositions is correct. He was not an annual renter for the reason the lease reads, "thence next ensuing, with the refusal of said premises from month to month thereafter, so long as said J. P. Heptinstall may desire to occupy said premises." These words create a mere preference of renting from month to month, and not a periodical tenancy; and this is, if the landlord continues to rent the property, he will accord to the tenant the privilege of renting at the end of each month of the tenancy. There is no obligation on the landlord to continue to rent his property indefinitely or perpetually to any one, or to renew defendant's lease so long as he may desire to occupy the property from month to month, but at the end of any month the landlord may desire to cease renting the property he may terminate the tenancy by refusal to renew the lease and demand for possession of the property. *Crawford v. Morris*, 5 Grat. 90. The defendant's term ends with his month each time, unless it is renewed by the assent of the parties, express or implied, and no notice to quit is necessary. Code 1899, § 5, c. 93. A demand for possession and a refusal to renew is sufficient. The plaintiff gave the defendant notice on the 15th day of August that she wanted possession of the property for the purpose of making repairs. He was entitled to hold on until the end of his current month, the 10th day of September following. Thereafter he could not continue to hold without a renewal of his lease. She began her suit for possession on the 16th of September, one month from the time of her demand. She was entitled to possession at any time after the 10th of September, the expiration of the tenancy.

Defendant insists that because plaintiff's notice contained the following language, to wit: "Should you remain in said rooms over five days from date of this notice, you will be required to pay rents at the rate of twenty dollars (\$20) per month; also pay all water rents"—that this is a renewal of the lease.

Such is not the case, but the language is only warning that, if he remains over five days, and she is compelled to put him out, she will require him to pay her \$20 per month so long as he unlawfully withholds the property from her. The notice is that she wants the property at once, and does not want to rent it to the defendant any longer, and cannot be otherwise construed.

This determines all material points in favor of the plaintiff. The circuit court's judgment is plainly right, and is affirmed.

(65 W. Va. 305)

WASHINGTON NAT. BUILDING & LOAN ASS'N v. WESTFALL et al.

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

APPEAL — RECORD — USURY — PLEADING — FORECLOSURE — SALE — DECREE.

1. A demurrer, copied into the record by the clerk, no order or decree of the court having been entered in the cause tendering or filing the same, nor in any manner recognising it as tendered or filed, is not a part of the record, and cannot be considered by the appellate court.

2. In a suit in equity to enforce a specific lien, to make the defense of usury, the defendant may in his answer in general terms aver that the contract or assurance on which the proceeding is founded was for the payment of interest at a greater rate than is allowed by law.

3. In such suit, where the plaintiff, a building and loan association, was claiming a balance due it, according to the terms of its contract, of \$670.40, as of the 30th of November, 1899, and the defendant by his answer says that his payments, as shown by his passbook, furnished by plaintiff, aggregated \$639.70; that the association charged \$4 per month interest on the \$800 loan, and \$4 per month premium thereon, and \$4.80 dues on the eight shares of stock upon which the loan was made, and that on the 1st day of September, 1898, he only owed the plaintiff \$317.65, with interest from that day; that from the 1st day of September, 1898, he made default in the payment of dues, interest, premium, and fines, and has continued to do so from that time to this; and further answered "that under the terms of said deed of trust, if default should be made, the whole debt should become due and a mere interest-bearing fund," *held*, such answer did not raise the question of usury. *Held*, further, that the defense of usury not being made by the defendant by his answer, the commissioner was not warranted in applying all payments made by defendant, of interest, premium, dues, and fines, on account of said loan of \$800 and interest at the rate of 6 per cent. per annum.

4. In a suit brought directly against the defendant to enforce the collection of a demand, the defense of usury must be pleaded, either by special plea or answer, or it cannot be relied on at the hearing.

5. It is error to decree the sale of real estate by a special commissioner in a cause, without specifying therein the terms upon which the sale is to be made.

(Syllabus by the Court.)

Appeal from Circuit Court, Upshur County; W. G. Bennett, Judge.

Action by the Washington National Building & Loan Association against G. D. Westfall and others. Decree for defendants, and plaintiff appeals. Reversed.

Forrest W. Brown and G. M. Fleming, for appellant. Young & McWhorter and C. C. Higginbotham, for appellees.

McWHORTER, J. Granville D. Westfall subscribed for eight shares of stock in the Washington National Building & Loan Association, of Washington, D. C. The association advanced to him a loan of \$800, the par value of said eight shares of stock, in redemption thereof. Westfall executed his bond, dated July 30, 1894, payable to said association, in the sum of \$1,600, with the following conditions: "The conditions of the above obligations are such that if the above-bound Granville D. Westfall shall well and truly, in the manner prescribed by its charter and by-laws, pay the said association monthly installments of twelve and ⁰⁰/₁₀₀ dollars each from the first day of August, 1894, until such time as the shares of stock hereinafter referred to shall be fully paid up—but no payments on account of stock nor premiums shall be exacted for a longer period than 84 months from the date hereof; but, should said shares of stock fail to mature on or before the expiration of said period of 84 months, then 6 per cent. per annum on the original amount loaned shall continue and be paid in monthly installments until said stock shall mature, when all payments shall cease and the mortgage be canceled—in consideration of the sum of eight hundred (800) dollars advanced to him by said association for the redemption of eight (8) shares of stock thereof, and shall, in accordance with said charter and by-laws, during the time, pay all fines and charges, and shall faithfully perform all other obligations to said association as provided and imposed by and in pursuance of said charter and by-laws, and any amendment thereto, then this obligation to be void; otherwise, to remain in full force and virtue. The said Granville D. Westfall hereby waives the benefit of his homestead exemption of this bond, and hereby agrees that, if suit is brought on this bond or to foreclose the mortgage given to secure the same, then upon such suit or foreclosure the same to be taxed as costs. G. D. Westfall. [L. S.]" He made the following assignment to the said association of his stock: "For value received, I hereby assign to the Washington National Building & Loan Association, of Washington, D. C., eight (8) shares of stock therein, this day redeemed at one hundred dollars per share. Witness my hand this 30th day of July, 1894. G. D. Westfall. [L. S.]" On the same day he conveyed to Josiah O. Stoddard and Addison G. Du Bois, trustees of the said association, a tract of 11¼ acres of land in Upshur county, "in trust for the following uses and purposes: First, that the party of the first part may retain quiet possession of said property so long as there shall be no default on the part of the said Granville D. Westfall in performing the condition of the said bond or complying with the covenants herein contained. Second, that upon

such default the said trustees, or either of them, or the survivor of them, thereunto required by the board of directors of said association, shall sell the property hereby conveyed, or so much thereof as may be necessary, at public auction on the premises, after having given ten days' notice of the time and place of sale in some newspaper published in Upshur county, W. Va., and upon the following terms: For cash as to so much of the purchase money as may be necessary to pay the expenses of executing this trust and the balance that shall be ascertained by the said board of directors to be due on said bond, the whole amount of which it is agreed shall, upon such default, at once become due and payable, together with all fines, charges, or other money at that time due said association on account of the debt evidenced by the bond hereby secured; and as to the residue of the purchase money upon such terms as to cash or credit as the trustees may determine—the credit payments, if any, to be secured by lien on the property, and, after paying the debt secured by said bond, the balance, if any, shall be paid to the said Granville D. Westfall, his heirs, personal representatives, or assigns. It is further covenanted between the parties hereto that the said grantors will, so long as the bond hereby secured remain unpaid, keep the buildings on said property hereby conveyed insured for the benefit of the beneficiary hereunder in some solvent insurance company for at least the sum of eight hundred (800) dollars. And the said grantors further covenant that, should they fail so to do, the said association or its assigns, or the trustees in this deed, shall be at liberty to insure the said buildings for at least the sum aforesaid, and all sums of money so paid shall be deemed and treated as secured by this deed as a part of the costs and expenses of this trust, and be paid out of the proceeds of sale of said property, if not otherwise paid. The said party of the first part covenants that he has the right to convey the property aforesaid to the parties of the second part, that the same is free from incumbrance, that he will warrant generally the title hereto, and that the party of the first part will execute such further assurance thereof as may be requisite." This deed of trust was duly acknowledged and recorded.

The said Westfall having made default, the said building and loan association filed its bill in the circuit court of Upshur county against said G. D. Westfall, Annie L. Post and Josiah C. Stoddard and Addison G. Du Bois, trustees, alleging the loan to the said Westfall on the 30th day of July, 1894, on the said eight shares of stock, subscribed for and owned by him, and the execution of the bond and the said deed of trust, and the assignment of the said shares of stock to the company, so redeemed by it at \$100 a share, and alleging that there was a balance due September 30, 1898, of \$709.13, and, if payment should not be made by September 30, 1898,

26½ cents per day thereafter should be added to said balance to cover interest and premium; that after bringing said suit, and before the filing of its bill, there had been paid on said interest and premium, dues, and fines the sum of \$100; that on April 6, 1895, said Westfall conveyed said 1¼ acres of land to the defendant Annie L. Post, by deed of that date, with condition that she should pay the dues monthly to said association from said Westfall; that by dues it was intended in said deed that said Post should assume all of said Westfall's obligations to said association under said bond and deed of trust, and pay all of said dues, interest, and premiums monthly, and pay fines, if any were allowed to accrue, and pay taxes and insurance; that both said Westfall and said Post, by the latter's acceptance of said conveyance, were under obligations to pay plaintiff said interest, premiums, insurance, and fines, and that there had been default in such payment by both Westfall and Post, and under the terms of said bond and trust deed all of said loan had become due, and the lien of said trust deed was entitled to be enforced; that defendants Stoddard and Du Bois had failed and refused to execute said trust, for which reason and because of said conveyance to said plaintiff it was advised that it was proper to resort to a court of equity to have the trust enforced—and prayed that the said debt of \$709.13, as of the 30th day of September, 1898, with a credit of \$100 as of the — day of December, 1898, with addition of 26½ cents per day from the 30th of September, 1898, until the date of said credit, be decreed against said Westfall and said Post, and that said real estate be sold, and the proceeds applied to the payment of said debt, and that it might recover its costs, and for general relief.

The defendant G. D. Westfall suggested that plaintiff had not filed any of the exhibits mentioned in its bill, and prayed a rule against the plaintiff requiring it to file its exhibits; and upon such suggestion and motion of the said defendant the court made an order requiring such exhibits to be filed with the bill by the next morning. The date of the order does not appear in the record; but, as the exhibits appear embodied in the bill as the record is made up, we take it that the order was complied with. There is copied into the record a paper purporting to be a demurrer on behalf of defendant G. D. Westfall; but the record does not show that it was filed, or even tendered for consideration, and no order or decree takes any notice of it. The demurrer is not relied upon, or even mentioned, in the brief of counsel for defendant, and, being no part of the record, we cannot consider it. *Park v. Petroleum Company*, 25 W. Va. 108.

The plaintiff filed an amended and supplemental bill, reiterating the allegations of the original bill in relation to the loan of the \$800 to Westfall and the execution of the bond and deed of trust, and the conveyance

of the real estate to the defendant Post, with condition that she pay to plaintiff the obligations of said Westfall under his bond and deed of trust; that said Westfall had again postponed and delayed the prosecution of said suit by promises to make settlement of the arrearages and costs, and carry on his loan and payments of interest thereon, and monthly premiums on stock in accordance with his original contract, but had utterly failed to do so; that it was informed by said G. D. Westfall that he had paid said Post all advancements that she had made on said land, and had paid all, or nearly all, interest, monthly premiums, and dues paid to the plaintiff under said loan, and had paid back to said Post any such premium, interest, and dues that she might have paid under said loan and said Westfall's conveyance to her of said real estate, and that he was entitled to have said land reconveyed to him, and was in fact the bona fide owner thereof as between him and said Post; that said Westfall was still delinquent and in arrears in the payment of interest, premium, dues, taxes, fines, and insurance, which he was to pay and keep paid under said deed of trust and bond filed with the original bill; that Post was likewise delinquent; and that plaintiff's entire debt, under the provisions of said loan, was then due and payable, and plaintiff was entitled to have a decree for the same, both against Post and Westfall, and declared a lien against said land superior to any rights of the said Post to the same—and filed a statement as an exhibit with said amended and supplemental bill, showing a balance due December 29, 1899, of \$697.53, and prayed for a decree for the satisfaction of the same as a lien on said property and for general relief.

Defendant Westfall filed his separate answer to said original and amended bills, admitting that he subscribed for the stock, and borrowed the \$800, and executed the bond and deed of trust to secure the said loan, and filed as an exhibit with his answer, showing payments made by him on said dues, interest, premium, and fines, which he claimed aggregated the sum of \$639.70, and that he paid to said association \$4.80 in addition thereto. Defendant further claimed that the association charged \$4 per month interest on said \$800, premiums \$4 per month, and dues \$4.80 per month, which interest, dues, and premiums should be applied on said debt; that on the 1st day of September, 1898, he only owed said association \$317.65, and that he had not owed said association any other debt since that time; that from the 1st day of September, 1898, he made default in the payment of the dues, interest, premiums, and fines, and had continued to do so from that time to the present; that under the terms of said deed of trust, if default should be made, the whole debt should become due and a mere interest-bearing fund; that he owed said association \$317.65, with interest from the 1st day of September, 1898. Respondent de-

nied that he had gained postponement and delay in the prosecution of the suit by promises to make settlement in the arrearages and costs, and carry on his loan and payment of the interest thereon and monthly premiums on stock in accordance with his original contract, but had failed to do so, and denied the allegation that he had asserted that he had paid Post all advancements as alleged in the bill, and that he was in fact the bona fide owner of the land, and entitled to have same conveyed to him.

A decree was entered upon the process on the original bill, and the amended bill taken for confessed and set for hearing, except as to G. D. Westfall, who filed his answer, and the cause was referred to one of the commissioners of the court to ascertain and report the present owner, legal or equitable, of the 11½ acres of land in the bills mentioned, the liens thereon, and the amounts and priorities, and to whom owing, and any other matters deemed pertinent by him or any of the parties. This decree is dated the 13th day of June, 1900. The commissioner filed his report, bearing date the 2d day of March, 1901, to which report the plaintiff filed the following exceptions: "The plaintiff excepts to the foregoing report: (1) Because the commissioner has applied all payments made by G. D. Westfall under his contract with plaintiff, by which the loan of \$800 was made to him, to interest at 6 per cent. and to the reduction of said loan as payments upon said principal, instead of allowing premium as agreed between the parties and monthly dues on stock; the true balance that should have been found in favor of plaintiff being \$670.40 as of the 30th of November, 1899, as shown on the paper 'A' with deposition of J. O. Stoddard. (2) Because he has made monthly application of such payments, when in fact, as shown by said Westfall's passbook, the payments were made principally at two or three times only, and in bulk of \$100, \$150, etc., at a time. (3) Because he has not allowed to plaintiff the 800 fines unpaid, or the \$10.80 already credited up to him out of the payment he has made. (4) Because he did not make statement of the calculation by which he arrived at the balance due, but at the request of plaintiff's attorney he (the said commissioner) has furnished said statement and pages of paper; and plaintiff asks that this calculation be held as a part of said report. March 2, 1901. G. M. Fleming, Atty. for Plaintiff."

The defendant G. D. Westfall by his counsel indorsed his objection to the said exceptions as follows: "G. D. Westfall says: That the first exception should not be sustained, because the plaintiff did not fix by its by-laws a minimum premium. See Code 1891, c. 54, § 26; Code 1899, c. 54, § 26; Gray v. B. & L. A. (W. Va.) 37 S. E. 535, 54 L. R. A. 217. That the second exception should not be sustained, because the commissioner applied the payments when made, and as to

the payments of \$100 and \$150 he applied them when made, and not as stated in said exception. As proof of this he reported as due \$423.90, as his calculation made on a basis of monthly applications makes us due only \$363.44. See statement of such calculation filed by commissioner at request of plaintiff marked 'Exhibit X. Y. Z.' Accompanied by a statement showing regular monthly charges of interest and monthly credits from August, 1894, starting with the sum of \$800 advanced, and closing with a total balance March 4, 1901, of \$363.40. "That the third exception should not be sustained because plaintiff is not entitled to said \$10.80 fines, and that the fourth exception should not be sustained because the commissioner is not required to file with his report his calculation. C. C. Higginbotham, Atty. for G. D. Westfall."

The court entered its final decree after these exceptions and statement by defendant Westfall, date of decree not given, as follows: "It appearing to the court that process in this cause has been duly served on the defendants, that the plaintiff's bill was filed at rules, was there taken for confessed and was by the plaintiff set for hearing at rules, and this cause coming on this day to be heard upon the bill, exhibits therewith, report of Commissioner W. G. D. Totten, with exceptions thereto by the plaintiff, which exceptions, being considered by the court, are overruled, and was argued by counsel for plaintiff, upon consideration thereof it is adjudged, ordered, and decreed that said report be confirmed. It is further adjudged, ordered, and decreed that G. D. Westfall do pay to the plaintiff the sum of \$425.86, with interest from this day and the costs of this suit, which debt and costs are a first lien on the 11¼ acres, with dwelling house thereon, situate on the Staunton & Parkersburg turnpike, in Upshur county, and conveyed by said G. D. Westfall to Josiah C. Stoddard and Addison G. Du Bois by deed of trust dated the 30th day of July, 1894, and shall be first paid out of the proceeds of its sale. It is further adjudged, ordered, and decreed that said G. D. Westfall pay to Franklin Davis Nursery Co. the sum of \$111.10, with like interest, and that the same is a second lien on said 11¼ acres of land, with dwelling house thereon. It is further adjudged, ordered, and decreed that, unless said debts and costs shall be paid within 60 days from this date, it shall be the duty of G. M. Fleming, who is hereby appointed a special commissioner for the purpose, to sell said parcel of land at the front door of the courthouse of Upshur county, on some court day for said county, at public auction, to the highest bidder, taking from the purchaser notes, with good security, bearing interest from the day of sale, and retaining the legal title as a further security until the purchase money is fully paid, after having advertised the time, terms, and place of sale of said real

estate, together with a general description thereof, by notice published once a week for four successive weeks in some newspaper published in said Upshur county." From such decree the plaintiff appealed.

The argument of counsel for the defendant and appellee starts out with this proposition: "All the points to be discussed in this case veer to the central question involved, viz., was the loan by appellant to G. D. Westfall usurious?" Has the question of usury been fairly raised in the cause? Section 6, c. 96, Code 1899, provides: "Any defendant may plead in general terms that the contract or assurance on which the action is brought was for the payment of interest at a greater rate than is allowed by law, to which plea the plaintiff shall reply generally, but may give in evidence upon the issue made up thereon any matter which could be given in evidence under a special replication." Webb on Usury, in section 405, p. 468, says: "The defense of usury must be pleaded, or it cannot be relied on at the hearing; and, where advantage is sought of usury in a foreclosure proceeding, it should be pleaded in the answer, and it cannot be properly exhibited in a cross-bill." In *Chambers v. Chalmers*, 4 Gill & J. 420, 23 Am. Dec. 572, it is held that "where a bill for the specific execution of a contract states a case which may or may not be usurious, according to the facts which really exist in the case, the statute of usury must be pleaded or relied upon in the answer, or it will not avail the defendant. The rule might be different if the bill stated a usurious contract, which no inference or intendment can help." 1 Beach, Modern Eq. Pr. § 349, says: "There can be no doubt that usury may be pleaded or relied upon in the answer, which must set out with precision and accuracy the particular facts and circumstances of the supposed usurious agreement, that the court may see that it was in violation of the statute. The terms of the usurious contract and the quantum of the usurious interest or premium must be specified, and distinctly and correctly set out"—and cases cited. The subject of pleading usury is fully discussed and many authorities cited in *Tyler on Usury*, pp. 458-463. The particularity and precision of the pleading of facts constituting usury is not required under our statute, as in most of the authorities cited; but "the defendant may plead in general terms that the contract or assurance on which the action is brought was for the payment of interest at a greater rate than is allowed by law, and this is sufficient in an answer to raise the question of usury in a court of equity." 1 Hogg's Eq. Proc. § 436, citing *Brakeley v. Tuttle*, 8 W. Va. 88, 131. Upon inspection of the answer defendant Westfall filed in this cause, it will be seen that he makes no specific allegation or averment of usury in the contract involved. He nowhere says that the plaintiff charged in said contract a greater rate of inter-

est than is allowed by law. He contents himself with merely stating the amount of interest, premium, and dues paid under such contract, which would indicate that he was merely describing the contract as a building and loan contract, and says that the payment of such interest, dues, and premiums should be applied on said debt of \$800, but gives no reason for any such application. He seems to have studiously avoided making any charge of usury against the plaintiff. He nowhere in his answer shows any reason why the contract is not a valid, honest building and loan contract, authorized by the statute. He says in his answer: "This defendant further says that under the terms of said deed of trust, if default should be made, the whole debt should become due and a mere interest-bearing fund. The defendant further says that he only owes said association \$317.65, with interest from the 1st day of September, 1898." He does not show, nor attempt to show, in his answer, why or how he owes the association only the sum specified. "The plea of usury (apart from fraud) must conform to the statute, where, as a defense, it has been made the subject of special litigation. But where property is sold on a usurious mortgage, and the proceeds are in court for distribution, the defense of usury need not be raised by special plea." *End.* on Building Ass'ns, § 378. And, as has been cited in *Webb on Usury*, "the defense of usury must be pleaded, or it cannot be relied on at the hearing" in a suit brought directly against the defendant by the creditor upon the alleged usurious claim; yet in a creditors' suit against a debtor, where creditors not named as parties in a suit, but are brought in by being convened to make their claims before a commissioner against the defendant, the latter may raise the question of usury by exceptions to the commissioner's report. *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1. See, also, *Webb on Usury*, p. 470, § 407, where it is said: "It may be relied upon before a commissioner; and if the commissioner audits a usurious debt against a debtor, and he has not raised such defense in any other mode in the suit, he must in a written exception to the report, signed by the counsel or himself, clearly and distinctly except on the ground that in the report interest has been charged against him in excess of what the law allows"—citing *Barbour v. Tompkins*. The defendant Westfall, having filed his answer and failed to make any defense of usury, could not raise the question of usury in the vague and uncertain manner it is supposed to be raised in his written reply to the exceptions taken to the commissioner's report by the plaintiff. In permitting the cause to be finally heard upon his answer herein, he failed to make the defense of usury, and waived his right to make such defense; and, the question not having been raised by the pleadings in the cause, it was error for the commissioner to base his calcu-

lation of interest on the theory that the debt of \$800 was a straight loan at 6 per cent. interest, and the exceptions taken by the plaintiff to the commissioner's report should have been sustained, and a decree entered in favor of the plaintiff for the amount due to it at the time of the entering of the decree according to the terms of the contract sued upon. The decree is further erroneous in that it does not direct the terms of the sale to be made, whether for cash or on credit, and terms, as provided in section 1, c. 132, Code 1899.

For the reasons stated, the exceptions of the plaintiff to the commissioner's report are sustained, the decree of the circuit court is reversed and annulled, and the cause remanded to the circuit court of Upshur county, with directions to ascertain the true amount due to the plaintiff on account of the said loan according to the terms and provisions of the bond and deed of trust securing the same, and to enter a decree therefor, together with provision for the sale of the 11¼ acres of land to satisfy the decree, in case it shall not be paid within the time to be fixed by the court for the payment thereof.

(55 W. Va. 317)

FAULKNER et al. v. GRANTHAM et al.
(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

EXPRESS TRUST—INSUFFICIENT EVIDENCE—APPEAL—REVIEW.

1. To sustain an express trust by oral testimony against an absolute deed, after a lapse of over 30 years, the grantee being dead, and having exercised complete control over the property during his lifetime, the evidence must be full, clear, and explicit, and not open to grave doubts, contradictions, and circumstances of suspicion.

2. When the circuit court has examined the testimony, and found it insufficient to sustain an alleged verbal trust set up after a long lapse of time and the decease of the alleged trustee, this court will not interfere with such finding, unless it is plainly contrary to the competent evidence.

(Syllabus by the Court.)

Appeal from Circuit Court, Berkeley County; Forrest W. Brown, Special Judge.

Suit by E. Boyd Faulkner and others against Melvina Grantham and others. Decree for plaintiffs, and defendant Josephine O'Brien appeals. Affirmed.

D. B. Lucas, Marshall McCormick, and Flick, Westenhaver & Noll, for appellants. Faulkner, Walker & Woods, Ingles & Nadenbousch, and H. H. Emmert, for appellees.

DENT, J. Josephine O'Brien complains of a decree of the circuit court of Berkeley county of the 5th day of March, 1903, dismissing her petition and amended petition filed in the chancery cause of M. S. Grantham's Adm'r v. M. S. Grantham's Heirs, etc. Appellant filed her petitions in said cause, claiming that the property known as "Grantham Hall," situated in Martinsburg, said county, was held in trust

by M. S. Grantham, deceased; that the same had been purchased and paid for by her father, who conveyed and had the same conveyed to his uncle, M. S. Grantham, to be held in trust for her; that the said M. S. Grantham always acknowledged the trust, and accounted for the rents until within a few years of his death; and she asked that the trust be sustained, and a deed be executed conveying the legal title to her. The deed from the commissioners of the court to M. S. Grantham bears date the 10th day of January, 1855, the deed from Joseph W. Grantham to M. S. Grantham for the former's interest in the property the 19th day of January, 1856. M. S. Grantham died in July, 1890. A period of over 34 years has passed since the making of the last of the two deeds, and now, against the same, the appellant attempts to set up a verbal trust, and sustain the same by oral testimony, as she has not during all these 34 years any kind of writing to show the existence of such trust, nor does she furnish any sufficient legal excuse for not having asserted such trust during the lifetime of her alleged trustee. This case is governed by the principles adjudicated in the case of *Troll v. Carter*, 15 W. Va. 567, where it is held that equity will never enforce "a parol trust where a great lapse of time has intervened since the absolute deed was executed, and where the grantee has during such time acted as the absolute owner of the property, unless the laches of those claiming to be cestuis que trust is satisfactorily explained" by evidence full, clear, and unquestionable. Also, on page 582: "All the authorities agree that an equitable claim of any sort, and especially one which depends on parol testimony only, will not be recognized after great lapse of time, during which time it has been ignored, where no satisfactory reason can be assigned for not setting up the claim sooner. And that is more especially true when the equitable claim is of a character which required clear and explicit evidence to sustain it; such lapse of time itself rendering the evidence which might otherwise have been regarded as sufficiently clear and explicit unsatisfactory." A careful examination of the evidence in this case fails to show any good legal reason why this trust, if it existed, was not asserted during the lifetime of M. S. Grantham. The petitioner had 34 years in which to do so, and yet the only reason for not doing so is the confidence she had in her trustee, who died without having in any writing of any description recognized such trust. Yet he wrote many letters—10 to the alleged creator of the trust—and in none of which, even in the vaguest manner, did he recognize or admit such trust. On this question of lapse of time and insufficient excuse for delay this case could well be determined for the appellees. "A court of equity, which is never active in relief of stale demands, will always refuse relief where the party has slept upon his

right and acquiesced for a great length of time. Nothing can call into activity this court by conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing." *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514. The evidence, taken as a whole, without regard to the competency of the witnesses, is neither full, clear, nor explicit to establish the trust claimed. There is no evidence showing an accounting from year to year of the rents of the trust property, and what little evidence of accounting there is tends rather to show a secret trust in favor of Joseph W. Grantham than a trust in favor of the daughter. The only positive evidence are the various pretended verbal acknowledgments of M. S. Grantham made to the witnesses, which are rendered insufficient and unsatisfactory by reason of his death and the relationship existing between the witnesses. The deeds, the will (which was refused probate, and of which the principal witness, Joseph W. Grantham, the creator of the supposed trust and father of the appellant, had knowledge before the death of M. S. Grantham), and the numerous letters, from what they fail to contain, are all strongly contradictory to the alleged verbal statements made by the deceased. Besides, the evidence of the appellant as to any transactions or communications had with the deceased is incompetent. Also the evidence of Joseph W. Grantham is equally incompetent. He was a party to the suit, and the creator of the trust, or the party through whom the appellant claims. Section 23, c. 130, Code 1899, provides that: "No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness with regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such person or the assignee or committee of such insane person or lunatic." The appellant derives her whole interest from and through her father, Joseph W. Grantham; hence he is incompetent to testify, notwithstanding he may have an adverse interest, as to any transaction or communication he may have had with the decedent in establishing this alleged trust in favor of his daughter. Joseph W. Grantham being incompetent, so is his wife, H. C. Grantham, mother of the appellant. *Kilgore's Adm'r v. Hanley*, 27 W. Va. 451. These three witnesses, who are the principal witnesses, and without whose testimony the case is of but little weight, are entirely incompetent as to any transactions or communications had personally with the deceased, unless the opposing parties testified to identically the same communication or transaction. With the incompetent evidence

In, the case made out by the appellant is full of so many doubts, preplexities, and contradictions that this court would not feel justified in disturbing the finding of the circuit court; and, with the incompetent evidence out, the grounds for the interference of a court of equity are without foundation. If the property is appellant's, as she claims, she has lost it by her own negligence in failing to make her claim good during the 34 years of M. S. Grantham's life, or procuring from him some transfer or acknowledgment thereof.

This case, on its merits, being plainly insufficient to sustain the trust set up by the appellant, it is unnecessary to consider the other technical grounds of error alleged. The decree is therefore affirmed.

(55 W. Va. 325)

ROWAN et al. v. CHENOWETH et al.
(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

RES JUDICATA—PAYMENTS—APPLICATION.

1. Reversal of a decree is not *res judicata* as to any matters not necessarily passed on in reaching a decree of reversal, or not passed on in the opinion.

2. As a general rule, payments, when not applied by the parties, are applied by the law to the oldest of several debts.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by S. A. Rowan, administrator, and others, against E. B. Chenoweth and others. Decree for plaintiffs, and defendants Yokum and Leonard appeal. Modified.

C. W. Dailey and Strader & Strader, for appellants. W. B. Maxwell and Harding & Harding, for appellees.

BRANNON, J. As will appear from a former decision in this case in 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796, Chenoweth was sheriff of Randolph county, and Leonard was his deputy, and Chenoweth had a demand against Leonard for taxes collected by Leonard for which he failed to account, and for some duebills given by Leonard for different sums to Chenoweth; and Leonard had a demand against Chenoweth for half of the fees and emoluments of the office, going to Leonard under the agreement between them, and Leonard also held certain receipts for different sums of money received by Chenoweth from Leonard. In the former decision this court held that the demand of Leonard for half the fees of the office was barred by the statute of limitations, and that the demand of Chenoweth against Leonard for the taxes collected by Leonard was likewise barred. When the case was remanded to the circuit court from this court, it was recommended to a commissioner to restate the account between the parties. Leonard in the meantime had died. The commissioner made

a statement, by which he charged against Leonard the duebills given by him to Chenoweth, and did not charge to Leonard's credit against Chenoweth the said receipts given by Chenoweth to Leonard for said moneys received from Leonard by Chenoweth. By this statement the said receipts were applied on the barred demand of Chenoweth against Leonard for taxes collected by Leonard. The commissioner also made another statement by which he credited to Leonard the moneys mentioned in said receipts given by Chenoweth, and thus applied those receipts on the duebills given by Leonard to Chenoweth. By the one statement Leonard was found indebted to Chenoweth \$1,854.06, and by the other report Chenoweth was found indebted to Leonard \$567.71. The court adopted by its decree the finding of the statement which gave Chenoweth against Leonard \$1,854.06. The receipts given by Chenoweth to Leonard are four in number. They are alike in language. The following is a sample of them: "Received June 13, 1888, of G. W. Leonard, deputy for Z. T. Chenoweth, three hundred and twenty-five dollars, which I am to account to him for in the collection of taxes in the several districts of Randolph county for the year 1887. Z. T. Chenoweth, S. R. C." One of those orders states that the payment was made "in orders." There is a fifth paper, reading as follows: "Due George W. Leonard, deputy for Z. T. Chenoweth, sheriff of Randolph county, one hundred and forty three dollars and seventy five cents, it being amount of orders received from him this 15th day of July, 1889. Z. T. Chenoweth, S. R. C." From the decree Leonard's administrators appeal.

They complain of the action of the court in adopting that one of the two commissioner's statements submitted to the court for its decision which denies to Leonard credit for the said receipts on the theory that they were applicable on the taxes collected by Leonard as payments on the demand based on such collected taxes. Leonard's side claims that the moneys specified in said receipts should not be applied as payments on the barred demand of Chenoweth against Leonard for taxes collected by Leonard, but that those receipts should be treated as evidences of indebtedness in favor of Leonard, and credited to Leonard as such against Chenoweth. The Leonard side of the case says, first, that the decision of this court is *res judicata* to fix and settle the allowance to Leonard of the moneys specified in the said receipts, and that whether they should be allowed Leonard as evidences of debt against Chenoweth is not an open question, but is foreclosed by the former decision of this court, and that those receipts must be treated, not as payments on the barred taxes collected by Leonard, but as debts and set-offs against the duebills of Chenoweth against Leonard; and the Leonard side says, secondly, that, if even the former decision is not conclusive to show that said receipts must be allowed as debts against

Chenoweth, then those receipts on their face show that they are not payments on the demand against Leonard for the barred taxes collected by him, but are evidences of debt for Leonard against Chenoweth. First. Is the decision of this court conclusive to show that those receipts are to be allowed as evidences of debt for Leonard against Chenoweth, and are not to be treated as payments on the barred taxes due from Leonard to Chenoweth? The Leonard side argues that this court decided that Leonard's claim against Chenoweth for half the fees of office was barred, and could not be allowed, and that from this it follows that the receipts were allowed to Leonard; that the commissioner, in the report involved in the case when it was formerly in this court, had allowed those receipts to Leonard's credit; and that whilst the circuit court allowed Chenoweth the taxes collected by Leonard, and credited those receipts to Leonard, this court reversed the decree because of the allowance of said taxes to Chenoweth, it logically left the receipts untouched, left them as allowances in favor of Leonard, and did not reject those receipts, but only rejected Leonard's claim for half the fees of office. In other words, it rejected one of Leonard's claims, but not the other. Now, the allowance by the commissioner of those receipts to Leonard's credit was not excepted to by Chenoweth, and was not in issue before this court. No exception put them in controversy. This court did not pass on those receipts. It held Leonard's account against Chenoweth for half the fees of office barred, and Chenoweth's demand against Leonard for taxes collected barred, but did not pass on those receipts. It simply reversed the decree in toto, and remanded the case for a new account. A reversal is not *res judicata* as to matters on which the opinion does not pass, unless such matters were necessarily passed upon in reaching the decree of reversal. Reversal as to these receipts was not necessary to reach a reversal. *Beckwith v. Thompson*, 18 W. Va. 103. If this court had only modified the decree of the circuit court so far as it allowed Leonard his half of the fees of office and allowed Chenoweth the taxes collected by Leonard, and in those respects reversed the decree, but in other respects affirmed it, or had simply reversed in those respects, then it might be said that those receipts were involved in the decision, and were to be allowed Leonard. But this, even, is questionable. A total reversal wiped out the decree, and left the case open except as to the items expressly passed on in the opinion. True, we did not hold those receipts barred; neither did we hold them debts. The circuit court, by confirming the report, did allow them to Leonard, but that confirmation was reversed. The opinion does not say whether those receipts were good or bad, and simply because they were not among the items held to be barred did not imply that they should be allowed in a fur-

ther account. It is only by inference that it is sought to make the decision operate as allowance of those receipts, and the law says that a decision cannot be made to operate as *res judicata* by mere uncertain argument or inference. *Bigelow on Estop.* 152. Indeed, it may be said that the inference is the other way. Chenoweth's claim for taxes collected was allowed against Leonard by the report and decree, and the receipts were allowed as payments thereon, and, as such taxes were disallowed by the decree of this court, it would rather follow that so, too, the receipts were disallowed. The inference might be rather that the receipts were rejected than that they were allowed, because they were only allowed by the circuit court as payments on the demand against Leonard for taxes, and, as that demand was held barred, the payments would go with them. In short, the inference would be that the decree below impressed them with the character of payments on taxes, and hence the decision fixes them as payments on those taxes. If there is any *res judicata*, it is rather that they must be held as payments on those taxes, not as evidence of debt against Chenoweth. But I do not assert that the decree is final to stamp those receipts as payments. It is only an inference. They might be set-offs. But the decree is not *res judicata* to stamp them as evidences of debt.

In the next place, are those receipts in themselves, regardless of our former decision, payments, or are they evidences of debt? They contain, to start with, the word "received," a word so universally used in receipts for payments that it stamps the paper as evidence of a payment, not an obligation to pay. If they were intended as notes, why were they not made notes or duebills? And why do they not contain some promises of payment? And then they are official receipts between sheriff and his deputy, and that alone tell us that they are payments of some demand of the sheriff against his deputy, if they did not specify what demand it is. We know from the record that there was then existing a larger claim than the receipts against the deputy in favor of the sheriff for taxes, and we would naturally apply the moneys on that demand, if the receipts showed no more than the receipts of such money. But then the receipts negative that they are evidences of debt, because they specify that the moneys were to go as payments for liability "in the collection of taxes." They bind Chenoweth "to account to him for in the collection of taxes in the several districts of Randolph county." Why shall we not apply them as payments on those taxes, when we know that Leonard was at the time indebted to Chenoweth for taxes collected? Under all these circumstances what other constructions can be given these receipts? When those payments were made, the demand for the taxes was not barred, and we do not have the question

how payments shall be applied when part of the demand is barred and part not. When the parties make no applications of payments, the law applies them to the oldest of several debts. *Genin v. Ingersoll*, 11 W. Va. 549. Leonard owed Chenoweth the taxes and duebills, the tax demand being the older. But we do not have to rely on that principle, for the reasons that the receipts themselves say on what particular demand they apply. Therefore, we hold that those receipts go as payments upon Chenoweth's demand for taxes collected by Leonard, and cannot be allowed as debts against Chenoweth. I should have said, though it is not important, that the word "orders" in two of the receipts does not change their import. They were orders on the sheriff, lifted by Leonard as deputy, and turned over by Leonard to Chenoweth to go to his credit in settlement with the county or districts. They were money.

The Chenoweth side excepts to the computation of interest on the duebills given by Leonard to Chenoweth. The commissioner's statement combined the principal of all the duebills into a lump sum, and deducted from it a store account of \$80.06, and on the balance gave interest from a date not given to October 10, 1902, the date of his report, whilst the duebills bore interest from different dates, and thus made the interest materially less than the duebills call for. This is cross-assigned as error for this. It was error to decree the sum so found. The sum which should have been decreed is \$1,843.14, instead of \$1,654.06. Chenoweth's representatives also cross-assign error in the allowance of a store account to Leonard of \$80.06, claiming that it is barred by limitation; but there is no exception for this.

Therefore it is adjudged, ordered, and decreed that the decree of the circuit court of Randolph county pronounced on the 15th day of May, 1903, be modified so that there be decreed in favor of the estate of Chenoweth \$1,843.14, with interest from the 10th day of October, 1902, and that H. Yokum and Beulah W. Leonard do pay out of the assets in their hands as administrators of George W. Leonard, deceased, the sum \$1,843.14, with interest from the 15th day of May, 1903, and that the estate of said Leonard is liable therefor, and do pay the same; and that the said decree of the circuit court, as modified by this decree, be affirmed.

(55 W. Va. 236)

VAN WINKLE v. CONTINENTAL FIRE INS. CO.

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

ARBITRATION—VACATING AWARD—REFUSAL TO HEAR EVIDENCE—MISTAKE.

1. In a suit to set aside an award because the arbitrators refused to receive or hear evidence, and it appears from the record that

plaintiff had full notice of the meetings of the arbitrators, and was called upon several times by one of the arbitrators during the work of the arbitrators, to whom plaintiff furnished some bills to be used in evidence, and said he had further evidence which he desired to present, but failed to appear before the arbitrators or offer any further evidence, the arbitrators cannot be held to have refused to hear or consider his evidence.

2. While it is a general rule that, if appraisers refuse to hear or consider material evidence, it will be fatal to the award, it is also true that evidence must be offered before it can be rejected.

3. Where the plaintiff claimed to have papers material to his interests to present as evidence before the arbitrators, but failed to appear or present them, it cannot be said that the arbitrators rejected material evidence.

4. Prior service of an arbitrator in a similar capacity does not render him incompetent, or invalidate an award in which he joined, in the absence of evidence showing that he was prejudiced.

5. Mistake of judgment in arbitrators is not sufficient evidence of improper conduct on their part to justify the setting aside of their award by a court of equity.

6. An arbitrator cannot contradict an award which he has signed.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County;
L. N. Tavenner, Judge.

Bill by W. W. Van Winkle against the Continental Fire Insurance Company. Decree for plaintiff, and defendant appeals. Reversed.

Harry P. Camden, for appellant. Van Winkle & Ambler and Mason G. Ambler, for appellee.

McWHORTER, J. W. W. Van Winkle was the owner of the one undivided half interest in a building in the city of Parkersburg known as the "Academy of Music," upon which interest he had two policies of fire insurance, of \$2,000 each—one in the Continental Insurance Company, and the other in the Westchester Fire Insurance Company. In December, 1895, while the said policies of insurance were in force, the said building was partially destroyed by fire. Each of the policies contained a clause by which it was agreed that, in the event of disagreement in the amount of loss, the same should be ascertained by two competent and disinterested appraisers; the insured and the company each selecting one, and the two so chosen to select a competent and disinterested umpire; the appraisers together then to estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, were to submit their differences to the umpire. The award in writing of any two to determine the amount of such loss. The insured and the said companies, failing to agree upon the amount of loss, entered into the following agreement in writing for submission of their differences to arbitration:

"This agreement, made and entered into by and between W. W. Van Winkle of the

¶ 5. See Arbitration and Award, vol. 4, Cent. Dig. § 314.

First part, and the Insurance Company or Companies, whose name or names are signed hereto, of the second part, each for itself and not jointly.

"Witnesseth, That Stephen Davidson and George Hodgden shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of December 9, 1895, as specified below. Provided, That the said appraisers shall first select a competent and disinterested umpire who shall act with them in matters of difference only. The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss.

"It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of sound value and loss and damage only, to the property hereinafter described, and shall not determine, waive, or invalidate any other right or rights of either party to this agreement.

"The property on which the sound value and the loss or damage is to be determined is as follows, to wit:

"W. W. Van Winkle. On his undivided one-half interest in the two and three story brick, slate and metal roof building, known as Academy of Music occupied on first floor for mercantile purposes; one room on third floor occupied by tenants as private club or lodge room; one room on second floor as clubroom by tenants residue of building occupied by owners as public hall, dressing rooms, ticket office and manager's office for same situate on the northwest side of Juliana Street, between Fifth and Sixth Streets in Parkersburg, West Va.

"It is further expressly understood and agreed that in determining the sound value and the loss or damage upon the property, hereinbefore mentioned, the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location or otherwise, a proper deduction shall be made therefor.

"In Witness Whereof, we have hereunto set our hands, at Parkersburg, W. Va., this 3d day of January, 1896. W. W. Van Winkle. S. T. Carter for Westchester Fire Insurance Co. of New York. E. E. Cole for Continental Insurance Co., of New York."

The said appraisers mentioned in the agreement were duly sworn on the 6th day of January, 1896, to "act with strict impartiality in making an appraisement and estimate of the sound value and the loss and damages upon the property hereinbefore mentioned in accordance with the foregoing appointment, and that we will make a true, just, and conscientious award of the same according to the best of our knowledge, skill, and judgment. We are not related to the assured, either as

creditor or otherwise, and are not interested in said property, or the insurance thereon. [Signed] Stephen Davidson, George Hodgden, Appraisers." The said appraisers then selected as umpire M. F. Gelsey, of Wheeling, to settle matters of difference between them in said appraisement. On the 14th of January, 1896, at the request of Appraiser Davidson, and with the consent of George Hodgden, C. T. Hickman, of Clarksburg, W. Va., was substituted for said Gelsey as umpire; and on the 15th day of January said Hickman accepted the appointment of umpire, and took the oath to act with strict impartiality in all matters of difference only that should be submitted to him in connection with his appointment, and that he would give a true, just, and conscientious award, according to the best of his knowledge, skill, and judgment, and that he was not related to any of the parties to the agreement, nor interested, as a creditor or otherwise, in the property or insurance. After having discharged their duties under said agreement and appointment the said appraisers and umpire made the following award:

"To the Parties Interested: We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value to be twelve thousand dollars, and the loss and damage as a whole to be six thousand twenty-nine and $\frac{4}{100}$ dollars. Witness our hands this 15th day of January, 1896. Stephen Davidson, Geo. Hodgden, Appraisers. C. L. Hickman, Umpire."

At the June rules, 1896, W. W. Van Winkle filed in the clerk's office of the circuit court of Wood county his bill in chancery against the said insurance companies, George Hodgden, Stephen Davidson, and C. L. Hickman, charging that the said award was void and should be set aside by reason of misconduct of the appraisers, and by reason of mistakes set forth in the bill, because of miscalculations therein and omissions of property that should have been included, by calculations of short quantities when true quantities should have been inserted, for unfairness and injustice, and praying that, if the court could not revise the award, it should be set aside and rendered null and void, and that the court would decree plaintiff entitled to the full amount of the policies, and that the court decree the \$2,000 against each of said companies, with interest from the 2d day of March, 1896, and that the said several parties mentioned be made parties to the bill, and be required to answer the same under oath, and for general relief.

The said defendant companies, on the 20th of July, filed their joint demurrer to the plaintiff's bill, in which the plaintiff joined, and afterwards, on the 8th of August, 1896, the demurrer was overruled by the court, and leave granted defendants to file their answer, and on the 7th day of September the

said defendant companies filed their joint and separate answer, in which they denied the material allegations of the bill. Depositions were taken and filed in the cause, and on the 5th day of February, 1903, the cause was heard on the process duly executed, and the orders and proceedings had in the cause, the said answer and general replication, and the bill taken for confessed, and set for hearing at the rules as to the other defendants, except Hodgden, and upon the depositions taken on behalf of the parties respectively, on the orders and decrees theretofore made and the papers formerly read; and the court, being of opinion that the award complained of in plaintiff's bill was unfair, unjust, and improper, and that the same should be set aside as a fraud on the rights of plaintiff, decreed that the award dated the 15th of January, and purporting to award to plaintiff the sum of \$3,010.42, be vacated, annulled, and set aside, and held as null and void, and decreed that each of said insurance companies pay to the plaintiff \$2,825, being the amount of \$2,000 with interest thereon from the 2d day of March, 1896, until the date of the decree, with interest on each of said sums from the date of the decree until paid, and awarded execution against each of said defendant companies for the amounts, respectively; each execution to include one-half the costs of the decree. From which decree the defendant companies appealed.

The first assignment of error is the overruling of the demurrer to plaintiff's bill. The court is of opinion that the allegations of the bill are sufficient, and that the demurrer was properly overruled; and, in view of the circumstances and facts in the case, the court deems it unnecessary to discuss the demurrer. Appellants say the decree is contrary to the law and the evidence in the case, and that, if the evidence shows any error whatever, in the award, it was a mere error of judgment, without fraud or mutual mistake, and such error is not sufficient to overthrow the award; that the decree erroneously substituted the judgment of Stephen Davidson and H. M. Patton, an architect, for the judgment of the said Stephen Davidson, George Hodgden, and O. T. Hickman, acting as sworn appraisers and umpire, respectively. "This is simply to overthrow an award of appraisers duly selected by both parties, and sworn to impartially perform their duties, because an award of two individuals, of ex parte selection, and not sworn, is inconsistent or in conflict with it"—and that, if the award of the appraisers should be set aside for any good reason shown, there is no evidence on which to predicate a decree for the full amount of the policies in each company, and that it was error to enter such decree.

The principal grounds relied on by the plaintiff's counsel in his brief, as well as oral argument for setting aside the award, is the want of notice of the meetings of the

appraisers, and an opportunity to be present and present his evidence. There is no allegation in the bill, nor complaint therein, that he had no notice of such meeting. There is an allegation in the bill that plaintiff "was not called upon, nor was he present, although he had expressed a desire to Mr. Davidson to present papers, and to offer evidence as to certain facts, as before stated." He further alleges "that he was not present at any of the sessions of the said appraisers, nor when they were holding their sessions with the so-called or supposed umpire; that he had requested, through Stephen Davidson, one of the appraisers, that, inasmuch as the entire inside of the greater and most valuable portion of the building had burned out, and that the facts and circumstances connected therewith, as to material, construction, cost and condition, was a matter of evidence, and could not be determined, nor seen nor known, except from evidence as to what existed there before the fire, and which had been entirely consumed, inclusive of the roof down to the second and first floors, that, before the arbitrators concluded, your orator would like to present bills, accounts, plans, specifications, and other evidence, if necessary, to inform the appraisers of the character, material, and quality of the construction, and the property that was consumed in said fire, and being a part and parcel of said building; and the said Davidson, who had made out the detail statement of loss which accompanied said proofs of loss, and which fact was known to said companies before the agreement was made, did come to your orator and get some accounts, but very few, but, notwithstanding he took such accounts, your orator is informed and believes that the said George Hodgden refused to consider the same, or to be informed or advised by what they contained, and also the said umpire, as your orator is informed and believes, refused to consider them, and also refused to hear any evidence of any kind on the part of your orator, claiming that this was an appraisal, in which it was not necessary to hear evidence, but they were to form their opinion independent thereof, from a view of the premises, for which your orator claims they could, at most, merely theorize and speculate as to many parts and portions of the building, construction, and decoration, and other details, where the subject itself had been entirely consumed by fire." Stephen Davidson was the builder who made out the proof of loss for the plaintiff after the fire, and was chosen by plaintiff as one of the appraisers, and who also had suggested the name of O. L. Hickman for umpire, to be substituted for Mr. Gelsey, of Wheeling. Mr. Davidson, a witness for plaintiff, testifies that the appraisers had the plans and specifications, which he says "were very explicit and plain, by elevation and floor plans and sections and cross-sections, so that they amply showed every part of the building." He stated that

at two or three times he got bills from the plaintiff; that he had the bills for decorations, painting, and some lumber bills; they were not all that plaintiff said he had; that the plaintiff said he had other papers that he desired to present as evidence showing the entire construction of the building in detail; that witness presented plaintiff's request to the appraisers, and told them that he wanted to be heard before the appraisalment was closed. Although plaintiff knew of the meetings, and that the appraisers were in session, and he presented, through Mr. Davidson, one of the appraisers, some papers and bills, yet he did not present himself or make known to them what particular evidence he desired to present. Plaintiff relies very strongly on the case of *Coons v. Coons* (Va.) 28 S. E. 885, 64 Am. St. Rep. 804. That was a case where it was specifically alleged that the umpire or third arbitrator, without giving any notice to plaintiff, and without his knowledge or consent and without hearing any evidence, made up his award solely and exclusively upon statements the two arbitrators made in the absence and without the knowledge of the plaintiff. This cannot apply to the case at bar, when there is no complaint in the bill whatever for want of notice of any of the meetings of the arbitrators, with or without the presence of the umpire. It appears that the proofs of loss were made up in the first instance for the plaintiff by Davidson from the plans and specifications of the building, and the same which the arbitrators had before them in making up their award. Appellee also relies upon the case of *McCormick v. Blackford*, 4 Grat. 133. That was a case where the arbitrators had adjourned to enable the parties to take the testimony of a particular witness. Before they were to meet again, one of the parties wrote to one of the arbitrators, requesting them to meet at a time specified; stating that he wished to be present, and that he had papers which would throw light upon the subject. The deposition of the witness for whose testimony the adjournment was had having been taken, the arbitrators, at the request of one of the parties, met, and made their award in the absence of the party who had written expressing a wish to be present, and without any notice to him, and before the time he had specified. This was held to be misbehavior in the arbitrators. That could hardly be authority in this case, where the party had full knowledge of the meetings, and did not ask to be present, nor did he ask to present any particular or specific evidence, which he had an opportunity to do if he had seen proper to be present at the meeting of the arbitrators. So in the case of *Halstead v. Seaman*, 82 N. Y. 27, 37 Am. Rep. 536. In that case the parties entered into an agreement for an arbitration to be "conducted and decided upon the principle of fair and honorable dealing between man

and man." On the hearing the parties presented written statements, and were heard. Plaintiff, on the second and third meetings of the arbitrators, offered to produce witnesses Sheldon and Brown to contradict the written statements made by the opposite party; but the majority of the arbitrators declined to allow it, on the ground that it was prohibited by the submission. The lower court sustained the award. See 52 How. Prac. 415. But the same was reversed by the Court of Appeals, as cited above. If plaintiff in the case at bar had appeared and offered any definite testimony or evidence proper to be introduced, and had been denied the privilege of being heard, this authority would be applicable to his case; but this he failed to do, and contented himself by sending by Davidson papers and bills when called on for them, but did not appear in person or by counsel to offer documentary or other evidence, although he knew the arbitrators were in session, passing upon his rights, pursuant to his agreement submitting same to them. Plaintiff, Van Winkle, states in his testimony that he told Hodgden, in the presence of Mr. Davidson, that when they made their examination, before closing any appraisalment, he desired to introduce evidence as to certain material and general matters as to such loss. At the time or shortly after there were placed in the hands of the appraisers the plans of said building, together with the specifications under which the building was originally erected. That, during the time that they were in session as appraisers, Mr. Davidson came to him, and wanted some bills, which he gave him. They were bills for the decorations of the walls, and the bill of the Parkersburg Mill Company for the lumber that had gone into the building, and they were returned to him afterwards with the statement that the other appraisers had refused to look at them. That Davidson came to his office several times and requested papers, which he did not then recall, outside of the bills mentioned. That he called his attention several times that when they were ready he wanted to insist upon his right to introduce testimony as to what had been destroyed, a great portion of which had been entirely consumed. That he was never permitted to introduce any such testimony, but, upon the contrary, was very much surprised to receive from Mr. Davidson a purported copy of the appraisalment, accompanied by the statement that they did not hear any testimony, and did not think it necessary. On cross-examination he was asked to produce the bills for examination that he had desired to lay before the appraisers. He produced two large packages of bills, marked on the back, "Academy of Music, Proprietary Vouchers, 1882 to 1889, Package number 1, Package number 2," and stated they extended over the period indicated. When asked what one of the bills he desired to produce before the appraisers, he said he did not

know of any particular bill; he was going to use the package as the case required, if the evidence had been admitted; that there were a great many of those bills that were pertinent on the question of price and material, but that he had not picked out any of the bills which he desired to submit; that he had given to Mr. Davidson the bills for lumber and the bills in relation to decoration; that Mr. Davidson had come and asked for them. He wanted to take them where the appraisers were in session. He also produced the plans and specifications, which were the same that the appraisers had at the time they made the appraisal. It was clearly the duty of plaintiff, when he knew the appraisers were in session, considering the matters submitted to them, to lay his evidence before them, and offer such oral testimony as he might deem proper to assist the arbitrators to arrive at a just conclusion; and it was not the duty of the arbitrators to send to plaintiff from time to time for such evidence as he might desire to submit. Hodgden, one of the appraisers, testified that he never heard of any request made by the plaintiff to be present at the session of the appraisers. When asked: "Were any bills or accounts or plans and specifications presented by Mr. Van Winkle to the appraisers that you refused to consider? A. No, sir; nothing. Only Mr. Davidson wanted me to take a lot of bills for lumber, and I said that I would not do, because, when I see a piece of work right before my eyes, I would not think for a moment to have some one else to come and tell me what that was worth. I would not consider myself a competent appraiser. Some painting, papering, and decorations that were destroyed, I did consider the bills for them." Mr. Hickman, the umpire, testifies that there was some little difference between the appraisers as to the value of the painting, papering, and decorations—something on that line—and that Mr. Davidson went out somewhere and got a bill for papering, and brought it in, and what arrangement there was made between the appraisers he did not know. It was not referred to him any more. He states that he heard no effort to present any other papers that were refused by the appraisers or by witness and Mr. Hodgden; that he would have no right to refuse any papers offered. He stated that Mr. Davidson and Mr. Hodgden participated in the calculations and measurements, and that he never heard or saw anything of Mr. Davidson being excluded from such participation; that witness had had no meetings with Hodgden at which Mr. Davidson was not present, or with Davidson when Hodgden was not present. Mr. Davidson was asked what items he and Hodgden disagreed upon in making their calculations. He said: "Well, we disagreed about the brickwork. I did not think he was counting brick enough. We disagreed in regard to the galvanized ironwork. We dis-

agreed in regard to the papering and decorating. We disagreed in regard to the stonework, and, I believe, in the painting"—and does not remember whether these were all; they might have been, and might not; that, when they disagreed, and submitted their disagreement to Hickman, he always agreed with Hodgden. Hodgden testified, when asked about what items he and Davidson disagreed, that the brickwork was the main item, and he thinks the galvanized iron was another, and, he thinks, painting, too, but that he remembered the brick and galvanized cornice distinctly. And on cross-examination Hodgden was asked to specify particularly on what articles of appraisal or materials he and Davidson disagreed, and were submitted to the umpire. His answer was: "One of them was the brickwork—that I know very positive—and the galvanized iron. I can't recall any other that we had very much difference regarding. It all went along smoothly. These two items was the only two we had any difference in at all. Possibly there might have been a little difference in the painting. I think he brought your bills over about this papering and painting. There was a talk among all of us together about the papering and painting. I have an idea that we used your bills. I said it was not out of the way very much. I had no word with Mr. Davidson at no time. Shook hands and laughed, and I supposed that was the end of it." Hickman, the umpire, testified that Mr. Hodgden, Mr. Davidson, and himself went to the building. There seemed to be a difference between the appraisers as to a few—two or three or four—different points. "I don't just remember or recollect, except probably three I can recall very distinctly. There were two places in the brick wall—probably three places—they could not agree as to where the wall should come down to, and another difference I remember of passing on was as to the value of the galvanized iron cornice, and another as to the value of square feet of the stone coping." He states that the two appraisers pointed out the difference that they desired him to settle. "On the building they spoke as to where the pressed-brick front should come down to, and also the common brick at the rear of the building. I think there were two places on the rear of the building that was cracked over the window, and another place near the rear on the right-hand wall, as you stand in front of the building, that was in dispute as to where they should come down to to be rebuilt to make it good. That the matter of the price of stone coping item was taken up when they were in the building or on the building, but the matter of galvanized iron cornice was taken up at the office; the number of feet was talked of between the two gentlemen, Mr. Davidson and Mr. Hodgden. I remember of taking a catalogue and selecting a cornice of about the same make as the old, and deducting the

discount on it, and fixed the value at that. That was what we done in the office." With reference to the difference as to the walls, he was asked what examination was made by him, when he stated: "Well, I went up through the building, and looked at the building out through the windows, and examined the nature of the crack in the rear wall, and then we went down on the ground and around the building, and looked from the ground up, and looked also in front; and I fixed the places as to where I considered it right the walls should come down to; and as to the number of bricks, and the value of the same, to replace the same, I made no estimate. The figuring was done by the appraisers."

In *Flubarty v. Beatty*, 22 W. Va. 698 (Syl., point 6), it is held: "If the arbitrators unreasonably refuse to hear competent witnesses offered by either party, this is such gross misconduct as to vitiate the award." It is not contended in the case at bar that plaintiff offered any particular evidence to the arbitrators which was rejected, or that he appeared before them to ask to offer evidence. It is only shown that he told one of the arbitrators that he had bills, etc., that he wished to lay before them, but did not say what they were, and in his deposition states that he did not know what particular bills, but he only expected to offer them as occasion might require. He offered nothing that was rejected. It is shown by the testimony that the bills he placed in the hands of Davidson were considered. In *Stemmer v. Insurance Company*, 83 Or. 65, 49 Pac. 588, 53 Pac. 496 (Syl., point 8), it is held: "While it is a general rule that, if appraisers exclude material testimony, it will be fatal to the award, it is also true that testimony must be offered before it can be rejected, so that, where the insured only announces that he was willing to produce witnesses on a certain point, without actually offering them, it cannot be said that the arbitrators rejected pertinent testimony." This is about the case here. The plaintiff, without going before the arbitrators, or in any way presenting the evidence which he said he had, and wanted considered, simply intimated to one of the appraisers that he had evidence which he desired them to consider, but never offered it; and certainly he cannot contend that he had no opportunity to offer it.

It is alleged in the bill, and attempted to be proven, that the appraiser George Hodgden was incompetent because of partiality; that he himself had asserted that he was the appraiser in the interest of the insurance companies, and that his conduct was such as to indicate that he considered himself and was acting as the agent of said companies, rather than a disinterested, unprejudiced, impartial appraiser, and that his efforts were to minimize the loss and damages in so far as he possibly could, and at the same time pretending to be fair and impartial, and that his

treatment of his co-appraiser, after the umpire was present, was to treat him with discourtesy, and not consult him in any way, and that he and the umpire attempted to make such appraisement independently of the said appraiser Davidson, and, by ignoring him, practically substituting the said umpire, who was not in any sense an appraiser, and could only pass upon matters of disagreement between the two, in place and stead of said Davidson; that the said appraisers were considering in the office of the agents of said insurance companies, in the city of Parkersburg; and that the agents were a part of the time present. Davidson, in his testimony for plaintiff, was asked what Hodgden said to him, or in his presence, relative to his business as appraiser of losses, and for whom. "A. Well, of course, he represented that he was here for the insurance companies, and was working for them. I do not know that he said that that was his business alone. I don't remember that he said anything about having been engaged in that business generally, but he spoke several times of having been employed for that business." Did not remember the language he used, and did not remember of hearing him say anything about having seen the proofs of loss in the case, but witness' impression was that he had seen them. Davidson states that, when Mr. Hodgden first came to Parkersburg, witness was sick, and could not attend to the business, and Hodgden returned to Pittsburg, and when he returned the second time he told Hodgden that he couldn't work with Mr. Gelsey, who had been chosen umpire, for the reason that he believed he was an expert, following that business; that he thought he got this idea largely from Hodgden's conversation on the previous visit; that Mr. Van Winkle came to his house, and he told him he could not work with that man, and that Hodgden and he were going to disagree, and that he was not willing to submit to Mr. Gelsey, and told him he could not serve with Gelsey, and wanted some one entirely disinterested, and that had not been posted; that Hodgden had intimated to him that he had seen and had a conversation with Gelsey; did not say so, in just so many words, but led him to believe in his conversation, and, in making the calculations, the first thing that Mr. Gelsey would agree with him; that Hodgden said he did not expect to consider the walls; that he was going to finish the balance, and leave that to the umpire. That was first mentioned when they went to the notary's office. They talked there for a while about Mr. Gelsey and about the walls, and a question came up about the walls while they sat there, and he made the remark that he would not consider them anyhow; that he would go home and submit that matter to the umpire. "Q. You stated before that you and Mr. Hodgden, after that, on the same day, went up and examined the building and the walls, and you could not agree as to the

loss? A. Well, we did not try to agree. I found that his opinion was different from mine in regard to them, and we went on with the other work." Mr. Hodgden, in his testimony, flatly denies that he intimated to Mr. Davidson that he had seen Mr. Geisey and had a conversation with him, and states that he never met Mr. Geisey, and never talked with him on this business; and he also denies that he ever said that he did not expect to consider the walls, and that he was going to leave that to the umpire, and further stated that he had tried to make the loss as impartial as it was possible to do, and tried to fix the value that was right between man and man—that was his purpose; that he never asserted himself to be an appraiser in the interest of the insurance companies, and did not attempt to minimize the loss, and would have been glad to have come down and repaired the job for the money fixed by the award. He stated that Mr. Davidson assisted in making every item on that award, was there when made, and talked it over item by item; that the calculations were not made by Hickman and himself, but by Mr. Davidson when they were figuring together, and, when a difference came, they submitted to the umpire; that he and the umpire did not treat Mr. Davidson with discourtesy, and did not have an unpleasant word from the time they began until they got through. He further testified, on cross-examination, that he never saw the proofs of loss in the case, nor any part of them; that they were never shown to him, and that they would not have influenced him any way; that his business was builder and architect in Pittsburg for about 30 years, and was also engaged in the steam-heating business; that he had acted as appraiser, many times, of buildings, and had repaired many of them; that he had acted as appraiser on both sides, acting many times for the owners of buildings, but presumed he had acted oftener for insurance companies than for owners. The most of his services as such appraiser had been rendered in Pittsburg, though he had served around in many places; that he had never made appraisements on behalf of the defendant companies; that he had made appraisements for Mr. Cole, who was the agent of one of the defendants. The fact that Hodgden was an experienced appraiser by no means disqualified him. In *Stemmer v. Insurance Co.*, supra, it is held: "The prior service of an arbitrator in a similar capacity does not render him incompetent, or invalidate an award in which he joined, in the absence of evidence showing that he was prejudiced."

The plaintiff employed W. H. Patton, an architect, of Belpre, Ohio, together with said Davidson, to make an estimate and calculation of the loss of the building after the rendering of the award, and they estimated the whole loss to be \$8,013.25. Mr. Patton testifies that he and Davidson made their "measurements from the original plans and speci-

cations of the old Academy of Music, and from personal visits to the building," and he was satisfied that the statement made from the measurements and the visits to the building, and careful examination of the plans and specifications, was practically correct; that they were furnished with the memorandum of items of details that it was claimed were used by the appraisers, and which they had a part of the time when they were making the calculations; that they had calculated the cost of restoring the walls on the measurements that they had made, and the difference between the aggregate found by them, and the aggregate in the appraisers' detail, to be \$337.15.

It is alleged in the bill in relation to the repairs of the brick walls, in which there was the greatest difference between the estimates made by the award and the subsequent one made by Patton and Davidson, that the appraisers did not use care and proper inspection to ascertain, or see with any certainty, the amount of brick walls that was to come down, or the estimate of the injuries thereto, inasmuch as there was no way for them, without getting on a ladder or scaffold, to examine the walls, that were 20 or 25 feet from any available point, and they did not go upon said north wall, and that plaintiff had had calculations made upon the plans as to points at which said wall should be taken down. On cross-examination, Mr. Patton stated that he had been employed by Mr. Van Winkle, in connection with Mr. Davidson, to make the examination; that he thought Mr. Van Winkle had expressed himself as being dissatisfied with the appraisal made by the appraisers, but he did not know that Mr. Davidson was dissatisfied with it; that he made personal inspection of the wall, but did not get upon it, for the reason that they could not get upon it. They went as close to it as they could get. So that it seems their examination was about after the same order as that of the appraisers. None of them got upon the walls, and the presumption is that they could sufficiently see the injury to the walls to make a fair estimate and calculation of the damages to the walls from the standpoint occupied by the appraisers. Patton further stated that he and Davidson made the examination before the building was torn down and prepared for reconstruction; that he was employed as architect by Mr. Van Winkle and Mr. Busch to reconstruct the building; that 13 items included in the estimate made by the witness and Davidson, and omitted from the estimate made by the appraisers, they got from the original drawings and specifications, and their knowledge of the building, and which all appear in the original plans and specifications, but it was possible that the electric light wire cutouts and sockets did not appear in those plans and specifications. Mr. Davidson, the appraiser chosen by Mr. Van Winkle, acted in that capacity

with Hodgden as appraiser, and Hickman as umpire, and signed the award made by the three without any protest, and afterwards was appointed, with Mr. Patton, by Mr. Van Winkle, to make a second appraisal (but it does not appear that either Davidson or Patton was sworn, under that employment, to act fairly and impartially), and made an appraisal or estimate of the loss far in excess of that made by the appraisers under oath. In *Campbell v. Western*, 3 Paige, 124, it is held, "An arbitrator cannot contradict an award which he has signed." It would seem that the difference in the estimates and calculations between Patton and the appraisers was a mere difference in judgment. The evidence fails to support the charges of fraud and partiality or misconduct and prejudice in the discharge of their duties, either of Hodgden, as appraiser, or Hickman, as umpire. In *Fluharty v. Beatty*, 22 W. Va. 698 (Syl., point 1): "Presumptions are not to be raised for the purpose of overthrowing awards, but the awards are to be liberally construed, so as to give effect and operation to the interests of the arbitrators, where it can be done, and every reasonable intendment is to be made in their support." And point 5: "A court of equity will set aside an award for fraud, collusion, corruption, or gross misconduct in the arbitrators." The evidence in the case at bar falls far short of warranting the setting aside of the award in this cause for any such reason as therein stated. In *Wheatley v. Martin*, 6 Leigh, 62: "It is equally the rule of equity, as of law, that the reasons for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake." And in *Bassett v. Cunningham*, 9 Grat. 684, the arbitrators and umpire sat together, and heard the evidence, of which a note was taken by one for the convenience of all. Upon the disagreement of the arbitrators, the umpire made his award, in which he did not refer to any of the evidence, or state the principle or facts upon which it was based; but, in sending his award to the clerk of the court in which the causes were pending, he sent with it all of the papers and the note of the evidence taken before the arbitrators. These papers and evidence were held not a part of the award, or connected with it, so that they might be considered upon a motion to set aside the award; and it was further held that an error of judgment on the part of the umpire in regard to the facts was not ground for setting aside the award. In *Morris v. Ross*, 2 Hen. & M. 408, it is held: "An award ought not to be set aside, either in a court of law or equity, on the ground of mistake in the judgment of the arbitrators, unless that mistake be very palpable; a mere difference of opinion between the court and the arbitrators in a doubtful case not being sufficient to authorize such interference." It is said in the brief of counsel for appellee that he "was

not heard, although, on learning of the session of umpire and appraisers, he demanded opportunity to be heard and present his case." It appears from the record that, while there was no formal notice given to plaintiff of the meetings of the appraisers, he had every opportunity to have appeared before them and presented any evidence that he desired. In his testimony appellee says: "During the time that they were in session as appraisers, Mr. Davidson came to me, and wanted some bills, which I gave him." Then he further says: "Mr. Davidson came to my office several times and requested papers, which I do not recall exactly, outside of the bills mentioned; but I called his attention several times that when they were ready I wanted to insist upon my right to introduce testimony as to what had been destroyed, a great portion of which had been entirely consumed." So it appears from his own testimony that, instead of attending to his business, and presenting his claims before the arbitrators, he remained in his office, and did not pretend to present anything, except what was called for; Mr. Davidson going to his office from time to time, and getting from him only what was asked for. It is claimed by appellee that the findings as to sound value are erroneous and fraudulent. I am unable to see the materiality of the sound value. The question is, really, what would it cost to put the building in the condition in which it was before the fire? This is an independent proposition—to replace the damaged part and that which was totally destroyed. Appellee also cites *Insurance Company v. Board of Education*, 49 W. Va. 360, 38 S. E. 679, where the bids or proposals made to restore the building were treated as the best evidence of the amount to be recovered. In that case bids were advertised for and accepted for restoring the property to its condition prior to the fire. The bids were made by responsible parties, and made in good faith, and were the best evidence that could have been adduced of the loss. In the case at bar it never was proposed to restore the building in the same way it had been, but it was built upon a different plan, and for different purposes.

Judging from plaintiff's conduct in the matter, it would seem that his "case is plainly within the sound proposition of Judge Kent in *La Guen v. Gouverneur & Kemple*, 1 Johns. Cas. 502, 1 Am. Dec. 121, when he says: 'Every person is bound to take care of his own rights, and vindicate them in due season and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant having the means of defense in his favor neglects to use them, and suffers a recovery to be had against him by a complete tribunal, he is forever precluded.' And he cited 2 Burrows, 1009, 7 Term Rep. 269; 2 H. Bl. 414. He also there cites the authorities at length, showing how firmly this principle is adhered to in courts of equity as well

as law." As stated in *May v. Miller*, 59 Vt. 577, 7 Atl. 818. The action of plaintiff in keeping aloof from the arbitrators when he had knowledge and notice of their proceedings, and furnishing items of evidence only as it was called for, would suggest the policy on his part of attempting to place himself in such position that, in case the award should be favorable to him, he could have the benefit of it, and, if it failed to meet his approval, he could contest it for want of formal notice, or other grounds.

For the reasons herein stated, the decree of the circuit court of Wood county is reversed and set aside, and the bill dismissed; reserving to plaintiff the right to prosecute any suit or proceeding he may be advised to institute, not inconsistent with the award.

(55 W. Va. 330)

BRAGG v. WISEMAN et al.

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

LIMITATIONS—DEMURRER TO BILL—SEISIN—DESCENT OF LAND—MARRIED WOMAN AS HEIR—CURTESY—COPARCENERS—POSSESSION.

1. To sustain a demurrer to a bill on the defense of the statute of limitations, the facts to warrant that defense must distinctly appear on the face of the bill.

2. When a bill alleges that a person was "seised and possessed" of land, it prima facie imports seisin in fact, not mere seisin in law.

3. If one die intestate, seised in fact of land, that seisin in fact is cast by descent on his heir, and the heir has seisin in fact without entry.

4. Where one dies intestate, seised in fact of an estate of inheritance in land, and one of his heirs is a married woman and dies, she has seisin in fact, so as to entitle her surviving husband to curtesy in her share.

5. Actual possession of land descended to several heirs by some of the coparceners gives actual possession to a married woman coparcener, so as to entitle her husband to curtesy in her share, though he or she were never in actual possession.

6. Chapter 78, § 1, Code 1899, changing the common law, passes all and whatever title, right, and interest of inheritance in land vested in an intestate to his heirs, including seisin in fact or law, whichever was vested in the intestate.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County; J. M. McWhorter, Judge.

Suit by W. W. Bragg against F. J. Wiseman and others. Decree for defendants, and plaintiff appeals. Reversed.

Dillon & Nuckalls, for appellant. Osenton & Ashby, R. J. Thrift, and A. D. Smith, Jr., for appellees.

BRANNON, J. Wiseman died seised of some land, leaving nine children, to whom it descended. One of these children, Minerva, married Wriston, and by him had four children. Her husband having died, Minerva Wriston married Bragg, and in 1891 died,

leaving her husband and said four Wriston children. Bragg, under claim to curtesy in the one undivided ninth of said land, brought a suit in 1903 in the circuit court of Fayette county against the heirs of Wiseman and the heirs of Minerva Wriston, seeking partition of the land so as to have the ninth of Minerva Wriston set apart in severalty. Upon demurrer to the bill it was dismissed, and Bragg appeals.

One reason given to justify the decree on which it is said the circuit court acted is that the suit was barred by the statute of limitations. To defeat the right to partition, it must appear that there had been 10 years of hostile, adverse possession prior to the suit. We cannot find this from this bill. At once upon the death of Minerva Bragg her husband's curtesy vested, and, if any presumption is to be indulged, it is that the wife and husband were in actual possession in common with other heirs of Wiseman, and that after her death he so continued. We should presume, what seems meant by the bill, that Minerva Bragg was in actual possession, along with those heirs, of a conceded right in the undivided property, and that a husband lives with his wife. This presumption is as reasonable as the reverse, and is the one to be preferred, because the facts to apply limitation must affirmatively be stated or in this case appear. But without indulging in presumption, this bill does not state or intimate any adverse possession by other heirs against the Wriston heirs, or by them against Bragg, or that he is not in possession as tenant by the curtesy, or that his right is denied, or that actual possession is withheld from him as tenant by the curtesy. Surely something of that kind should appear from the bill to warrant the application of the statute of limitation. The same fact must appear in the bill which the defendant must state in a plea or answer setting up the statute. Not only does this bill not give such facts, but it negatives them. It avers twice that Minerva Bragg died "seised and possessed" of a one-ninth interest in the land. This imports seisin in fact. At common law livery of seisin means delivery of actual corporeal possession. There may be, it is true, seisin in law as well as in deed or fact; but where the word is used, it certainly may be taken to mean seisin in fact as well as law. If any distinction is to be drawn, it would first import actual possession. The word "possession" surely means prima facie actual possession. When, therefore, the bill says that Minerva Bragg was seised and possessed, we must say that it alleges she was in actual possession. 25 Am. & Eng. Ency. L. (2d Ed.) 253; 2 Bouvier, Law Dic. 702, 975; 2 Blackstone, Com. 310; Tiedeman on Real Prop. § 24; 26 Am. & Eng. Ency. L. (1st Ed.) 26, note. Ooke says that seisin "in the common law signifies possession." Institutes, 153a. The wife being in actual possession, with her last breath the law cast

¶ 1. See Limitation of Actions, vol. 33, Cent. Dig. § 671.

it upon the husband, and he succeeded her therein under his curtesy estate. This suit, in fact, is not a suit for recovery of his curtesy; it is not even suggested by the bill that it is unlawfully withheld; but it is a suit for partition, and the curtesy estate is stated only as the title enabling Bragg to call for partition.

The appellees also make the point that Bragg does not show a curtesy estate vested in him, because the bill does not allege that his wife had seisin in fact during her life. This presents a question akin to that mentioned above, but somewhat different, since, to defeat a right by limitation, facts giving ground for the bar must appear, whereas, as to curtesy, the claimant must state facts giving it to him. The law requires a seisin in fact to give curtesy, seisin in law not giving it. *Fulton v. Johnson*, 24 W. Va. 95. The bill says that Wiseman died "seised and possessed" of the land. It does not say in words that he had seisin or possession in fact. Is it necessary to expressly aver seisin in fact? This puts the question whether, when one dies seised in fact of land, his heirs get from him that seisin in fact which he had, without entry after his death. I think we may say as to Wiseman that he had seisin in fact. Most books speak to the effect found in 1 Lomax, Dig. 5: "Where a freehold estate is conveyed to a person by feoffment, with livery of seisin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seisin in deed and a freehold in deed. But where a freehold estate comes to a person by act of law, as by descents, he only acquires a seisin in law—that is, a right to the possession—and his estate is called a freehold in law. For he must make an actual entry on the land to acquire a seisin and freehold in the deed." This seems unreasonable. Where the ancestor is not in actual possession, and thus has not seisin in fact, it is rational to say that his heir has not seisin in fact; but where the ancestor has seisin in fact, why does it not go by law to the heir? Under the doctrine given in Lomax, Coke says that "if a man dies seised of lands in fee simple or fee tail general, and they descend to his daughter, who marries, has issue, and dies before entry, the husband shall not be tenant by the curtesy; yet in this case the husband had seisin in law. But if she or her husband had entered during her life, he would have been tenant by curtesy." 1 Inst. 29a; 1 Greenl. Cruise, 140. But some books do not lay down the doctrine of seisin as quoted from Lomax. 1 Washburn on R. Prop. § 97, says that, where the possession is vacant at the ancestor's death, the heir has only seisin in law; and in volume 3, § 1963, says: "There is a seisin in deed and a seisin in law, and the difference between the two is that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from

his ancestor, while the possession is vacant, before he has made an actual entry." Coke upon Lit. (by Coventry) 266b, says that it is only where the ancestor is out of actual possession that descent cast on heirs mere seisin in law. Hilliard on R. Prop. 82, says entry by the heir is not necessary. The prevailing doctrine of the United States is that no actual entry is necessary, either by an heir or grantee, in order to give him a seisin in deed, provided the ancestor or grantor was seised at the time, or the possession was vacant (not in a disseisor), "and the ancestor or grantee had the right." Kerr on R. Prop. § 232.

There is another consideration, seemingly decisive, to show that an heir gets his ancestor's seisin in fact without entry. By common law, in order that one might as heir inherit from another, that other must have had seisin in fact, not mere seisin in law. If the ancestor had no seisin in fact, nothing could be inherited from him, but the estate went from the last person having seisin in fact, under the maxim, "*Seisina facit stipitem*"—seisin makes or points to the root of descent. 1 Lomax, Dig. 586; 2 Minor, Inst. 525; 4 Kent, 385. But this common-law rule was wiped away by the statute of descents of Virginia passed in 1785, saying that "henceforth, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass" to certain persons. Such is our Code of 1899, c. 78. Under this statute it is not necessary that there be *conjunctio seisinæ et juris*—a union of seisin and title—or both possession and title in a person, to enable his heirs to take from him by descent whatever he has.

"The common-law rule, '*Seisina facit stipitem*,' may now be regarded as abrogated in Virginia, and estates of intestates, whether in possession or vesting in title, whether present or reversionary, will all of them descend to the same heir, without any regard to the seisin of the ancestor." 1 Lomax, Dig. 594. See 4 Kent, § 88. So, whatever title or right a man has descends to his heir. If he has title merely, that descends. If he has title, and under it actual possession, that title and that possession both descend, as possession is a valuable element of title. Therefore, when Wiseman died, his actual possession vested in Minerva Wriston and her coparceners, and she had seisin in fact. But if this were not so, the bill saying that Minerva Bragg died "seised and possessed," it imports seisin in fact. "Seised," if it does not alone mean that the person is in possession, imports title of inheritance, and the two words combined signify that the party is in actual possession of an estate of inheritance. *Seim v. O'Grady*, 42 W. Va. 77, 24 S. E. 904, tends to support this decision. And if the other Wiseman heirs were in possession, their actual possession was that also of Minerva Bragg, she being a parcener, and that pos-

session gave Bragg right to curtesy, even if she or he were not on the land. Kerr on R. Prop. § 732.

Decree reversed, demurrer to bill overruled, and remanded.

(55 W. Va. 335)

JOHN L. ROWAN & CO. v. HULL.

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

**REAL ESTATE AGENT—AGENCY COUPLED WITH
INTEREST—REVOCATION—CONTRACT
—CONSIDERATION.**

1. Mere commission or reward to be earned by an agent in executing the agency does not, alone, make the agency one coupled with an interest.

2. An agency uncoupled with an interest, and not for a fixed time, may be revoked by the principal at will, without liability for damages; and, though it be for a fixed time, still it may be revoked at will, but the principal will be liable to the agent for damages for wrongful revocation within such time. There is often a difference between a power to revoke and a right to revoke, as between principal and agent.

3. A written proposition to employ one as agent to sell land, signed by the proposer, accepted by the agent, though not signed by him, makes a binding contract of agency between them, and is a bilateral mutual contract, and enforceable against both.

4. A promise of remuneration for service to be performed makes a valid consideration for a contract. If one employ another as agent for remuneration on performance, the contract is based on sufficient consideration, and is mutually binding.

5. Benefit to be derived by each party to a contract furnishes a sufficient consideration for it.

6. It is for the court to determine whether there is evidence to render an instruction relevant. An instruction cannot be given, and its consideration by the jury made to depend upon whether the jury finds that there is or is not such evidence.

(Syllabus by the Court.)

Error to Circuit Court, Monroe County; J. M. McWhorter, Judge.

Action by John L. Rowan & Co. against J. W. Hull. From a judgment of the circuit court affirming a judgment for plaintiffs on appeal from a justice, defendant brings error. Affirmed.

John Osborner and J. D. Logan, for plaintiff in error. Rowan & Boggess, R. E. L. Clarke, and J. A. Meadows, for defendants in error.

BRANNON, J. In the circuit court of Monroe county, in an appeal from a justice, John L. Rowan & Co. recovered against J. W. Hull a verdict and judgment for \$137.50, and from this judgment Hull has brought a writ of error. The claim of Rowan & Co. is that Hull engaged them to sell for him a tract of land, and that they undertook the service, and made effort to sell to several persons; that they interested John O. Ballard in the land, and sent him to see it, but

Hull informed Ballard that he had concluded not to sell, and had revoked the power of Rowan & Co. to sell. Ballard then went to Rowan & Co., and they exhibited to him the written memorandum empowering them to sell, and convinced him that they still had power to sell under it, notwithstanding the revocation of their authority to sell; and then Ballard made a writing, addressed to Rowan & Co., saying that he would give them \$5,500 for the Hull farm. Before Ballard went to see the land, Hull wrote Rowan & Co., on the 12th of August, that he had concluded not to sell his farm. The memorandum putting the land in the hands of Rowan & Co. for sale is as follows: "300 acres in Sweet Spring Dist. near Gap Mills—good dwelling, fine barn and other buildings—fine orchard, well watered with running water—well timbered—one of the nicest farms in Monroe. Price \$5,500. Terms easy. 5 per cent. to John L. Rowan & Co. Land to be exclusive with them 3 months and until withdrawn. This August 5th, 1902, J. W. Hull." On 5th of January, 1903, Rowan & Co. sued Hull for compensation for their service under said agreement. Hull contends that the paper given by him conferred on Rowan & Co. a naked power to sell, uncoupled with an interest, and that it was revocable at any moment he might choose to revoke it, and that, when he revoked it before sale, Rowan & Co. could not recover the agreed commission, but only, at most, compensation for what they actually did, if anything, under the power. Hull would reverse the judgment on the strength of his revocation of the authority of Rowan & Co. to sell. The summons not being before us, and no pleading to show whether Rowan & Co. claimed 5 per cent. on \$5,500, or merely actual compensation for trouble as agents, we cannot say, by the record, which character of claim was made, but we assume that it was for commission. What is the effect of the revocation before Rowan & Co. found a purchaser? We have the question strictly as between those parties, not the rights of Ballard. This power was naked, coupled with no interest, as the commission to be earned is not an interest rendering the power irrevocable. 1 Am. & Eng. Ency. L. (2d Ed.) 1217; Mechem on Agency, § 207. The same book (section 209) says: "Power to Revoke—How Distinguished from the Right to Revoke. Where the authority is not coupled with an interest, the principal has power to revoke at his will at any time. But this power to revoke is not to be confounded with the right to revoke. Much uncertainty has crept into text-books and decisions from a failure to discriminate clearly between them. Except in those cases where the authority is coupled with an interest, the law compels no man to employ another against his will. The relation of agent to his principal is founded, in greater or less degree, upon trust and confidence. It is essentially a personal relation. * * *

¶ 1. See Principal and Agent, vol. 40, Cent. Dig. § 66.

It is the rule of law that contracts of agency, like those creating other personal relations, will not be specifically enforced. Nor does it make any difference, in this view, that the principal has expressly agreed that he will continue to confide in the agent for a definite period. It is no less difficult, on that account, to coerce compliance. * * *

The law therefore leaves the principal in such cases to determine for himself how long the relation shall continue. This, then, is what it meant when it is said that the principal may revoke the authority at any time. But it by no means follows that, though possessing this power, the principal has a right to exercise it without liability, regardless of his contract in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such agreement the principal is as much liable as for the breach of any other contract. It is in this view, therefore, that the question of the right to revoke arises." Section 210: "When the Right to Revoke Exists. When no express or implied agreement exists that the agent shall be retained for a definite time, the power and the right of revocation coincide. Such employments are deemed to be at will, merely, and may be terminated at any time by either party without violating contract obligations or incurring liability. The law presumes that all general employments are thus at will, merely, and the burden of proving employment for a definite time rests upon him who alleges it." Also section 620. To like effect, see Reinhard on Agency, §§ 159, 161; 1 Am. & Eng. Ency. L. 1216. Thus Rowan & Co. had a right of action for the breach of the contract in the revocation of their power within the period of three months. Authorities cited for Hull do not oppose this position, except *Simpson v. Carson*, 11 Or. 361—a case not well reasoned. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589, was a power coupled with an interest—a power to sell and pay the agent a debt—and it was held irrevocable in life or by death. By no means does it touch the proposition that, where one empowers another for a given time, the power can be recalled sooner without liability. We do not deny that, even if the power says it is exclusive or irrevocable, it may be revoked, unless coupled with an interest or for a fixed term. Mechem on Agency, § 204. But here is a fixed term.

The right of action of Rowan & Co. thus being clear, what is the measure of recovery? Hull says that they have a right to recover for what service they performed, but that the recovery is beyond that. Even on that basis, we do not see that we can deny the finding of the jury. But that is not the test. "Where the parties have provided by their agreement what the agent's compensation shall be, in case the principal sees fit to re-

voke the authority prematurely, such agreement will form the basis of the agent's recovery." Reinhard on Agency, § 269; Mechem on Agency, § 622. Under this principle the jury could have given Rowan & Co. \$275, and so Hull has no right to complain of a less verdict. They could have realized that sum, had not the agency been terminated. See *Ferreira v. Sayres*, 40 Am. Dec. 496.

But Hull says further that the memorandum is one-sided, imposing no duty or liability on Rowan & Co., and not binding them, because they did not sign it. A writing was not necessary, on their part, to create an agency. If they accepted the agency, that was enough. *Reynolds v. Tompkins*, 23 W. Va. 229; Mechem on Agency, § 271. If a principal employ the agent for pay for executing the agency, it is enough. Reinhard on Agency, § 62. The oral evidence proves that they did accept the agency. That evidence does not contradict or vary, but supplements and applies, the short memorandum, and explains the contract as consistent with it. Indeed, no oral evidence is for that necessary. Of course, oral evidence is permissible to show acceptance of the agency, as it is to show acceptance of a deed. Rowan & Co. went on to execute the agency by seeking purchasers under it, and this signifies acceptance. "This consent, of course, may be inferred from the acts of the agent. Thus, where he is found performing the agency, his acceptance of it will be presumed." Mechem on Agency, § 108. Rowan & Co. accepted the memorandum. Offer on one side accepted by the other makes a mutual contract binding both. *Bishop on Contracts*, § 322. The consideration is valid in law—the promise on the one side to employ, the agreement on the other side to be employed, signified by the delivery of the memorandum and its acceptance and prosecution of the agency under it. There were mutual and dependent promises—on the one side to employ, on the other to serve. In the forms of declaration touching services, we find them saying that, in consideration that one agreed and undertook to employ, the other agreed and undertook to serve in a given capacity. These are mutual promises. It is surely not true that Rowan & Co. were bound to do nothing. When they accepted that memorandum of that employment, they became liable to the duties imposed upon them by law in such cases. For breach of their duty—for negligent loss of a sale—they would be liable. 3 Minor, 329. There was benefit to be derived on each side from the contract, and that fills in the fullest the demand of the law as to consideration. *Sturm v. Parish*, 1 W. Va. 125. "Where mutual promises are made, the one furnishes sufficient consideration for the other." 9 Cyc. 323. Bilateral contracts furnish both the required consideration and mutuality. 6 Am. & Eng. Ency. L. (2d Ed.) 727. This case is but an instance of the old basic rule of the law of contract—

that, where an offer is made and accepted, a contract has been made.

Hull says that plaintiffs' instruction 3 is bad. It says that the consideration for a contract need not be money, but may be of an act to be performed, and, if plaintiffs agreed to sell for remuneration, that is sufficient consideration. This is sound. But it is said that it conflicts with defendant's first instruction, saying that, when Hull put his land into the hands of Rowan & Co., he could revoke at any time. Where is the conflict when one deals alone with consideration and the other with revocation? There is no inconsistency between instructions 3 and 4; the latter saying that if Rowan & Co. found a purchaser, and consummation of sale was prevented by defendant, they could recover commission. They deal with different subjects.

Fault is found with plaintiffs' instruction 5. After stating a proposition, the court stated to the jury that the instruction was to be considered, if evidence had been given to sustain it, but, if no such evidence had been given, the jury must disregard it. It is very old law that an instruction should not be given without evidence bearing upon the facts on which it rests, and whether there is such evidence the court must say. Upon this view, it would be error to give an instruction conditionally, as in this case. Reversals are innumerable for the cause that there was no evidence to render an instruction a question before the jury. When the court gives an instruction, the jury must say that, in the opinion of the court, the subject of the instruction is a proper matter for the consideration of the jury under the evidence. Though error to give the instruction, it ought not to reverse the judgment. The instruction runs that if Rowan & Co. got Ballard to view the land, with a view to buy, and Rowan & Co. did this before revocation, and afterwards Ballard made an offer to buy at the price fixed in the memorandum, and did so in pursuance of the solicitation of Rowan & Co., then they were entitled to recover the commission stipulated in the contract. It was claimed on the one side, and denied on the other, that when Rowan was on the witness stand he stated that a few days after the engagement of Rowan & Co. as agents, and before the 12th of August, the date of revocation of their authority, Rowan talked with Ballard and Mann about the land, and they agreed to examine it. The judge was sitting with his back to the witness, and could not certify that the witness had so stated, and therefore left it to the jury to say whether he had so stated. Now, the date when Rowan talked with Ballard and Mann, and requested them to examine the land, is immaterial, so it was within three months. That evidence, the existence of which was left to the jury, was immaterial. That statement of the instruction was hurtful to the plaintiffs and

beneficial to the defendant. Eliminate it, and the instruction is sound law and pertinent to the case.

Our conclusion is to affirm the judgment.

(55 W. Va. 261.)

RITCHIE COUNTY BANK v. FIREMEN'S INS. CO.

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

INSURANCE—ACTION ON POLICY—CHANGE OF TITLE—BREACH OF CONDITIONS—WAIVER.

1. The defendant insurance company, in consideration of \$75 premium, by its agent, C., issued and delivered its policy to S. D. W. for \$2,500, as follows: \$1,500 thereof on a building used for a hotel, office, and other purposes, then owned by S. D. W., and \$1,000, the residue, on hotel, office, and kitchen furniture; loss, if any, under the first item of the policy, payable to B., as its interest might appear at the time of fire. The property was totally destroyed by fire. *Held*, that B. can maintain its action in its own name upon said policy against the company for said \$1,500.

2. Where an insurance policy stipulates that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void, if any change, other than by the death of the insured, shall take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, judgment, or voluntary act of the insured, or otherwise, and the insured, after the policy is issued and delivered to him by the company, without any agreement or consent of the company indorsed on said policy or added thereto, and without the consent of the company in any other way obtained by him, voluntarily conveys by deed the insured property to another, such conveyance and change of title of the insured property forfeits the policy, with the right to recover thereon for loss or damage to the property.

3. S. D. W., after he had received the policy sued on, conveyed the insured property by deed to E. D. W., and E. D. W., after such conveyance to him, made and delivered his notes, payable to C. (who, as the agent of the company, issued the policy to S. D. W.), in payment of the premium expressed in the policy, and afterwards E. D. W. paid the said notes to C., but without the knowledge, consent, or ratification of the company. *Held*, that the acts of C., in receiving said notes and collecting the same in payment of the said premium, did not constitute a waiver by the company of the forfeiture of said policy as aforesaid.

4. Chapter 83, p. 120, of the Acts of the Legislature of 1899, renders fire insurance companies doing business in this state liable, in case of total loss, by fire or otherwise, as stated in the policy, on any real estate insured by them, for the whole amount of insurance stated in the policy of insurance upon said real estate.

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County; M. H. Willis, Judge.

Action by the Ritchie County Bank against the Firemen's Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Sherman Robinson and J. Newman, for plaintiff in error. Young & McWhorter, for defendant in error.

MILLER, J. In an action of assumpsit, brought by the Ritchie County Bank against the Firemen's Insurance Company of Baltimore, Md., the circuit court of said county, on the 28th day of February, 1908, rendered a judgment against the plaintiff, dismissing its action and awarding costs to the defendant. To this judgment, the plaintiff bank obtained a writ of error and supersedeas. Various rulings of the court, made during the progress of the action, are assigned by petitioner as grounds of error. All of the evidence adduced on the trial is certified in bills of exception. Plaintiff's declaration is in the form prescribed by section 61 of chapter 125 of the Code of 1899. It alleges that the defendant, by virtue of the policy of insurance thereto attached and therewith filed, owes to the plaintiff the sum of \$1,500 for loss in respect to the property insured by said policy, caused by fire on or about the 21st day of December, 1901, at the town of Cairo, in the said county of Ritchie. The policy sued on is in form the "standard fire insurance policy," bears date on the 8th day of March, 1901, is numbered 709,506, and, among its many provisions, contains the following:

"In consideration of the stipulations herein named and seventy-five & no/100 dollars premium, does insure S. D. Williams for the term of one year from the 9th day of March, 1901, at noon, to the 9th day of March, 1902, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding twenty-five hundred dollars, to the following described property, while located and contained as described herein, and not elsewhere, to-wit: Mr. S. D. Williams, \$2,500.00 as follows: \$1,500.00 on the three-story frame metal-roofed building, situate on the north side of Railroad street, Cairo, Ritchie county, West Va., and occupied for hotel, office, and mercantile purpose; and \$1,000.00 on hotel, office, and kitchen furniture of every description, including billiard tables, pool tables, balls, cues, and all appurtenances thereto, all while contained therein. Loss, if any, under first item of the within policy, payable to the Ritchie County Bank as its interest may appear at the time of the fire. Other insurance permitted. * * * This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured, * * * or if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or voluntary act of the insured, or otherwise. * * * In any matter relating to this policy, no person, unless duly authorized in writing, shall be deemed the agent of this company. * * * If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or

of any person or corporation having an interest in the subject of the insurance other than the interest of the insured as described herein, the condition hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto. * * * If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and amount claimed thereon, and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance, whether valid or not, covering any of the said property, and a copy of all the descriptions and schedules in all policies, any change in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at time of fire, and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged, and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, not related to the insured) living nearest to the place of fire, stating that he has examined the circumstances and believes the insured has honestly estimated the loss to the amount that such magistrate or notary public shall certify. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provisions or conditions of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

Attached to the printed form of the policy is the following: "Note. To secure mortgagee, if desired, the policy should be made

payable on its face to such mortgagee, as follows: Loss, if any, payable to — as his interest may appear." And the "consent by company to assignment of interest": "The Firemen's Insurance Company of Baltimore, hereby consents that the interest of — as owner of the property covered by this policy be assigned to —, Agent."

The defendant interposed a demurrer to the declaration, which was overruled by the court. Defendant contends that the policy sued on is indivisible, and, being so, its said demurrer should have been sustained. The policy expressly provides that loss, if any, under the first item (the \$1,500 item) of the policy shall be payable to the Ritchie County Bank as its interest may appear at the time of fire. The declaration avers that the defendant owes to the plaintiff the sum of \$1,500 for loss in respect to the property insured by said policy. Under section 62 of said chapter, if good cause therefor be shown or appear, the court or judge in vacation may order the plaintiff to file a more particular statement in any respect of the nature of his claim, or the facts expected to be proved at the trial. By this section the defendant may obtain the facts which may be necessary for his defense, when they are not fully disclosed by the declaration. Kerr on Ins. p. 764, says: "The determination of the proper parties to an action upon an insurance policy must be largely governed by the law and practice of the forum regulating suits upon ordinary contracts. The policy itself designates the party to whom the proceeds are primarily payable, and a suit upon a policy must, as a general rule, except where otherwise provided by statute, be brought by the one designated in the contract as the payee, or his privies. * * * The mortgagee may sue alone, and in his own name, where the loss, if any, is payable to him as his interest may appear, when his interest equals or exceeds the full amount due under the policy." 3 Joyce on Ins. § 2305, among other things, states: "In addition to the class of assignments which we have mentioned in the preceding section, there is another species, which is similar to that of the assignment of a chose in action. We refer to those cases where the policy is issued to one person, 'loss, if any, payable to' another, or 'in case of loss pay the amount to —.' An insurance policy making loss payable to another than the assured must be regarded as having been at its inception assigned to such other person with the consent of the company, and it is not necessary for him to obtain a transfer of the policy from the assured, assented to by the company, as in ordinary cases. A provision that a loss shall be payable to a mortgagee, or his assign, as his interest may appear, operates only as a conditional appointment to pay so much of the proceeds of the policy as may be equal to the amount of the mortgage at the time of a loss under the policy." Many cases are cited by the author to sustain the principle above stated. Colby v.

Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. 303, holds that where "a policy of fire insurance insures A. in a given sum, part of it on one property, part on another, loss payable to B., 'mortgagee, as his interest may appear,' and B.'s mortgage covers only one of the properties insured, B. may sue on the policy in his own name and recover the total loss on both properties, not exceeding his debt, notwithstanding his mortgage covers only one of the properties insured." In Brown v. Insurance Co., 5 R. I. 394, it is held that a policy of fire insurance, effected by the owner and mortgagor of a stock of goods, by the terms of which the loss or damage, if any, is made payable to the mortgagee, is in legal effect assigned by the former to the latter, with the consent of the insurer, as collateral security for the mortgage debt. A policy of insurance, made payable to a third person as beneficiary, as his interest may appear at the time of fire or loss, does not, according to this view, insure such third party, or his interest in the subject of insurance. Therefore his right to sue and recover on the policy depends upon his interest in the insurance money at the time of the loss, or, more accurately speaking, at the time of the institution of his action. The court, therefore, did not err in overruling the said demurrer.

The defendant also filed its plea of *res judicata*, and with said plea and in support thereof vouched the record of a certain action of *assumpsit*, instituted in the circuit court of Ritchie county, on the 21st day of April, 1902, by S. D. Williams against said Firemen's Insurance Company for \$1,000 damages. The declaration in the last-mentioned action was filed at the May rules, 1902, and alleges that the defendant, by virtue of the policy of insurance thereto attached and therewith filed, owes to the plaintiff the sum of \$1,000 for loss in respect to the property insured by said policy, caused by fire, on or about the 21st day of December, 1901, at the town of Cairo, in the said county of Ritchie. Said last-named policy is also numbered 709,508, bears date on the 8th day of March, 1901, and, among other things, recites and states that: "In consideration of the stipulations herein named, and of seventy-five and no/100 dollars premium, does insure S. D. Williams for the term of one year from the 8th day of March, 1901, at noon, to the 9th day of March, 1902, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding twenty-five hundred dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit: Mr. S. D. Williams. \$2,500.00, as follows: \$1,500.00 on the three-story frame metal-roofed building, situate on the north side of Railroad street, Cairo, Ritchie county, West Virginia, and occupied for hotel, office, and mercantile purposes, and \$1,000.00 on hotel, office, and kitchen furniture of every description, including billiard table, pool tables, balls, cues, and all appurtenances

thereto, all while contained therein. Loss, if any, under first item of the within policy, payable to the Ritchie County Bank as its interest may appear at time of fire. Other insurance permitted." Pleas were filed therein by the defendant, and issues made upon the demand of said Williams for said \$1,000. A trial of this action was had, in which no matter was put in issue except the right of Williams to recover said \$1,000, as mentioned in the second item of said policy. On the 5th day of January, 1903, after the plaintiff had introduced his evidence in chief in support of his claim, the defendant demurred to said evidence, whereupon the court sustained the demurrer, dismissed the action, and gave judgment in favor of the defendant against plaintiff, Williams, for costs, which judgment is in full force and effect, and was asserted in the circuit court and is urged here as a full and complete defense to the action before us for review. To the plea of *res judicata* the plaintiff filed its demurrer, which was overruled, and issue was then joined upon said plea.

While it is true that the said policy No. 709,506 was attached to the declaration in the Williams case, no averment was made in the pleadings in that case, or issue joined therein, as to said \$1,500 item. Neither was any evidence offered or heard on the trial in that action in relation thereto. There are two separate and distinct items in the policy for which separate actions may be prosecuted, upon appropriate pleadings and proofs. The principle of *res judicata* has been so often passed upon by this court that almost every conceivable question arising thereunder has been settled. In the recent case of *Waldron v. Harvey* (decided at the present term) 46 S. E. 603, this court holds that where there is no pleading to warrant a decree, or part of a decree, the decree, or such part of it, is not merely voidable, but void, as it is not a matter in issue. Brannon, J., speaking for the court, says a decree is a conclusion of law from pleading and proofs, and where there is a failure of either pleading or proofs there can be no decree. A decree, or any matter of a decree, which has no matter in the pleadings to rest upon, is void, because pleadings are the very foundation of judgments and decrees. *Cresap v. Cresap* (decided at the present term) 46 S. E. 582; *Bierne v. Ray*, 49 W. Va. 129, 38 S. E. 530; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16. There could not have been, and was not, an adjudication in the Williams case of the \$1,500 item mentioned in the policy, because there was neither pleading nor proofs to warrant such adjudication. Therefore the defendant's plea of *res judicata* is not established by proof.

Plaintiff contends that the court erred in sustaining defendant's demurrer to plaintiff's evidence, and in its said judgment for the defendant against plaintiff for costs. The defendant, in its specification and notice of

defense filed and relied on by it in said action, in part says that the interest of the insured at the time the policy was issued was other than unconditional and sole ownership; that a change, other than by the death of the insured, took place in the interest, title, and possession of the subject of insurance, in this: that after said policy was issued, and without notice to this defendant, and without its consent, the property thereby insured was assigned, transferred, and conveyed to one Edgar D. Williams, by deed from said S. D. Williams and Lilly C. Williams, his wife, bearing date on the 1st day of April, 1901; that the insured thereafter had no interest or title of any kind or character in the subject of the insurance set forth in the declaration; that after said policy of insurance was issued and delivered the hazard thereof was increased by means within the control and knowledge of the insured; and that said S. D. Williams, the party to whom the said policy was issued and delivered, transferred, sold, and conveyed the subject-matter of insurance, as above set forth, by which the hazard of said insurance was increased. Defendant also filed an amended plea, specification, and notice, wherein it averred that on the 7th day of January, 1899, said S. D. Williams and his wife executed a deed of trust, conveying said property to one E. C. Carver, trustee, in trust to secure the Bank of Cairo in the payment of a certain note for \$3,000, therein fully described; that said trust deed was a lien and incumbrance upon said property at the time said policy was issued, and was unknown to said defendant, and was without its knowledge or consent, and was in violation of the warranties, provisions, and conditions in the said policy contained, in this: that said policy provides: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein." Defendant further averred that plaintiff had not, nor had any one for it, within the time in said policy specified, rendered a statement to the defendant, or to any one for it, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances, whether valid or not, covering any of said property, etc. The plaintiff replied generally to the pleas and specifications filed by the defendant, and denied the truth thereof, and also replied thereto specially, and says that plaintiff had nothing to do with any of the alleged changes of ownership of the subject-matter of insurance at any time, and had no notice or knowledge thereof. Plaintiff further avers that the defendant did know of said changes of ownership, and transfers in the title of the

subject-matter of said insurance; that C. D. Cutright, the duly accredited general agent of the defendant, after the deed from said S. D. Williams to Edgar D. Williams for the subject-matter of said insurance had been made, with the full and complete knowledge of said deed, and in whom the title of said property was then vested thereby, accepted a premium upon said policy of insurance, and thereby waived all claim of the forfeiture of the policy sued upon, and thereby completely estopped the defendant company from setting up the same; and that, even if plaintiff had knowledge of said transfer of the title of the subject-matter of insurance as aforesaid, yet the defendant company is estopped by reason of the acceptance as aforesaid of said premium upon the policy sued on, after said transfer had been made, and at a time when said company well knew of said transfer as aforesaid.

Plaintiff's special replication, in effect, contends that the act of the insured, without its knowledge, consent, or ratification, could not prevent its recovery from the defendant upon said policy. This contention is untenable. The person named in the policy as owner, and not the mortgagee (in this case, the trust creditor) to whom the loss is payable, is the insured, within the purview of a condition of forfeiture. *Kerr on Ins.* 429. The authorities examined upon this question hold that, no matter to whom the loss may be made payable, it cannot be recovered by any one, if, by the terms explicitly set forth in the policy, no right of action can accrue at all upon the violation of some specific condition, whose observance by the insured is made necessary to fix the insurer's liability. *Agricultural Ins. Co. v. Hamilton (Me.)* 38 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; *Kabrich v. State Ins. Co.*, 48 Mo. App. 393; *Oakland Home Ins. Co. v. Bank of Commerce (Neb.)* 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663; *Bently v. Ins. Co.*, 40 W. Va. 738, 23 S. E. 584. In this case the plaintiff has no better right than the insured would have had, so far as the question of the forfeiture of the policy is involved. It is shown by the evidence that the building insured by the defendant and described in the policy as aforesaid was totally destroyed by fire on the 21st day of December, 1901; that at the date of the policy, and at the time of said fire and loss of the insured property, and at the time of the institution of plaintiff's action, the said S. D. Williams was indebted to plaintiff in the sum of \$3,000, evidenced by his note, which had, before the date of said policy, come into the hands of the plaintiff bank, in the regular course of business; and that the payment of said note was secured by said deed of trust made by said S. D. Williams and wife, bearing date on the 7th day of January, 1899, which conveyed said property to E. C. Carver, trustee, for that purpose. The deed of S. D. Williams and wife, bearing date on the 1st day of April, 1901, to Edgar

D. Williams, for said insured property, was also put in evidence, and is part of the record. It is also proved that, at the time the policy was issued, one Hoff occupied the property and controlled it as the tenant of S. D. Williams; that Edgar D. Williams took possession of it, under his deed, about May 12, 1901, and, together with his mother and sister, occupied it until about the 12th day of November next following, when they left it, one Forward being then put in possession of it by Edgar D. Williams, who then left and went to Moore, in Tucker county, W. Va., where he remained until about the 30th day of December, 1901; that neither Edgar D. Williams, his mother, sister, nor father, S. D. Williams, was in possession of the property from the 12th day of November, 1901, up to the time of the fire; that Mr. Forward was not in possession thereof at the date of the policy; and that Edgar D. Williams had no communication with the company or with Cutright from the 12th day of November, 1901, the day on which said Forward was put in possession of the property, until after the said fire. It is further shown by the evidence that the policy in question was issued and delivered to S. D. Williams by C. B. Cutright, whose name appears thereon, as follows: "Countersigned by C. B. Cutright, Agent"; that Edgar D. Williams took charge of the property after its conveyance to him, and conducted a hotel therein; that Cutright first knew of the conveyance of the property to Edgar D. Williams on or about the 29th day of May, 1901; that there was no incumbence on the property at the date of the policy, except the said trust deed to secure the \$3,000 note, which deed of trust was contemplated and indirectly referred to in the said provision of the policy relating to payment of loss, if any, to the Ritchie County Bank, as its interest might appear at the time of fire; that there had never been any other suit brought against defendant for said \$1,500 item; that the policy was not at any time presented by S. D. Williams, or any person for him, to the company, or its agent, with a demand or request for its consent to the conveyance or transfer of said property to said Edgar D. Williams; that no transfer of the policy by the company was ever made to Edgar D. Williams; and that no request was ever made to the company for such transfer. Edgar D. Williams swears that he paid the premium on the policy in suit; that it was paid in and by two notes, which he gave to the insurance agent, C. B. Cutright, the same person whose name appears on the policy; and that there were two other policies by different companies on the property, issued by said Cutright as their agent. Several notes were given in evidence, all signed by Edgar D. Williams, and each payable to the order of C. B. Cutright, at the Bank of Cairo, W. Va., one for \$70 at 60 days, and another for \$65 at 90 days, both bearing date on the 13th day of April, 1901; another for \$70,

dated June 12, 1901, payable in 90 days, a renewal of the above-mentioned \$70 note; one for \$40, dated July 12, 1901, at 90 days; another one for \$40.60, dated October 12, 1901, at 90 days; and a check for \$25.60, dated July 12, 1901, made and payable as aforesaid—which notes first given, and the renewals thereof, and said check, were made and delivered to Cutright, and paid by Edgar D. Williams, as he states, for said three premiums. It is claimed that said notes, some being renewals of the others, and said check, were given to and collected by said Cutright, as the agent of the defendant company; but it will be observed that said notes and check, and each of them, are on the face thereof payable to Cutright individually, and not as "agent." There is no proof in the record showing or attempting to show that he was authorized by the company to receive notes or checks for premium due to it, or that it ever had any notice at any time of said transactions, or any of them. It is also apparent that the notes and check, and each of them, were made and delivered by Edgar D. Williams to Cutright after the conveyance of the insured property to Edgar D. Williams by S. D. Williams.

The plaintiff, moreover, contends that Cutright wrote the other insurance on the property, after the change in its ownership, occupancy, and conveyance thereof as aforesaid; that he accepted payment of premiums on the policy sued on after the said conveyance, with full knowledge of the facts aforesaid; that he thereby waived any forfeiture of the policy; and that, by reason of the acts and conduct of Cutright, the defendant is estopped from claiming a forfeiture of the policy by Williams, and from denying a waiver of such forfeiture by Cutright, as agent of defendant. The evidence proves that, after the policy sued on had been issued by the company and delivered to S. D. Williams, a change of title, occupancy, and possession of the insured property took place, by reason of the voluntary act of the insured, to wit, by the deed from Williams and wife to Edgar D. Williams, without the knowledge or consent of the company; that another change of occupancy and possession of said property took place about six weeks before its destruction by fire; and that when the said fire occurred neither S. D. Williams nor any member of his family, nor said Edgar D. Williams, was in possession thereof—all of which was without the knowledge or consent of the company, unless the acts and knowledge of Cutright aforesaid be taken and held as the acts and knowledge of the company, and in legal effect a waiver by it of the conditions in the policy contained. The insurer undertakes to guaranty the insured against loss or damage, and to make certain payments upon the terms and conditions agreed upon and specified in the policy, which embodies the agreement of the parties, and upon no other, and, when called

upon to pay in case of loss, the insurer may justly insist upon the fulfillment of those terms. The terms of the policy constitute the measure of the insurer's liability, and, if it appears that the contract has been terminated by the violation on the part of the assured of its conditions, there can be no recovery. *Kerr on Ins.* 430. The company assumed the risk of the insurance under the conditions existing at the time of the completion of the contract. It contracted with reference to the title to and occupancy of the property, and provided that no change should thereafter, during the life of the policy, be made therein without its consent, given in a specified manner. Such provisions are a guard against the diminution in the strength of the motive which the insured may have to be vigilant in the care of his property, and the substantial diminution of interest in the property insured has been suggested as a test of the kind of transfer or change of title which will avoid the policy. In the case of *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553, it is said: "The object of the insurance company, by this clause, is that the interest shall not change, so that the assured shall have a greater temptation or motive to burn the property, or lose interest or watchfulness in guarding and preserving it from destruction by fire; and any change or transfer of the interest of the insured in the property, of a nature calculated to have this effect, is a violation of the policy." In the case of *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, it is said "that contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in cases of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; * * * that it is competent and reasonable for insurance companies to make it a matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; * * * that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, where the waiver relied on is the act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with full knowledge of the facts, ratified the action of the agent." Three of the Justices of the Supreme Court in the case cited dissented from the opinion of Mr. Justice Shiras, but upon what point or points therein does not appear.

Whatever difference of opinion there may be among judges as to the legal effect of the acts of agents, during the negotiations of the parties, in the inception of the contract, there can be no room for difference as to the law governing the acts of agents and the parties to the contract, after its completion and delivery. All of the acts of S. D. Williams relied on by the defendant as a forfeiture of the policy, and all of the acts and transactions of Cutright relied upon by the plaintiff as in legal effect a waiver of the forfeiture, if any, by the defendant, were after the delivery of the policy to the insured. There is no proof that, at the time of the execution and delivery of the aforesaid notes and check by Edgar D. Williams, Cutright was yet the agent of defendant. But, if we may presume that he continued to be such agent until that time, it is not shown that his acts in receiving the notes and check were authorized by the defendant, in the manner above stated, or otherwise, or that such acts, or any of them, ever came to the knowledge of the defendant. In the case of *Maupin v. Scottish Union & National Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003, the following expressions are cited with approval by Brannon, J.: "If one who is dealing with an agent knows that he is acting under circumscribed and limited authority, and that his act is outside of and transcends the power conferred, the principal is not bound, whether the agent is general or special, because principals may limit the power of one as well as the other. If a policy of insurance declares that no officer or agent has power to waive any provision or condition embraced in a printed or authorized policy, but may waive certain added conditions, provided such waiver is written on or attached to the policy, an attempted waiver by an agent of one of the conditions, which the policy declares he shall not have power to waive, is inoperative and void." *Quinlan v. Providence Ins. Co.*, 133 N. Y. 356, 81 N. E. 81, 28 Am. St. Rep. 645: "Where a policy of insurance itself contains an express limitation upon the power of the agent, he has no right to contract, as against the company, with the party to whom the policy has been issued, so as to change its terms, or dispense with the performance of any part of the consideration, either by parol or in writing, and the insured is estopped by accepting the policy from setting up powers in the agent at the time in opposition to the conditions in the policy." *Weldert v. State Ins. Co.*, 19 Or. 261 [24 Pac. 242] 20 Am. St. Rep. 809. To the same effect *Cleaver v. Ins. Co. (Mich.)* 32 N. W. 660, 8 Am. St. Rep. 908; *German Ins. Co. v. Heiduk*, 30 Neb. 288 [46 N. W. 481] 27 Am. St. Rep. 402. "We must take the contracts [policies] as we find them and enforce them as they read," says the late case of *Rohrback v. Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451." It seems very plain that there was a forfeiture of the policy by reason of

the conveyance of the insured property by said S. D. Williams and wife to Edgar D. Williams as aforesaid, and that the acts of Cutright above stated did not amount to a waiver of such forfeiture on behalf of the defendant.

Plaintiff also complains that the circuit court erred in rejecting the proof of loss of the insured building offered by it in evidence, and contends that said proof was and is sufficient. The statement or proof of loss is signed and sworn to by said S. D. Williams, bears date on the 11th day of February, 1902, and, among other things, says that on the afternoon of Sunday, December 22, 1901, from a gas stove in a bedroom, as he is informed and believes, a fire originated that totally destroyed the three-story metal-roofed building and its contents, insured by him, situate in Cairo, Ritchie county, W. Va., and occupied for a hotel, mercantile, and office purpose. It then states the interest of the plaintiff by reason of its deed of trust, the conveyance of the property to said Edgar D. Williams, the other insurance thereon, and by whom and for what purpose the building was occupied and used at the time of the fire. The sufficiency or insufficiency of the proof of loss depends upon the construction which we may give to our statute relating to insurance and insurance companies. Chapter 33, p. 120, of the Acts of the Legislature of 1899 is entitled: "An act fixing the liability of fire insurance companies." It was passed February 21, 1899, and took effect 90 days thereafter. It was therefore in force and effect at the time the policy in question was issued and delivered to S. D. Williams. The language of the act is: "All fire insurance companies doing business in this state shall be liable, in case of total loss, by fire or otherwise, as stated in the policy, on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon said real estate; and in case of partial loss by fire or otherwise, as aforesaid, of the real estate insured, the basis upon which said loss shall be computed shall be the amount stated in the policy of insurance effected upon said real estate, and the insured shall have the right to enforce his claim for said loss in any court having jurisdiction." Valued policy laws are now in force in many of the states of the Union, besides West Virginia. These statutes vary somewhat in phraseology, but all have the same purpose. In Wisconsin, which enacted the first of such statutes, it is provided that "whenever any policy of insurance shall be written to insure any real property, and if the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and the measure of damages when destroyed." In *Oshkosh Gaslight Co. v. Germania Fire Ins. Co.*, 71 Wis. 454, 87 N. W.

§19, 5 Am. St. Rep. 233, the court says, after quoting the law: "Under this statute, it is settled by frequent adjudications that the actual value of such real estate when insured is wholly immaterial. * * * The statute must be regarded as a part of the contract of insurance, and the amount written in the policy, as liquidated damages as agreed upon by the parties, is conclusive as to the amount of the damage, if any, for which the insurer is liable by reason of the loss." In *Relly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552, it is held that, "as the statute rests upon grounds of public policy, the conclusive effect of the amount of insurance written in the policy upon the measure of damages is not altered by a stipulation in the same instrument that the damages should be established 'according to the true and actual cash marketable value' of the property when the loss happened." *Thompson et al. v. Citizens' Ins. Co.*, 45 Wis. 388; *Seyk et al. v. Millers' Nat. Ins. Co.*, 74 Wis. 87, 41 N. W. 443, 3 L. R. A. 523. In *Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 418, 41 S. W. 279, 280, the court says: "It is perfectly evident that the Legislature intended to remedy the evil of overvaluation in insurance, and in doing so followed the example of many other states of the Union by making the insurer responsible for overvaluation, and to do this the remedy was and is to compel the insurer to pay the full amount (in case of total loss) for which it writes the policy, and on which the premium is calculated and collected, subject only to be diminished by any deterioration in value between the dates of the policy and the loss, and providing, further, for relief for fraud on the part of the insured, where the insurer is deceived thereby. In other words, the law says to insurance companies: 'If you want to pay only a fair price for property that may be destroyed, you must adjust that matter before the policy is issued, and, if you fail to do so, you will be the loser, as the law fixes the amount you are to pay by the amount you collect premium on, subject to deterioration in value after the date of the policy.' As to whether this is right we do not say. It is the law, and, if recognized and obeyed in spirit, would no doubt remedy a great and growing evil in the country. From what we have said, it is manifest that we are of opinion that the appellant was bound to pay the appellee the full face of his policy, as the case is presented. As to the arbitration alleged, there was nothing to arbitrate."

We adopt the language of the court in the last case cited as peculiarly appropriate in explanation of the intention of the Legislature in the enactment of our insurance law above quoted. The language of the act is broad and unambiguous. Under it, the insurance company shall be liable, in case of total loss, by fire or otherwise, as stated in the policy, on any real estate insured, for the whole amount of insurance upon said real estate, any provisions in the policy to the contrary notwith-

standing. All provisions in a policy in conflict with a valued policy statute are void, and hence a provision for the appointment of arbitrators in case of loss is ineffective where the property is wholly destroyed. *Elliott on Ins.* § 318. The proof of loss informed the defendant of the total loss of the insured property, and of the liability of the company under the policy and the statute, as claimed by the plaintiff. The reasons for the insertion of the many statements in the proof of loss, where the policy is not issued under and governed by a valued policy statute, having ceased in this case, we hold that the proof of loss offered in evidence by the plaintiff, but rejected by the court, was and is sufficient.

But, upon the whole case, we find no reversible error. We therefore affirm the judgment.

(55 W. Va. 342)

MEDLEY v. GERMAN ALLIANCE INS. CO.

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

INSURANCE—AUTHORITY OF AGENT—LIABILITY OF COMPANY—CONDITIONS OF POLICY—WAIVER—NOTICE TO INSURED—LACHES—REFORMATION OF POLICY—LIMITATIONS OF AGENT'S AUTHORITY—FORFEITURE—PROOFS OF LOSS—FALSE SWEARING.

1. An insurance company establishing a local agency is responsible to the parties with whom its agent transacts business for his acts and declarations within the scope of his employment, and to the extent of the authority apparently conferred upon him by the company; and a limitation upon such apparent authority, not communicated to the insured before he acted upon the representations or conduct of the agent, will not relieve the company from liability, unless, after discovery of the want of authority in the agent, the insured has precluded himself from the assertion of his rights by laches. (By three Judges.)

2. When an insurance agent, intrusted with blank policies, and authorized to fill up, countersign, and deliver them, is correctly informed, by the person whose property he undertakes to insure, as to the state of the title, and other facts material to and affecting the inception of the contract, so far as inquiry is made respecting them, and takes no written application for the insurance, and then issues a policy embodying, as warranties therein, facts different from those which were given to him by the insured, the company is estopped from defending a claim for loss under the policy on the ground of such false recitals, unless it is shown that the insured had prior or contemporaneous notice of want of authority in the agent to waive conditions. (By three Judges.)

3. A contract in writing is presumed to be the embodiment of an antecedent verbal agreement, and upon clear and full proof that the person who undertook the preparation of it has, by mistake or fraud, written the contract different from what it was as made by the parties, it may be reformed in equity; and, where such departure occurs in a policy of insurance prepared by an agent of the company, it raises an equitable estoppel against the company, which may be effectually asserted by the insured in a court of law, unless he had notice of

¶ 2. See *Insurance*, vol. 22, Cent. Dig. §§ 899, 1001, 1002.

want of authority in the agent to waive the conditions at all, or except in a specific manner. (By three Judges.)

4. A clause in a policy of insurance so limiting the authority of the agent is not notice to the insured of the agent's want of power to bind his principal in respect to transactions had between them before the policy was delivered, such as will prevent a reformation of the contract at the instance of the insured, or preclude him from relying upon a waiver of conditions by the agent made prior to the issuance of the policy. (By three Judges.)

5. Failure to read a policy of insurance within a short time after its delivery is not such neglect or laches as will preclude the insured from having a reformation of it, or deprive him of the benefit of a waiver by the company through its agent, unless some fact was known to him sufficient to put him on inquiry as to whether it had been correctly written, or contained a limitation upon the powers of the agent. (By three Judges.)

6. Restrictions inserted in a policy of insurance upon the power of the agent to waive any conditions, except in a particular manner, as by indorsing the waiver on the policy, do not apply to those conditions which relate to the inception of the contract. (By three Judges.)

7. As to promissory warranties, conditions for the violation of which the policy is rendered noneffective after it has become effective and operative, such limitation clause is not only notice to the insured of want of authority in the agent to waive them, but also a stipulation between the parties that the agent has not, and shall not have, any such power.

8. Notice of sale of the insured property under a deed of trust, served upon the insured before the occurrence of the loss, precludes recovery, when the policy contains a stipulation that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall be void, "if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," together with a clause inhibiting the agent from waiving such condition otherwise than by an agreement so indorsed or added, and no agreement waiving the condition as to commencement of foreclosure proceedings and notice of sale is so indorsed or added unless the forfeiture is waived by the company, or the agent under authority therefor conferred by the company.

9. Forfeiture for breach of a promissory warranty is not waived by retention of the premium after notice thereof.

10. Under such a policy, having a slip attached thereto by the agent saying, among other things, "§ ——— Other Concurrent Insurance permitted," additional insurance on the property will not prevent recovery for loss on the policy.

11. Denial by an insurance company of its liability on other grounds, within the time allowed for furnishing preliminary proofs of loss, is, in law, a waiver of the conditions of the policy requiring such proofs.

12. When, by the provisions of a policy, it shall be void in case of fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, false swearing, in order to defeat recovery, must be intentional, and done for the purpose of defrauding the insurer.

Brannon, J., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Kanawha County;
F. A. Guthrie, Judge.

Action by Lucy A. Medley against the German Alliance Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Watts & Ashby and Ohlilton, MacCorkle & Chilton, for plaintiff in error. A. W. McDonauld, Brown, Jackson & Knight, Linn, Byrne & Cato, and A. B. Littlepage, for defendant in error.

POFFENBARGER, P. The German Alliance Insurance Company complains of a judgment of the circuit court of Kanawha county rendered against it, and in favor of Lucy A. Medley, for the sum of \$1,782, in an action of assumpsit upon a policy of insurance upon a dwelling house, and personal property therein, for the sum of \$1,500; alleging that the court erred in overruling its motion to exclude the plaintiff's evidence, made at the conclusion thereof; and its motion to exclude all the evidence and direct a verdict, made after all the evidence had been introduced; in giving to the jury five several instructions, and each of them; in refusing to set aside the verdict; and in entering judgment thereon.

One of the principal defenses to the action, raised by a proper plea, and which forms the subject-matter of instructions given and refused, is the alleged breach of a condition of the policy which reads as follows: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple." No such provision was indorsed on the policy. Mrs. Medley's title to the land on which the building stood is evidenced by a deed by which the Kanawha Valley Bank, a corporation, "doth grant and convey unto" her the lot (describing it), and which contains, in the habendum clause thereof, the following: "And it is fully understood and agreed between all of the parties herein interested that the said lot of land is hereby conveyed by the parties of the first part to the party of the second part for and during her lifetime and at and after her death the title to the said lot is to pass unto and vest in her children born and unborn." No written application for the policy was made. The contract of insurance was effected by Thomas Popp, on behalf of the company, as its agent and G. W. Medley, the husband of the plaintiff, as her agent. The insurance was solicited by the company through Popp, who inquired of Medley, before issuing the policy, as to the person in whose name the deed was, in response to which Medley said: "The deed is deeded to my wife and her heirs, born and unborn." George Medley, a son of the insured, says his father told Popp the property was deeded to his mother and her heirs, and also that there was a lien upon it by deed of trust for \$300 in favor of Ben Baer. Both father and son say the agent inquired, not as to the estate or interest of Mrs. Medley in the property, but as

to the name of the person to whom it was deeded. Popp's testimony was not taken.

The policy contained the following additional clause, limiting the authority of the agent: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of these companies shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024, this court held that "if an insurance company elects to issue its policy of insurance against a loss by fire without any regular application, or without any representation in regard to the title to the property to be insured, it cannot complain, after a loss has occurred, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed." Said case follows the decision in *Insurance Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846. The principle was again applied in *Cleavenger v. Franklin Insurance Co.*, 47 W. Va. 595, 35 S. E. 998. In that case, at page 608, 47 W. Va., page 1003, 35 S. E., Judge English, delivering the opinion of the court, says: "This policy, then, was issued by the Franklin Company without any application therefor signed by the assured. In such cases the law is thus laid down in *Insurance Company v. Rodefer*"—and then quotes the syllabus in that case as above given. This is consistent with, and logically results from, other principles of insurance law several times announced by this court, one of which is that the agent of an insurance company, in preparing, or directing the preparation of, an application for insurance, acts for his company, and not for the applicant. He is the agent of the company, and not the agent of the applicant, and, in what he does, binds the company, and not the applicant, if he acts improperly. "Though the weight of the modern authorities, as well as reason, in my judgment, leads to the conclusion that where an application for a policy, which is filled up by an agent of an insurance company, and signed by the insured on the faith that it has been properly filled up, who has not read the application, though he had an opportunity to do so, if none of the false answers were given by him, but were inserted

either fraudulently or by mistake, where the mistake was not the result of anything said or done by the insured, the insured or assured is not bound by such false answers inserted in the application, but these answers should be regarded as the act of the insurance company, by its agent, and not as the act of the insured. It is true, this position is still controverted by respectable authorities. * * * But outside of Massachusetts the weight of authority now seems to be in favor of the position that, under circumstances above stated, false answers in the application for an insurance will not forfeit the policy, and I concur in this view." Green, J., in *Schwarzbach v. Insurance Co.*, 25 W. Va. 622, 663, 52 Am. Rep. 227. This view is embodied in point 12 of the syllabus of said case. The same doctrine is reiterated in *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909, and it is incorporated in point 3 of the syllabus of that case, together with the further declaration that "this rule is not changed by a stipulation inserted in the policy, subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the insured."

It is denied, however, that this law is applicable to the case in hand, for the reason that the policy contains a clause limiting the power of the company's agent to waive conditions of the policy. As the policy was delivered into the hands of the insured with this clause plainly printed in it, it is said that she had notice of it, and was bound to know, whether she read the policy or not, that the agent had no power to issue a policy upon any other conditions than those stated in it. It is difficult to see any solid ground for this distinction. In the *Deitz Case*, the policy, when put in the hands of the insured, said that, if the property was held in trust or on commission or by leasehold or other interest not amounting to absolute and sole ownership, it must be so represented to the company, and expressed in the policy in writing, else the insurance as to such property should be void, and that if, through the agent, any misrepresentation as to the title to the property or any other matter had been made, the agent should be deemed to be the agent of the insured, and not of the company, and, further, that the company should "not be bound by any act of, or statement made to or by, any agent or other person," which was not contained either in the policy, or in the written application upon which the insurance, or any renewal thereof, was based. How could the company have chosen and put into its policy words more emphatically denying to its agent the power to bind it by any word or act outside of the written matter contained in the application for the policy? For the very reason that the company had so attempted to limit the authority of its agent in respect to matters preceding the issuance of the policy in the

negotiation of the contract, this court virtually declared that clause of the policy void, or at least that the clause in the policy subsequently issued was not notice to the insured of the limitation of the agent's authority. In that case the policy was issued to a husband, on a building belonging to his wife; and the court held the insurance company bound to pay the loss, notice of want of authority apparent on the face of the policy (if it be notice) to the contrary notwithstanding. In *Cleavenger v. Franklin Insurance Co.*, 47 W. Va. 595, 35 S. E. 998, the interest of the insured was different from that stated in the policy, and the policy declared that if it were different the policy should be void. Whether it contained any clause concerning the authority of the agent, does not appear. In *Wolpert v. Northern Assur. Co.*, Judge English said: "It appears that the plaintiff in this case is illiterate, cannot read a word of English, and had to rely on the insurance agents in taking out the policy. No questions appear to have been asked him in regard to the deed of trust, and it does not appear that the conditions of the policy were read or made known to him, and no concealment appears to have been made by the plaintiff. It was simply an omission by the agent to inquire in reference to liens on the property, which was not the fault of the plaintiff; and, looking at the entire case as presented by the record, I do not think the court erred in refusing to set aside the verdict and award a new trial, and in entering judgment." This doctrine was applied, also, in the case of *Coles v. Jefferson Insurance Co.*, 41 W. Va. 261, 23 S. E. 732, the syllabus in which says: "A provision in the application or in the policy making him the agent of the insured, and not of the company, cannot change his legal status as agent of the company, or the law of agency, if he is in fact the agent of the latter." This seems to be an extension of the principle, and to hold that a limitation of authority in the printed application is not binding upon the insured. In the opinion, Judge Holt says: "This rule is not affected or changed by a stipulation inserted in the policy subsequently issued that the acts of such agent in making out the application shall be deemed the acts of the insured, unless written in the application or expressed in the policy."

These decisions are founded largely upon that of the Supreme Court of the United States in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, in which Mr. Justice Miller, delivering the opinion, said: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and

that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith, and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto. * * * It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject, and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal."

But this is said not to be applicable to the case in hand, for the reason that notice of the agent's want of authority to waive conditions was not brought home to the applicant in that case. It is also said that a limitation in the policy is notice, although the policy is prepared by the insurance company alone in pursuance of a prior verbal agreement to which it ought to correspond, and to which it will be made to conform, in equity, upon proof of the fraud or mistake on the part of the agent of the company which resulted in the incorrect preparation of the policy. It is further said that subsequent decisions of the Supreme Court of the United States, as well as some prior to that of *Insurance Co. v. Wilkinson*, are authority for the position that the limitation clause in the policy is notice. One of these is *Carpenter*

v. Providence Washington Insurance Co., 16 Pet. 495, 10 L. Ed. 1044, but it is to be noted that the statement of that case contains this recital: "Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: 'Notice of all previous insurances upon property insured by this company shall be given to them, and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect.'" That was a paper exhibited to the insured by the company before the policy was issued, imparting to him information of the only conditions upon which a contract could be made, and was therefore direct and positive previous notice. Moreover, it was, in legal effect, notice of want of authority of the agent to make any other kind of a contract. Another is *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, which the court distinguished from the case of *Insurance Co. v. Wilkinson*, saying: "Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements." Observe that this was prior, not subsequent, notice. Another is *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387. The condition for the breach of which the policy in that case was forfeited was a subsequent one, and notice in the policy of the limitation of the agent's authority was prior notice. It provided that removal to and residence in certain prohibited sections of the country by the insured should forfeit the policy. Another is *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689, but the condition violated in that case was one subsequent, and not prior, in its nature. Another one is *Assurance Co. v. Building Ass'n*, 183 U. S. 808, 22 Sup. Ct. 123, 46 L. Ed. 213, relied upon by this court as authority for the decision in *Maupin v. Insurance Co.* 45 S. E. 1008, and it does actually decide as follows: "Where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power. Where such limitation is expressed in the policy, the assured is presumed to be aware of such limitation." This much of the decision is based upon the prior decisions of that court hereinbefore referred to and explained, all of which are cases showing either that there was notice in the application prior to the issuance of the policy, or that the principle had only been applied to conditions in the policy, the violation of which subsequent to its issuance rendered it invalid and non-effective. Hence it is clear that the doctrine

has been extended in this last case to limits beyond those theretofore defining its application. This court has said that subsequent notice of the agent's want of authority, contained in the policy, is not binding upon the insured as to representations made at the inception of the contract, and in the verbal negotiations preceding the issuance of the policy. Moreover, at best, it is only presumptive, not conclusive or actual, notice. In the case last cited, the court says the assured is presumed to be aware of such limitation. And in *Insurance Co. v. Fletcher*, cited, Mr. Justice Field said only that the insured "must be presumed to have read" the limitation clause in the application. "In regard to waivers before issued, it is by no means clear that the constructive notice supplied by provisions of a policy not yet in the hands of the applicant should be binding upon him. Prudent men are accustomed to rely upon the acts and statements of the agent, and they should be protected in so doing. Busy men have not time to study the interminable provisions of insurance policies. Only when the custom of limiting the authority of a general agent in the policy has become so general that it is a part of the ordinary business knowledge of the world that such provisions exist and are to be examined will it be proper to hold the applicant bound by them in respect to negotiations prior to the issue of the policy." May on Insur. § 137a.

A large number of the states hold, for one reason or another, that the limitation, expressed in the policy, of the authority of the agent, or prohibition of his authority to waive conditions, has no application to those conditions which relate to the making or inception of the contract, but only to conditions inserted in the contract as actually made, and to be thereafter observed. "It seems to be the prevailing doctrine that the rule holding the company chargeable with the acts, declarations, or knowledge of facts of a general soliciting agent at or before the issuance of the policy is not affected by clauses in the policy prohibiting waivers by agents, or stipulating that the agent shall be the agent of the assured, where it is not shown that such limitations were brought to the knowledge of the assured." 16 Am. & Eng. Enc. Law (2d Ed.) 948. "The restrictions inserted in the policy upon the power of the agent to waive any condition, unless in a particular manner, as by indorsing the waiver on the policy, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation. This doctrine has been applied to both general and soliciting agents." Id. 949. For this position, decisions by the courts of Georgia, Kentucky, Michigan, Missouri, New York, Pennsylvania, South Carolina, Texas, Wisconsin, and West Virginia are cited, and there are others. It is the well-settled law of Maryland, and it

is apprehended that it is the law of New Jersey, if resort be had to a court of equity instead of a court of law. In the opinion in *Insurance Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271, from which Mr. Justice Shiras, in *Assurance Co. v. Building Ass'n*, cited, quotes at great length, it is said: "The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence to vary or control the written contract will be found, on examination, to be, to a large extent, those in which the proof has been received with a view to a reformation of the policy in equity, or to meet the defense that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box." So, in *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 866, from which Mr. Justice Shiras quotes also at considerable length, the court say: "But it is said the agents of the defendants who procured this contract were aware that the real contract designed to be made was that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is contended, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle can this be done? There is no pretense of any fraud in the procurement of this policy. The only ground that can be taken is that the agent, knowing that the premises were to be, in part, used as a stable, should have so described the use in the policy. The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that in a proper case of this kind an equitable remedy exists." So it appears that the only trouble in New Jersey as to this power of waiver is the selection of the proper forum in which to assert it. You cannot have it in a court of law, but you may have it in a court of equity. In this state no such difficulty exists. This court has not been turning the assured round to a suit in equity to have reformation of his contract. *Travis v. Insurance Co.*, 28 W. Va. 583; *Deitz v. Insurance Co.*, 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908; *Coles v. Insurance Co.*, 41 W. Va. 261, 23 S. E. 732; *Woolpert v. Insurance Co.*, 42 W. Va., 647, 23 S. E. 521; *Woolpert v. Insurance Co.*, 44 W. Va. 734, 29 S. E. 1024. These cases were in assumpsit, which is held to be an equitable action at law, and in them the principle of equitable estoppel was applied, and the same result speedily and inexpensively reached that would have been attained by a suit in equity to reform and enforce the contract. *Croft v. Hanover Insur. Co.*, 40 W. Va. 508, 21 S. E. 854, 52

Am. St. Rep. 902; *Cleavenger v. Insurance Co.*, 47 W. Va. 595, 35 S. E. 998. Even in Massachusetts, where conditions and warranties in policies of insurance are enforced to the very letter, the jurisdiction in equity to reform a policy on the ground of mistake or fraud is admitted. *Washburn v. Insurance Co.*, 144 Mass. 175.

The following illustrations of the exercise of equity jurisdiction are given by May on *Insur.* (4th Ed.) § 566a: "An error in a policy may be corrected by the memorandum of the agreement or by the application marked 'Accepted,' over the initials of an officer of the company. If by mistake of the agent a policy is issued in wrong form or with errors, equity will reform it, even after a loss. A mistake brought about by wrong information given by the agent of the company, he being a lawyer, by which the policy was issued in the name of the mortgagor, instead of the mortgagee, will ground a bill for reformation. Where the agent fails to state the interest that is intended to be insured, the policy will be reformed. If a policy differs from the memorandum, the policy will, by equity, be made agreeable to the memorandum. Where the policy omits the name of the insured, and states sixty days as the term of insurance, instead of a year, as agreed upon by the parties in the verbal contract which the policy was intended to embody, the policy will be reformed. Upon 'clear and convincing' evidence of mistake by one party and fraud by the other, or of mutual mistake, so that the writing does not carry out the intention of either, equity will reform. When the insured by mistake inserted the name of another vessel than the one intended to be insured, the policy was reformed after loss. A policy issued in the wrong name by mistake of the company's agent may be rectified after loss, although the said agent signed the application with his own name for the applicant. When the insurer by mistake indorsed 'eight boxes,' etc., on the policy, from a bill of lading given by the insured of a shipment, when in fact it was eighteen, which was not discovered until after loss, the policy was reformed. The rule that mistake must be mutual does not prevail where there is bad faith on the part of the defendant, or where confidence was reposed in him, and he was intrusted with and assumed the preparation or completion of the instrument, in which willfully or negligently he has omitted what had been clearly stated to him as the intent of the plaintiff, who relies on the defendant in the matter. When the insurance company was told that no charter of the ship was at hand, and the insured did not know just where she would touch, but wanted a policy for the round trip, which would cover everything, and when the company purported to give such a policy, but in fact limited it in opposition to the charter, when found, equity ordered a reformation of the contract. When circumstances indicate that a policy was in-

tended to be issued for two months, and the premium was paid for that time only, and the policy was written for a longer time, equity will reform the policy on the company's request. If a certificate for two thousand dollars is by mistake issued upon an agreement for a one thousand dollar policy, the company is entitled to have the document reformed."

If the terms of a policy are so unalterably and absolutely binding upon the assured, after its acceptance, upon the theory of notice, how is it possible that such jurisdiction exists and may be exercised in one forum or another in all the states? If that be true of policies of insurance, how is it possible that deeds and other instruments may be reformed and made to express the true verbal contract which it is supposed to embody, upon the application of the party into whose hands they have been placed? The description in the deed may be altered and reformed so as to speak the truth upon the application of the grantee therein. *Bieler v. Dreher*, 129 Ala. 384, 30 South. 22. So a mortgage will be reformed in like manner upon the application of the mortgagee. *Houston v. Faul*, 86 Ala. 232, 5 South. 433. And the holder of a title bond is not precluded from having a rescission of his contract in equity for misdescription of the land. *Reese v. Kirk*, 29 Ala. 406. The only ground upon which this right of reformation can be denied is laches. How is the person into whose hands the policy of insurance is placed to know whether it has been drawn according to the verbal understanding of the parties, until after he has read it? Is he to reject it upon suspicion? Has he not the right to assume for the time being that it has been properly drawn? As a matter of fact, is it not common knowledge that agents are relied upon to properly prepare the policies, and that they are scarcely ever critically examined before acceptance? There can be no notice until after the reading, and, after the acceptance of the policy, there can be nothing more than a sort of implied notice; and a court of equity will not hold the party guilty of laches for mere negligence to actually read the policy, any more than it will in the case of a deed. Compare the case of a misdescription of a tract of land with the insertion of the complex and artificial terms of insurance policies, such as "unconditional and sole ownership," "fee-simple title," and say whether a layman, especially an illiterate person, can be rightfully or legally subjected to a stricter rule in respect to them than he is in respect to a description of a thing with which he is perfectly familiar, or which he is obviously capable of fully comprehending.

"Where the plaintiff applied for a renewal on the same terms as the old policy, and the defendant promised to give it, and the plaintiff did not examine the new policy until after loss, when he found it different from the old one in a matter materially affecting his

rights of recovery, it was held that he was not guilty of laches—having a right to presume the new policy to be like the old, according to promise—and that the policy should be reformed. The length of time before the assured discovers the mistake in the policy is only important as evidence of the existence of such a mistake. There is no period short of the statute of limitations within which a man must discover such error. A plaintiff is not, by neglecting to read his policy, guilty of such laches as to bar him from seeking to have the policy reformed to agree with the contract he made. Where a suit on the policy has been brought within the period of limitation agreed on, a bill for reformation in aid thereof may be brought after the limit." *May on Ins.* (4th Ed.) § 566.

It is upon these principles, well settled and fundamental in their nature, and not because of the desire to treat insurance companies different from other litigants, that the courts have enforced their contracts under the conditions of this case. Bearing them in mind, and applying them to the facts, the following language from the New York Court of Appeals has nothing of harshness or irregularity in it: "The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation. To take the benefit of a contract, with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party." *Wood v. Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733. Nor has this language any strange or unusual sound to one who has had his mind fixed upon those principles: "The rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it by proving the existence of facts which would render it void, where it had full knowledge of them when the policy was issued, is too well established by the authorities in this state to require further discussion. It is manifest that the facts in this case bring it clearly within the principle of the cases cited. Whether the decisions of this class of cases proceed upon the charitable theory that the insurance company by mistake omitted to make the required indorsement, or intended to waive the provision regarding it, or upon the idea that its purpose was to defraud the insured, and is for that reason estopped, is of but little consequence, as any one of those theories is sufficient to avoid the defense relied upon in this case." *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159. Nor does the following stand upon a different principle, except in degree: "Where, upon an application for a

fire insurance policy upon property covered by a chattel mortgage, a representative of the plaintiff disclaimed any knowledge of claims against the property, but stated that, if there were any, defendant's agents could ascertain by inquiry of the plaintiff, which the agent voluntarily agreed to do, but failed to do, that the policy is subsequently issued with no reference to the chattel mortgage indorsed thereon or added thereto, as required by one of its conditions, is no defense to an action upon it for a loss, since, while the agent was ignorant of the existence of the incumbrance, under the circumstances he was chargeable with knowledge of it, and, having issued the policy, it was a waiver of the condition requiring the indorsement, and the defendant is bound thereby." *Skinner v. Norman*, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776. In the opinion, the court says such is the law, "notwithstanding a provision in the policy that no agent of the company shall have power to waive any such condition, except by written indorsement, though a different rule prevails where a change in the title or occupation of the property occurs subsequent to the issue of the policy."

Nor, it is humbly and deferentially submitted, does the following extract from the opinion of Mr. Justice Shiras, the only portion of it bearing directly upon this question, either answer this reasoning in the language of the law, or cover the principles upon which this doctrine stands: "The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and that consequently it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provisions that no waiver shall be made by the agent except in writing, indorsed on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon the facts existing at and before the time when the contract was made, or upon the facts subsequently taking place."

To say there is no difference between prior and subsequent presumptive notice, with reference to the powers of the agent in respect to a condition or matter, and that a limitation in the policy upon the powers of the agent, which the assured has never seen, and could not have seen until after the acceptance of the policy, which he had the right to presume would conform in every respect to the verbal contract which it was designed and intended to embody, shall have the same effect, as to representations and transactions preceding

the preparation of the contract which the insurer undertook to write up, as it has in respect to matters solemnly agreed upon to be done and observed after the contract has been written up and completed, and form parts of the completed contract itself, and after the insured has had presumptive notice of the want of power in the agent, is to overlook and lay aside that distinction upon which a court of equity has always permitted the introduction of parol evidence for the purpose of canceling or reforming a written instrument, and refused to admit it for the purpose of altering, contradicting, varying, adding to, or subtracting from a written agreement after it has been written in strict conformity with the verbal agreement which it was designed to embody. This ignores the entire doctrine of rescission, cancellation, and reformation of written contracts, or else it asserts that no such doctrine applies when the contract is made on one side through an agent of limited authority, while the other party was absolutely ignorant of the limitation until after he was irrevocably and unalterably bound. "In an action upon a policy of fire insurance, it appeared that no written application for insurance was made, and that the policy was written by defendant's agent, and accepted in good faith without examination, and not read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as 'occupied by the insured as a dwelling only.' The plaintiff fully and accurately described the property to the agent as a boarding house, and it was seen and examined by the agent, and the misdescription was his act alone. Held, that the plaintiff was entitled to recover." *Dowling v. Insurance Co.*, 168 Pa. 234, 31 Atl. 1087. In that case the court said, without dissent:

"The fraud or mistake of an insurance agent, within the scope of his authority, will not enable his principal to avoid a contract of insurance to the injury of the insured who acted in good faith, and the fraud or mistake of the agent may be proved by parol evidence, notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured. This is clear upon principle, and it is abundantly sustained by authority. *Smith v. Farmers' & Mechanics' Mutual Fire Ins. Co.*, 89 Pa. 287; *Ellenberger v. Protective Mutual Fire Ins. Co.*, 89 Pa. 464; *Susquehanna Mutual Fire Ins. Co. v. Cusick*, 109 Pa. 157; *Klister v. Lebanon Mutual Ins. Co.*, 128 Pa. 553 [18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696]; *Meyers v. Ins. Co.*, 156 Pa. 420 [27 Atl. 39].

"This case is much stronger for the plaintiff than those above cited. In all of these, written applications had been signed by the insured, and in each case the application was made a part of the contract. In this case no written application was made, and the policy was written by the agent, and not

read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as 'occupied by the insured as a dwelling only.' The testimony was clear and uncontradicted that there was no mistake or deception on the part of the plaintiff, who fully and accurately described the property to the agent as a boarding house, and spoke to him of its capacity and use. It was seen and examined by the agent, and its use, which was apparent, was fully known to him. The misdescription was his act alone, in the face of light and knowledge, and was unknown to the insured until after the loss occurred. The defendant cannot be released from its contract because the plaintiff, acting in good faith, accepted without examination the policy written by its agent.

"In *Swan v. Watertown Ins. Co.*, 96 Pa. 37, the insured signed an application which had not been finished. He directed another to fill it up, and expressed a doubt as to the manner in which it should be done. It was held that he knew facts to incite him to read the policy, and was charged with knowledge of its contents, and should, under the circumstances, be presumed to have accepted it as written. No such presumption arose in this case. Having made a full and frank disclosure of the facts to the company's agent, who was empowered to write the policy, and who, from observation, knew the character and use of the building, there was nothing to induce or warn the insured to read the policy, unless it was the anticipation of fraud or mistake, and this could impose no duty in protection of the rights of the defendant."

Church, C. J., delivering the opinion of the court in *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, says: "It was bad faith on the part of the defendant to change so radically the terms of the policy, and deliver it as a policy simply renewing the old one, without notice of the change. A party whose duty it is to prepare a written contract, in pursuance of a previous agreement, who prepares one materially changing the terms of such previous agreement, and delivers it as in accordance therewith, commits a fraud which entitles the other party to relief, according to the circumstances presented. Equity will reform a written instrument in cases of mutual mistake, and also in cases of fraud, and also where there is a mistake on one side and fraud on the other. *Welles v. Yates*, 44 N. Y. 525; *Rider v. Powell*, 28 N. Y. 310, and cases cited. The negligence of the plaintiff in not discovering the change and laches, in not sooner seeking relief, are questions which make the propriety of granting relief in a given case discretionary. The court below, upon the findings of fact, we think properly exercised its discretion in this case in granting relief. Policies of fire insurance are rarely examined by the insured.

The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when for the first time he was informed of the peculiar terms of this provision." See, also, *Broadhead v. Insurance Co.*, 23 Hun, 397, and *Miaghan v. Insurance Co.*, 24 Hun, 58, in the syllabus of which the following is found: "The plaintiff was, against the defendant's objection and exception, allowed to testify that he did not read the policy when it was delivered to him. Held no error; that it tended to show that he relied on the agent's acts."

The only new element in this case which could possibly distinguish it from the decisions made by this court, to which reference has been made, as holding that where the agent of the company issues a policy without having taken any written application therefor, or, having taken one, has incorrectly stated therein the information given to him by the applicant, the company is estopped from relying upon facts, existing at the time the contract was made, differing from those incorrectly stated in the application for the policy, is the alleged notice of want of authority in the agent, conveyed by incorporating the limitation clause in the policy. If this is not notice, there is nothing else in the case which forms the basis of even a pretense that it is to be distinguished from the other cases. Nothing more need be said to show that it is not conclusive, actual notice, irrevocably and unalterably binding the insured. To say so would be to take a position inconsistent with the law relating not only to insurance contracts, but all other kinds of contracts.

The courts, with few, if any, exceptions, say that, in the absence of any collusion between the agent and the insurer, where the latter has no knowledge of a limitation upon the authority of the former, the company is bound by the knowledge of the agent; and that if the applicant for insurance has truthfully answered the questions propounded to him, and put the agent in possession of all the material facts necessary to the preparation of a valid contract of insurance, and the agent, in writing up the contract, incorrectly states the facts, or, in other words, writes the contract as if the facts were different from those given to him, or, having knowledge of the facts himself, without any representation from the applicant, writes a policy containing false recitals of the facts, whether the departure be due to an innocent mistake or to actual and willful fraud on his part, not participated in by the applicant, the company is estopped from making defense to an action on the policy on the ground of such departure or misrecital. Some of the cases decided by this court and the Court of Appeals of Virginia, already cited, go further than this, and hold that if

the agent, without any representation whatever from the applicant, writes up the policy, stating the facts upon his own responsibility, the company is likewise bound by his act, and estopped from disputing the truth of the recitals in the policy. Why should not the company be bound under such circumstances, as well as when the agent has made the inquiries and obtained correct information and then put false recitals in the policy? As has been shown, the company is bound, because the contract would otherwise operate as a fraud upon the insurer. Would it not be an equally rank fraud to permit the company to take the premium and give no insurance in exchange therefor, when the agent foregoes any inquiries whatever and assumes to write the policy himself? Authority other than our cases and the Virginia cases says the company is bound under such circumstances. "When the defendant's agent issued the policy without ascertaining from the owner whether the property was incumbered, he in effect determined that the existence of incumbrances was immaterial, and the defendant agreed to insure the property incumbered or unincumbered. It was the agent's failure to comply with his agreement which led the plaintiff into what was practically a trap, and the defendant should not be allowed to plead its ignorance of a fact as to which it has agreed to obtain knowledge. I know that it has been said by a distinguished judge 'that illustration is not argument,' but at times it is at least a very convenient substitute for it. If in the case of distant property the owner should state to the insurance company that he did not know whether the premises were occupied or vacant at the time, I assume no one would deny that he might, by agreement with the company, obtain a valid policy of insurance if the indorsement 'occupied or unoccupied' was made on the policy." Cullen, J., in *Skinner v. Norman*, 165 N. Y. 585, 571, 59 N. E. 309, 310, 80 Am. St. Rep. 776. But if the applicant, undertaking to state the material facts to the agent, has, by mistake or with fraudulent intent, misstated them, the agent may rely upon his statement and issue the policy in accordance therewith, and is not bound to inquire further as to the truth of the facts, and, if the statements be untrue, the company may defend and be relieved from the contract, on the ground of the falsity of the representations made by the insured. This is the class of cases in which the courts say that the agent need not examine the records as to the title of the insured and incumbrances upon the property, and that the company is not bound by constructive notice. Here the applicant himself is at fault.

In this case the agent of the insured, when solicited to take insurance upon the property, did not say that the title of the insured was the fee-simple estate in the property. He said either "the deed is deeded to my wife

and her heirs born and unborn," or that "the property was deeded to Mrs. Medley and her heirs." To any one but a person learned in the law, this would hardly be taken to mean the fee-simple title. To the layman it imports an estate in the heirs. Under the rule in *Shelley's Case*, the word "heirs" in such deed is a word of limitation, and not of purchase; and the rule involves intricate and fine distinctions, incomprehensible to any person except those who have studied the law. Upon this information, the agent assumed to write in the policy that Mrs. Medley owned the fee-simple title to the lot on which the building stood. Had he put upon that policy the words actually used by the agent of the insured, the company would, no doubt, have made inquiries which would have disclosed the actual state of the title. If the company has been prejudiced, the fault rests with its own agent. Upon the principles hereinbefore referred to, it is clear that no advantage of it can be taken by the company.

It is also urged that the clause providing for unconditional and sole ownership has been violated, because the insured had only a life estate, and it was incumbered by a deed of trust. Though only a life estate, it was an unconditional estate, and she was the sole owner of it. A life estate is a freehold of uncertain duration, but, if it is free from any condition working a forfeiture of it before the death of the life tenant, it is absolutely unconditional. As she did not own that estate jointly with any other person, and it had not been divided or segregated by any lease or in any other mode, it was sole ownership. It has been held over and over by this and other courts that the warranty of sole and unconditional, or absolute and sole, ownership is not broken by the existence of an incumbrance on the land. *Wolpert v. Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024; *Insurance Co. v. Weill*, 28 Grat. 389, 26 Am. Rep. 304; *Quarrier v. Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582. A mortgagor in possession, being the owner of the incumbered fee-simple title, has sole, entire, and unconditional ownership within the meaning of the policy. *Dolliver v. Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Insurance Co. v. Beck*, 43 Md. 358; *Insurance Co. v. Barker*, 7 Helsk. 508; *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473.

The foregoing observations sufficiently demonstrate that the court did not err in giving plaintiff's instructions Nos. 2 and 4, which read as follows:

"(2) The court instructs the jury that, if they believe from the evidence that before the issuance of the policy read in evidence the duly authorized agent of the defendant who took the said policy and represented the defendant in procuring the same was fully informed of the facts of and concerning the plaintiff's title and ownership of the real estate referred to in said policy, and was informed of the provisions of the deed convey-

ing said property to the plaintiff, and that he, the said agent, then and there informed the representative of the plaintiff that the policy should be taken in the name of the plaintiff as the owner of said property, and that the representative of the plaintiff, relying upon said representative and agent of the defendant, assented to such suggestion, and that the policy was accordingly so written by the representative of the defendant and delivered to the plaintiff, and the representative of the defendant then and there accepted and received the premium for the said policy, then the defendant would not be relieved from liability under said policy, even if the deed referred to only vested a life estate in the plaintiff."

"(4) The court instructs the jury that, if they believe from the evidence that before the issuance of the policy of insurance read in evidence a trust lien on the real estate therein mentioned existed in favor of Ben Baer, and that the agent of the defendant who acted in the issuance and delivery of said policy was informed and notified of the existence of said lien, and of the fact that it remained unpaid, and that the said agent then and there stated that the fact of the existence of said lien made no difference, and that he issued said policy and received the premium therefor with full notice thereof, then the defendant would not be relieved from liability on said policy on account of the existence at its date and delivery of the said deed of trust."

It is equally apparent that the court did not err in refusing to give defendant's instructions Nos. 3, 4, and 9, which read as follows:

"(3) The jury are instructed that if they believe from the evidence that the agent, Thos. Popp, who solicited said insurance, inquired of the agent and husband of the plaintiff as to who owned the property to be insured, and said agent stated to said Popp, in answer to said inquiry, that the deed to said real property was to his wife and her heirs, born and unborn, or to her and her heirs, then the plaintiff is not entitled to a verdict in this case.

"(4) The jury are instructed that if after said fire the plaintiff, in her additional statement of proof of loss sent to the defendant, stated that said real estate so insured in said policy belonged to her and her heirs, then she is not entitled to recover as to said insurance on said building in this case."

"(9) The court instructs the jury that, if they believe from the evidence that the plaintiff was not the unconditional and sole owner of the house described in the policy of insurance in this case at the date of the loss of said house, the jury cannot find any damages against the defendant by reason of the destruction of said house by fire, unless the jury further find from the evidence that the true title of the plaintiff to said property was made known to the defendant, or its agent, prior to said fire."

Another clause of the policy said that, unless otherwise provided by agreement indorsed thereon or added thereto, it should be void, "if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or deed of trust." It may be very well doubted whether, if this clause had been brought to the attention of the insured at the time of the making of the contract, any policy would have been issued without an indorsement thereon waiving this condition; but it is in the policy, and relates to something which will occur, if at all, subsequent to the time of the making thereof. It is a part of the contract as made, and that contract further stipulates that no agent shall have power to waive any of its conditions. As to these subsequent conditions or warranties, this non-waiver clause is effective. As to them, it is not mere notice of want of authority. It rises to the dignity of an agreement that there is not, and shall not be, any power in the agent to waive. *Quinlan v. Ins. Co.*, 133 N. Y. 356, 365, 31 N. E. 31, 28 Am. St. Rep. 645. "A provision that a policy shall be void in case of foreclosure proceedings is common in insurance policies, and we must assume that experience has shown to the underwriters that such proceedings increase the risk to the insurer. The defendant might have been willing, for the premium charged, to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceedings to foreclose the mortgage. It did assent to the mortgage, and agree that loss, if any, should be paid to the mortgagee, but it did not assent to continue the insurance in case the risk was increased by proceedings to foreclose the mortgage. Before commencing the foreclosure, the plaintiff should have obtained the assent of the defendant. It might have examined the circumstances and granted such assent without any conditions, or it might have required additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year, or surrendered the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for it. There it is, and we cannot take it out of the policy by construction." *Titus v. Ins. Co.*, 81 N. Y. 410. See, also, *Quinlan v. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645.

Notwithstanding this clause, and the fact that notice of sale under the deed of trust was given and served upon Mrs. Medley, it is urged that the policy was not thereby avoided, for the reason that she brought a suit in equity and enjoined the sale, and, after dissolution of her injunction by the court below, took time for an appeal to this court, and thereby defeated the sale until after the loss by fire occurred. The condition does not say that if sale is made the policy shall become noneffective, but that notice of sale shall

avoid it. This clause is inserted by insurance companies for their protection, because it is said that when foreclosure proceedings are commenced with the knowledge of the insured the risk is thereby increased, as under such conditions the temptation to burn the property and thereby procure money to discharge the lien may be very great, according to the exigencies of the situation. It is therefore considered a reasonable and prudent condition, and though, in some cases, it may work great hardship, the courts can do nothing but enforce it.

The forfeiture thus effected could have been waived by the company, or by the agent acting under enlarged powers, but not under his authority as limited by the policy, and there is some evidence tending to show an offer by the local agent to pay \$1,000 in satisfaction of the claim. If this could operate as a waiver, there is no evidence of the authority of this agent to waive. Nor is there any evidence of waiver on the part of the company, unless its failure, or offer, to return the premium could so operate, but it cannot. As to this condition, violated after the policy became effective and operative, the return of the premium is not a prerequisite to an assertion of the forfeiture. It does not render the policy void ab initio. It is not cause for rescission, in the execution of which the parties must be put in statu quo; nor is it a case of the ratification of an unauthorized contract, made by an agent, by retention of benefits thereunder. If it were not a breach of a promissory warranty, but a violation of a stipulation as to a fact relating to title or condition of the property, or to some other matter affecting the inception of the contract, retention of the premium might, on sound principle, amount to a waiver of the breach, for the ground of defense there would be the want of a valid contract to start with, and not the cessation of a contract, in the manner therein appointed by the parties for putting an end to it, after it has gone into effect.

This conclusion makes apparent the error of the court in giving plaintiff's instruction No. 5, which reads as follows: "The court instructs the jury that if they believe from the evidence that before the time of the alleged fire a notice of sale was given under the deed of trust to secure Ben Baer, read in evidence after the issuance of the policy of insurance declared on, but that said notice was given without the procurement or knowledge of the plaintiff, and that she had no notice of the fact that it was intended to give notice of such sale until she was served with such notice, and that no sale was ever made under the said notice or under the said trust deed, then the defendant would not be relieved from liability on account of said policy by reason of the issuance of such notice of sale."

The policy provides that it shall be void in case of any fraud or false swearing by the insured touching any matter relating to the

insurance or the subject thereof, whether before or after loss; and the court is said to have erred in refusing to instruct the jury that if the plaintiff, in her proof of loss, verified by her oath, and transmitted to the company, "stated that the building covered by said policy, and for the loss of which she was seeking pay from the defendant under said policy, belonged to her at the time said insurance was effected and procured, then the jury must find for the defendant." The instruction was fatally defective in omitting to say the false swearing must have been done knowingly and with fraudulent intent. *May, Ins. § 477*. For a similar reason, the objection to plaintiff's instruction No. 3 is unsound. The inclusion of property in the proof of loss, which did not belong to the insured, could not defeat her claim, unless it was fraudulent.

Plaintiff's instruction No. 1, saying the failure of the insured to furnish sufficient proofs of loss would not preclude recovery, provided the jury should find the defendant, within the time allowed for proof of loss, denied liability on grounds other than failure to furnish such proofs, was proper, as there was evidence tending to prove such denial, and the court did not err in refusing defendant's instruction No. 16, because it ignored this evidence and might have misled the jury, if it had been given. "A denial by an insurance company of its liability on other grounds, before any preliminary proofs are made, and before the time within which such proofs are to be made by the terms of the policy, is in law a waiver of the conditions of a policy requiring such proofs." *Sheppard v. Ins. Co., 21 W. Va., 368 (Syl., point 14)*.

Whether any demand was made for the certificate of the disinterested magistrate or notary public, living nearest the place of the fire, as to the amount of the loss, is a question of fact, calling for no decision or expression of opinion here.

Benj. Baer, holding a lien on the property by deed of trust, took out additional insurance on the property. Whether, if the plaintiff had knowledge of this, it would have avoided the policy, need not be decided, for a slip was attached to the policy, saying, among other things, "\$—— other concurrent insurance permitted," and the policy on its face gave the agent authority to consent to additional insurance. It is urged that, as no amount was stated, it must be presumed that this slip was left on inadvertently, and should not be treated as a part of the contract, but contracts of insurance are construed most strongly against the company. *Bryan v. Ins. Co., 8 W. Va. 605; Quarrier v. Ins. Co., 10 W. Va., 507, 27 Am. Rep. 582; Miller v. Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452*. For the same reason, any doubt as to whether a paper attached to the policy is a part of it ought to be resolved against the company. It prepares the policy.

Whether the principles here announced are

inconsistent with the application of the law in *Maupin v. Insurance Co.*, 53 W. Va. 557, 45 S. E. 1003, depends upon the determination of a question of fact involved in that case. If the attempted waiver is regarded as having been made at the time the contract was made and without notice to the insured of the limitation upon the agent's authority, according to my view of the case, some conclusions announced here are inconsistent with that decision; but if it was an attempted waiver after the policy became effective, as seems to have been the finding by the majority of the court, there is no such inconsistency. As abstract law, however, point 3 of the syllabus in *Maupin v. Insurance Co.* is not in accord with the views here expressed, in so far as it asserts that there can be no waiver of the "iron safe," or a similar clause "before the time of the issuance of the policy."

For the error above noted, as well as for insufficiency of evidence to support the verdict, the judgment will be reversed, the verdict set aside, a new trial granted, and the case will be remanded.

BRANNON, J. (dissenting). I agree to the judgment. I do not agree to the opinion excusing one from reading a policy before he accepts, and excusing him from its conditions because he did not read or understand it. I think that when a man accepts a deed he is bound by its terms. If it departs from the agreement, and he accepts, he waives the points of departure. The agreement is merged. The deed is a contract; so is a policy of insurance. *Weidert v. State Ins. Co. (Or.)* 24 Pac. 242, 20 Am. St. Rep. 809. I do not agree to take from the company the condition that the policy should be void if the insured owned less than a fee. A company would be willing to take a risk if the insured owned a fee, but not if he owned only a life estate. A person owning a life estate could make money by burning or by being careless. This company never agreed to insure a life estate. It had a right to put that condition in the policy. It is advisable and prudent for its safety; but reasonable or unreasonable, it had right to fix any terms it pleased, and the other party had right to accept or reject the policy. The insured is bound to know the meaning of the policy, and cannot plead ignorance of law.

I do not agree to allow oral evidence, preliminary to the contract, to change its terms. The authorities given in *Maupin v. Scottish Union National Ins. Co.*, 45 S. E. 1003, 53 W. Va. 557, will sustain this view. That oral evidence is that the agent was told that the deed was to Mrs. Medley and heirs—that in law meant a fee simple, just as the policy says. So the agent did not write the policy different from the statement, in the eye of the law.

I do not agree that the disability of the agent to waive vital conditions extends only

to things occurring subsequent to the issue of the policy. It is agreed that an agent may not, after the policy issues, waive conditions; but, it is said, before it issues he may waive the duty of the insured to conform thereafter to its requirements, and may waive the presence or existence of essential facts at the date of issue; for instance, that the party has a fee simple. That is, though the company is willing to risk only on the basis of a certain state of things, yet the agent in every place can waive them, and accept another basis, and this in the face of the policy, which says that it is issued on the faith of a certain specified basis, and, further, that no agent can dispense with that basis. This seems to deny right of contract, and to be hard and unjust to insurance companies, which are valuable institutions to the country. Their dangers are great enough, contract as carefully as they may; but to take from them the right to protect themselves against their agent's wrongful acts imposes unjust burdens, and exposes their written contracts to defeat from perjured oral evidence. An insurance company has right to defend itself against fraud and falsehood, to put in conditions as to the title of the property, the duration of the estate, and other matters as they exist at the date of the policy, and make the policy conditional upon them, and it has right to warn the other party that no agent can waive such conditions. It does this by the very letter of its policy. The insured accepts upon such condition, including the statement that no agent can dispense with such conditions. I have always understood that a purchaser of land is bound to know, whether in fact he does or not, clauses, conditions, and limitations, not only in the last instrument in the chain of title, the deed to him, but also away back in any deed in the chain; but here it is proposed to release a party from a condition set before his eyes in the very deed to him. *Waldron v. Harvey (W. Va.)* 46 S. E. 608. An insurance company deals with persons far off, and has to do so by agents. If bound by their waivers, by agreements between the insured and the agents, it would be ruined. It would be subject to oral evidence, sometimes true, oftener false. It is absolutely necessary that it put its terms and conditions in its policy, and if you nullify these, it has no protection. You impair, destroy its contracts. I assert that any man may limit the power of his agent. Any one dealing with him must inquire as to his power. But, plainer yet, the principal can limit his agent's authority, and notify those dealing through him, as in this case. The policy holder or acceptor is told by his policy of the limitation. That limitation of power is general, and applies to any and every condition, prior or subsequent.

As to the argument that the agent was told one thing as to the title and wrote another in the policy, and therefore the policy

can be reformed so as to conform to the statement, that makes it conform to what the one side agreed to, but what the other side never agreed to. That forces on the company a contract it never made. Equity never reforms a deed except to correct mutual mistake. Where both sides do agree to the same particular thing, and agree to have an instrument drawn to do that thing, and the scrivener fails to make the document accomplish what both parties intended it to do, equity will reform, but not where both sides never agreed to do that same thing. In the one case you carry out the intention of both sides, in the others you carry out the intention of one side, but defeat the intention of the other, and make for him a new agreement. In such case equity will rescind, but not reform. *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187.

Some of our decisions may seem in contrast with the view above expressed, and if it were not for the recent labored consideration of the whole question by the Supreme Court of the United States in *Northern Co. v. Grand View*, 188 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, I should not be so insistent upon the matters above discussed. I referred to that case at length in *Maupin v. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003, and now cite the latter case for fuller views. On a question of insurance, I think the decision of the Supreme Court ought to govern. See *Ritchie Co. Bank v. Ins. Co.* (decided this term) 47 S. E. 94, for views touching this question.

MILLER, J., concurs in this note.

(135 N. C. 12)

CANDLER et al. v. ASHEVILLE ELECTRIC CO.

(Supreme Court of North Carolina. April 12, 1904.)

JUDGMENTS—DAMAGES FROM DAM—RES JUDICATA—PURCHASE OF EASEMENT—CONDEMNATION PROCEEDINGS.

1. Code, § 1859, provides that, when damages are recovered in an action for injuries from the building of a mill, and execution is returned unsatisfied, the judge shall order the dam or other cause of injury abated as a nuisance. An action to abate a dam and for damages to land caused by the ponding back of water was submitted to arbitrators to find whether plaintiffs were entitled to damages, and, if so, distinguishing in finding the same between those from permanent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plaintiffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years. Judgment was entered on the award, the judgment providing that the execution should be subject to the provisions of Code, § 1859, and for that purpose the cause was retained on the docket, etc. The judgment was paid in full by the successor in title of defendant. Held, that the judgment was not res judicata of plaintiff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years.

2. The payment of the judgment did not amount to the purchase by defendant's successor in title of an easement to pond back water on plaintiffs' land.

3. Nor did the award and judgment and the payment thereof amount to condemnation proceedings to secure plaintiffs' land.

Appeal from Superior Court, Buncombe County; Hoke, Judge.

Action by T. J. Candler and another against the Asheville Electric Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. C. Martin, for appellant. F. A. Sondley, for appellees.

MONTGOMERY, J. This action was brought for the abatement of an alleged nuisance, viz., a dam maintained by the defendant company across a stream below the land of the feme plaintiff, and to recover damages for alleged injuries done to the land through the ponding of water on the same, caused by the dam. The defendant, in its answer, denied that any injury had been done to the land by means of the dam, and also pleaded as an estoppel the award and judgment made in a certain action between the present plaintiffs, who were also plaintiffs there, and the West Asheville Improvement Company and J. E. Rankin and J. E. Cutler, receivers of the West Asheville Improvement Company, defendants, made at the August term, 1898, of Buncombe superior court. In that action the plaintiffs brought suit against the West Asheville Improvement Company for the abatement of the same dam as a nuisance, and for the recovery of damages for injury to the same tract of land of the feme plaintiff, caused by the ponding of water on the land. The complaint in that action was filed at the December term, 1895, of Buncombe superior court, and after the charter of the West Asheville Improvement Company had been repealed by the General Assembly, and after Rankin and Cutler had been appointed receivers of the company. At the December term, 1897, of that court, by consent of all the parties, it was ordered that the issues arising upon the pleadings be submitted to the arbitrators and award of A. H. Felmont and Geo. S. Powell as arbitrators, who should, as such arbitrators, hear the cause, and examine into the matters therein involved, and determine the same; that they should find and award whether or not the plaintiffs, or either one of them, were entitled to any damages from the defendants, or any of them, and, if so, what damages, distinguishing in so doing between damages by reason of permanent injuries to the land described in the complaint, if any such they should find, and annual damages, if any such they should find, for the period of five years from and after the 1st day of September, 1893; and it was further ordered that the award of the arbitrators should be the rule of the court, and that judgment should be rendered thereon for said perma-

uent damages and as under the milldam act for said annual damages for five years as aforesaid. At the August term, 1898, of the superior court the arbitrators reported an award in the following words: "(1) They assess the permanent damage of the plaintiffs to this date to their lands described and referred to in the complaint in this cause at the sum of \$500, including interest. (2) They find and award that the plaintiffs have suffered an annual damage of \$235.20 per annum, including interest, for five years beginning September 1, 1893; making a total damage for said period of five years on account of loss of crops on said lands the sum of \$1,176. This makes the total damages assessed by us herein \$1,676. And your arbitrators further award that said sums are to bear interest from the filing of this award until paid." And at the same term judgment was rendered upon the award for the sum of \$1,676, the amount of the damages aforesaid so sustained by the plaintiffs as above set forth, with interest on the same at the rate of 6 per centum per annum from August 17, 1898, until paid, the said sum being the damages so sustained by the plaintiffs as aforesaid, the sum of \$500 as permanent damages up to August 17, 1898, sustained by the plaintiffs to their lands described in the complaint in this action by reason of the matters therein complained of, and the additional sum of \$1,176, the total of the annual damages sustained additional to said permanent damages by the plaintiffs to their said lands by reason of the matters so complained of during said five years commencing September 1, 1893, which said annual damages amount to the sum of \$235.20 per year for every year of the said period of five years beginning September 1, 1893, and continuing until the expiration of five years. The judgment contained this further provision: "And it is further ordered and adjudged that execution issue upon this judgment, and this judgment shall be and is subject to the provisions of chapter 43 of the first volume of the Code of North Carolina, and in particular to the provisions of section 1859 of said Code of North Carolina, and for that purpose this cause is retained upon the docket for further proceedings, orders, judgments, and decrees, and the question of the abatement of the dam mentioned in the pleadings in this action as a nuisance and of injunction in regard thereto is accordingly hereby reserved until return of execution hereon to be determined upon the pleadings in this action, and the record herein, the admissions and allegations in them contained, the orders herein, said award, this judgment, and the matters determined or found, or both, by or in it, and upon such further evidence as may be hereinafter adduced and finding as may be hereafter in this action had, in accordance with the law and course of practice of this court, and consistent with them."

The judgment record in that case showed

that the judgment was paid off in full on the 19th of September, 1898, by the Asheville Electric Company, the defendant in the present action. In the present action two issues were submitted to the jury by the court; the first one in these words: "Has there heretofore been an arbitration and award and satisfaction concerning the dam and injuries caused thereby between the parties to this action, and on what terms?" and the second was, "What is the entire damage, permanent and prospective, wrongfully done to plaintiffs' land by defendant's dam occurring since September, 1898, the dam to remain out or reduced to the height of original Shuford or Stephens dam?" The jury answered the first issue "Yes; and the terms are as shown in the record presented." And they answered the second issue, "Permanent \$100, rental \$600, total \$700," and judgment was rendered accordingly against the defendant. The record referred to in the verdict of the jury was the record in the case of the plaintiffs against the West End Asheville Improvement Company and Rankin and Cutler, receivers, and which record we have referred to sufficiently already for the purposes of this opinion. That the second issue may be understood, it is necessary for us to state that the Shuford or Stephens dam was erected over 40 years ago on the same spot where stood the dam which was erected by the West End Improvement Company of Asheville in 1892, and which the defendant in this action maintained after August, 1898. The Stephens or Shuford dam was 14 feet high, and was used to store water for an ordinary country gristmill, and the dam maintained by the defendant and as it was erected by the West End Asheville Improvement Company was 80 feet high, used for the purposes of storing water to furnish an electric plant.

The defendant appealed from the judgment. Its main contention is that the award and judgment in the action which was commenced by the plaintiffs against the West End Asheville Improvement Company and Rankin and Cutler, receivers, were in meaning and effect an award and judgment for permanent damages—damages for past, present, and prospective injury—and equivalent to a purchase of the easement to pond water on the plaintiffs' land; and that, therefore, the plaintiffs are estopped from claiming damages of any nature against the defendant in this action because of the purchase by the defendant from Cutler and Rankin, receivers of the West End Asheville Improvement Company, of all the property of that company, including the dam and site of the mill. The other contention of the defendant is that, if the judgment in this action is not a complete bar to the plaintiffs' right of recovery, it is a bar to the recovery of all damages except such as were suffered by the plaintiffs on account of additional injuries or injurious to additional lands of the plaintiffs

after September 1, 1898; or, to put it in other words, if there had been no increased injury to the plaintiffs' land after the award, the plaintiffs could recover nothing in this action, because the former award and judgment gave the right to the defendant, as purchaser from the receivers, to maintain the dam as it was at the time of the award without being liable to any further damages. In the trial below the court was of the opinion that neither of the defendant's contentions could be upheld. His honor instructed the jury, in substance, that the award and judgment did not amount to the purchase of the easement to pond the water, nor to a condemnation of the land; that the award having provided for all present and current damages to the land up to September 1, 1898, would preclude all damages to that date on the assumption that the defendant would then remove the dam or reduce it to the height of the old Stephens dam; and the true rule of damage was for the jury to assess all damages, past, present, and prospective, which had occurred since the 1st day of September, 1898, comparing the land not with the condition it was in originally, but with the condition it would have been in had the defendant taken out the dam, or reduced it to 14 feet, the height of the original Stephens dam.

The court further instructed the jury on the rule of damages applicable to the case as follows: "Award both permanent damage, if any occurred since September 1, 1898, permanent destruction of the land or injury to it causing loss of productive capacity, and also current damages, loss of rents and profits, if any, caused by any increase in area injuriously effected and by delay in reclaiming the land because dam was not lowered or removed on September 1, 1898. Language of issue is both present and prospective, and the jury will award damages if they find such, of both kinds, that may have accrued since September 1, 1898, or which will accrue from the dam or delay in taking it out." We find no error in the view which his honor took of the case, or in the instructions which he gave to the jury. It is clear from the language of the award and the judgment which followed thereon in the suit of the plaintiffs against the West End Asheville Improvement Company that "permanent damages," in the sense in which that term is used in *Ridley v. Railroad*, 118 N. C. 998, 24 S. E. 730, 32 L. R. A. 708, and in *Parker v. Railroad*, 119 N. C. 677, 25 S. E. 722, were not meant to be fixed or allowed in that action. In the two just above mentioned cases permanent damages meant such damages as were apparently to be continuous and prospective, because being permanent, and likely to continue indefinitely as the natural effect of that cause. But there is another kind of permanent damage referred to in *Beach v. Railroad*, 120 N. C. 498, 26 S. E. 703, as damage done by one act, or all at once, such as the destruction of forests or an orchard, or the demolition of a house; and

such must have been the damages assessed as permanent under the arbitration referred to. Anyway it did not embrace permanent damages in the sense that those words were used in *Ridley's* and *Parker's Cases*, supra, because they were assessed not for prospective damages, but up to a specified period, to wit, the 1st of September, 1898. The assessment of the annual damages under the arbitration for the five years preceding the 1st of September, 1898, was, according to the award and judgment, to be treated as assessed under the milldam act (chapter 43 of the Code); and the damages sought to be recovered in the present action were therefore to be considered in connection with the condition of the land as it would have been in case the defendant had removed the dam at the time of the award, or reduced it to the height of the Stephens dam, according to the instructions of his honor. The defendant acquired no easement to pond the water on the plaintiffs' land under the award of 1898, and there was no purpose to condemn the land under that arbitration and award. It is not necessary, from the view we have taken of the case, to discuss the other questions raised by the appeal.

Affirmed.

(134 N. C. 574)

**INDIAN MOUNTAIN JELICO COAL CO.
v. ASHEVILLE ICE & COAL CO.**

(Supreme Court of North Carolina. April 5, 1904.)

**SALES—CONTRACT—CONSTRUCTION—RECOVERY—
BREACH—EFFECT—DAMAGES—TRIAL—ISSUES.**

1. An answer in an action to recover for goods sold which admits that defendant promised to pay the sum sued for, "except as stated in its further defense and counterclaim," in which it admits that it has not paid the sum sued for, but denies that it is due, because it has been damaged in a greater sum (specifying it) by reason of plaintiff's breach of contract, a request by defendant to submit as issues to the jury the question whether he is indebted to plaintiff, and, if so, in what sum, and to assess defendant's damages on the counterclaim in excess of the amount due plaintiff, is satisfied by submitting the questions as to whether defendant is indebted to plaintiff, and in what sum, and what damage defendant is entitled to recover for plaintiff's breach.

2. A contract binding plaintiff to sell to defendant all the coal it may require during a specified period at a fixed price per ton, stipulating that shipments shall be promptly made when ordered, and that payments therefor are due in the next succeeding month, is not an entire, but a divisible, contract.

3. A recovery for coal delivered under a divisible contract, binding the seller to sell to the buyer all the coal it may require during a specified period, and providing for payment the month next succeeding the delivery, is not barred by a breach of contract on the seller's part occurring either before the month during which the coal sued for was delivered, and accepted and used by the buyer, or during such month.

4. A contract binding plaintiff to sell to defendant all the coal it may require during a specified period, and promptly ship the same when ordered, unless prevented by strikes or other

¶ 2. See *Sales*, vol. 43, Cent. Dig. § 174.

causes beyond its control, cannot be construed so as to compel defendant to submit to a reduction of coal to which it is entitled by prorating with other patrons of plaintiff.

5. The rule that, when a seller fails to comply with his contract, the buyer is entitled to recover the difference between the contract and market price at the time of the breach, is subject to the qualification that the buyer must use reasonable diligence to mitigate the damages.

Clark, C. J., dissenting in part.

Appeal from Superior Court, Buncombe County; Hoke, Judge.

Action by the Indian Mountain Jellico Coal Company against the Asheville Ice & Coal Company. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought to recover the sum of \$361.54, alleged by the plaintiff to be due from the defendant for coal sold and delivered to it in the months of February and March, 1899. The coal was delivered under a contract between the parties, of which the following is a copy: "Jellico, Tenn., Apr. 12, 1898. This agreement, entered into this day by and between Indian Mountain Jellico Coal Co., of Jellico, Tenn., and Asheville Ice & Coal Co., of Asheville, N. C., witnesseth: Party of the first part hereby agrees to sell party of the second part all the coal that may be required by said second party between this date and May 1, 1899, at the following price per ton of two thousand pounds f. o. b. mines. [Description of coal, with prices per ton.] Shipments to be made promptly when ordered unless prevented by strikes or other causes beyond the control of the party of the first part. It is further agreed that the party of the second part has the exclusive agency for the sale of Indian Mountain Coal in Asheville market. Payments due succeeding month's shipment from September 1, 1898. In consideration of the foregoing the party of the second part agrees to handle no first-class coal except such as it may purchase from the party of the first part." The plaintiff, in its complaint, alleged (1) that it had sold and delivered the coal under the contract; (2) that it was reasonably worth \$361.54; and (3) that the defendant promised to pay that price for it. The defendant, in its answer, admits the truth of the first two allegations of the complaint, and also admits the third allegation, "except as stated in its further defense and counterclaim," in which it admits that it has not paid the said sum to the plaintiff, but denies that it is due and owing, because, as it avers, by reason of plaintiff's failure to comply with its part of the contract, the defendant has been damaged "in a sum far greater than the said sum of \$361.54, to wit, in the sum of \$1,000, and that the defendant does not now, nor did at the commencement of the action, owe the plaintiff any sum whatever because of the damage aforesaid, as the defendant is advised and believes." There was a denial of this counterclaim in the reply. The issues submitted, with the

answers thereto, were as follows: "(1) Is the defendant indebted to the plaintiff for coal sold and delivered, and in what sum? Ans. Yes; \$361.54 and interest from March 31, 1899. (2) Did plaintiff and defendant enter into the contract set out and described in defendant's counterclaim? Ans. Yes; September 2, 1898. (3) Did the plaintiff wrongfully and in a breach of its contract fail or refuse to deliver defendant's coal as therein required? Ans. Yes. (4) What damage is defendant entitled to recover of plaintiff for such wrong and injury? Ans. \$150." The other facts appear in the opinion. Judgment was rendered for the plaintiff, and defendant excepted and appealed.

Merrimon & Merrimon, for appellant.
Moore & Rollins and H. B. Lindsay, for appellee.

WALKER, J. (after stating the case). The defendant insisted that it was entitled to rely upon its counterclaim in bar of any recovery by the plaintiff, and that the issue should be, "Is the defendant indebted to the plaintiff, and, if so, in what sum?" and also that there should be issues on the counterclaim as to the surplus. We do not think the defendant has pleaded the matters set forth in the counterclaim strictly in defense as a bar to the plaintiff's recovery, and the court so held. The counterclaim would, of course, have operated as a bar if the jury had found that defendant's damages for the breach of the contract by the plaintiff equaled or exceeded the amount of the plaintiff's claim, and in that event it would have been a bar in fact, though not in law; that is, it would not have been a bar within the technical meaning of that word. The court held at the outset, and "at the request of the defendant," as the court recalled, "and certainly without objection by the defendant to the ruling," that the burden of proof was on the defendant. If the defendant's present contention as to the proper issues and as to the state of the pleadings is correct, and the plaintiff was required to show performance of the contract on its part before it could recover, the burden was on the plaintiff, and not on the defendant, as ruled by the court. We understand from the record (and by that we must be governed) the defendant insisted at the trial that, upon the answer as drawn, the issues should be so framed as to require the jury, in response to the fourth issue, to assess the defendant's damages in excess of the amount due the plaintiff for the February and March deliveries. While the form of the answer did not entitle the defendant to such an issue, we think the issues as framed enabled the defendant, by a proper prayer for instructions, to present this view to the jury; and it is not required that issues should be submitted in any particular form, provided the parties have the opportunity of presenting their case fully to the jury upon

the law and the evidence applicable thereto. *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368. We have been unable to perceive what legal or practical difference there is between assessing the full amount of damages under the fourth issue, as was done in this case, and confining the assessment to the excess of damages, or the difference between the plaintiff's claim and the full amount of the defendant's damages. The usual and the better practice is that which was adopted by the court, and, under the clear and explicit instructions to the jury, we do not see how they could possibly have been misled as to the true nature of the controversy. The plaintiff, as we will show hereafter, was entitled to recover the value of the coal sold and delivered to the defendant, or the price agreed to be paid therefor, which in this case is the same in amount; and the defendant was entitled to have assessed by the jury the full amount of the damages arising out of the breach of the contract by the plaintiff, if any; and the difference between these two amounts, whether in favor of the plaintiff or defendant, is, of course, the amount of the judgment to be rendered against the party recovering the smaller sum. There is no error in this ruling of the court.

It was contended in the argument before us, by the defendant's counsel, that, as the jury had found there was a breach of the contract by the plaintiff, its right to recover anything is wholly barred, and we were asked, "Can one who has wrongfully refused to do what he contracted to do, recover for a part performance?" Our answer to this question is that, under the circumstances of this case, he can. In the first place, this is not an entire contract. The shipments made in any one month were to be paid for in the next succeeding month, and the price per ton of the coal was fixed. It appears from the testimony that the breach of the contract, or the failure to make deliveries under it, upon orders from the defendant, occurred prior to February. Mr. Collins, who was the president and manager of the defendant company, and a witness for it, testified that "between September 20th to February and March" the defendant ordered, and the plaintiff failed to deliver, about 307 cars of coal. The case shows that it is not meant by this testimony that there was any failure to deliver in February and March, and, even if that had been the case, we do not think it would make any material difference, in the view we take of the law. It would be manifestly unjust, treating the contract as divisible, to permit the defendant to receive and use the coal delivered in February and March, and refuse to pay for it, merely because the plaintiff had failed to fill orders for any one or more of the preceding months; and especially so when the defendant, at the time he received the coal in February and March, well knew of the prior breaches. *Tipton v. Feit-*

ner, 20 N. Y. 423; *Ming v. Corbin*, 142 N. Y. 334, 37 N. E. 105. We will go further, and declare the law to be that if the breach by the plaintiff had occurred in the same month when the coal, for the price of which this action is brought, was delivered, the defendant could not defeat a recovery by the plaintiff, provided he received the coal and had the full benefit of it. Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other, and full performance is required before there can be any recovery, as in the case of *Lawing v. Rintles*, 97 N. C. 350, 2 S. E. 252. But this rule does not apply if, for instance, work has not been done or materials furnished in strict accordance with the contract, provided one of the parties has received and enjoyed any benefit from the contract, and certainly not unless full performance is made a condition precedent to payment. The law implies a promise by the party to pay for what has been thus received, and allows him to recover any damages he has sustained by reason of the breach, for this is exact justice. The language of the court in *Britton v. Turner*, 6 N. H. 492, 26 Am. Dec. 718, seems to fit this case: "If, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case—one not within the original agreement—and the party is entitled to 'recover on his new case' for the work done, not as agreed, but yet accepted by the defendant." In *McClay v. Hedge*, 18 Iowa, 66, the court, by Dillon, J., referring to *Britton v. Turner*, says: "That celebrated case has been criticised, doubted, and denied to be sound, yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules as found in the older cases." And the same court, in *Wolf v. Gerr*, 43 Iowa, 339, states it to be the settled doctrine "that a party who has failed to perform in full his contract may recover compensation for the part performed, less the damages occasioned by his failure." This principle is fully sanctioned by the authorities. *Chamblee v. Baker*, 95 N. C. 98; *Simpson v. Railroad*, 112 N. C. 701, 16 S. E. 853; *Gorman v. Bellamy*, 82 N. C. 496. In the case last cited this court said: "The inclination of the courts is to relax the stringent rules of the common law, which allows no recovery upon a special unperformed contract itself, nor for the value of the work done, because the special

excludes an implied contract to pay. In such a case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law therefore implies a promise to pay such remuneration as the benefit conferred is really worth." The court also said in *Brown v. Morris*, 83 N. C., at page 257: "If there had been delivered a smaller number of bricks, and they had been received and used by the defendant without objection, we see no reason why the plaintiff would not be entitled to compensation for such as were delivered; and we are not disposed to carry the doctrine, that a partial delivery under an agreement to deliver a definite quantity or number of goods leaves the purchaser the possession and use of such as are delivered without liability to the seller, beyond the decided cases, and as operating only when the failure to deliver is willful and without legal excuse." *Monroe v. Phelps*, 8 Bl. & B. 739; *Reade v. Rann*, 10 B. & C. 438; *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382; *Horn v. Batchelder*, 41 N. H. 86; *Bush v. Jones*, 2 Tenn. Ch. 190; *Duncan v. Baker*, 21 Kan. 99; *Lamb v. Brolaski*, 38 Mo. App. 51; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Hansen v. C. S. H. Co.*, 73 Iowa, 77, 34 N. W. 495; *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529. The doctrine is well stated and supported by the citation of numerous authorities in 9 Cyc. of Law & Pro. pp. 686, 687, note 15.

The defendant excepted to an instruction in regard to the date of the contract, but we cannot see how the date is material, as the parties, according to the very terms of the contract, agreed that shipments should be made from September 1, 1898, and this is the construction placed upon the contract by defendant in its first prayer for instructions.

The remaining exceptions relate to the judge's charge upon the counterclaim, and especially to the measure of damages. The defendant contended that the plaintiff was bound to supply it with coal, under the contract, unless prevented from doing so by strikes or other causes beyond the plaintiff's control, even though it had other customers at the time who had entered into similar contracts with the plaintiff, and that this is so because the defendant had shown by the testimony that the plaintiff had represented, when the contract with the defendant was made, that it had no other outstanding contract, and would make no other. It is sufficient to say in regard to this matter that it was fairly submitted to the jury, and found against the defendant, or the latter had at least the full benefit of the point under the charge of the court. But it becomes immaterial, in the view we take of the case, as will appear hereafter. The court charged the jury, substantially, that if the plaintiff failed to ship the coal to the defendant upon its orders, according to its agreement,

and was not prevented from doing so by strikes or other causes beyond its control, and which it could not have avoided by the exercise of ordinary care, it would be liable to the defendant for such damages as the latter sustained by reason of the breach, and that if at the time the plaintiff had other customers similarly situated with the defendant in respect to contracts with the plaintiff of the same character, and the plaintiff, by reason of causes beyond its control, could not fully supply all, the latter had the right, and it was its duty, under the law, to apportion its shipments pro rata among its said customers, provided it did so in good faith and with perfect fairness to each, and provided it had not represented that there were no contracts other than the defendant's, and had not agreed that it would make no other contract. If, in fact, there were no other contracts, then this instruction would not apply, and plaintiff would be liable in damages, unless the jury found, under the charge of the court, that the plaintiff was protected by the clause of dispensation in regard to strikes and other causes beyond the plaintiff's control. The plaintiff says that this instruction is sustained by the cases in which it has been held that a railroad company should not discriminate against any of its customers in the transportation of freight. It is true, it has been held that it is no proper business of a railroad company, as a common carrier, to foster particular enterprises or to build up new industries, but deriving, as it does, its franchises from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, and to provide reasonable facilities for transportation of persons and property, and in this respect to put all its patrons upon an absolute equality. *Railroad v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986; *U. S. v. Ry. Co. (C. C.)* 109 Fed. 831. In the latter case it is held that, while the capacity of a shipper of coal may be greater than his allotment of cars, yet, when such is also the case with every other operator, similarly situated, in the coal fields, it is the duty of the railroad company, when the supply of coal cars is short, to prorate the supply on hand, without unjust discrimination, among all the operators, including the shipper in question. 4 *Elliott on Railroads*, § 1468 et seq.; *Root v. Railroad*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643. But those cases were decided under the provisions of the interstate commerce act and upon the principles of the common law forbidding discrimination, and the doctrine is confined to cases where the party from whom the particular duty is owing is a common carrier, or is operating under a public franchise which imposes upon it certain obligations and responsibilities with respect to the public and to those who deal with it in its capacity as a quasi pub-

lic corporation. We are unable to see that they have any application to the facts of this case, nor did the learned counsel refer us to any authority for the principle upon which the court directed the jury to assess the defendant's damages, nor have we been able to find any. The question, therefore, must be decided according to the ordinary rule in the law of contracts. It is a well-settled principle of law that if a party, by his contract, charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. The law regards the sanctity of contracts, and requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties have not stipulated. *Ingle v. Jones*, 2 Wall. 1, 17 L. Ed. 762. The courts will not make an agreement for the parties, but will ascertain what they have agreed by what they have said, and by the meaning of the words used to express their intention. Where the intention clearly appears from the words used, there is no need to go further, for in such a case the words must govern, or, as it is sometimes said, where there is no doubt there is no room for construction. *Clark on Contracts*, p. 591. We must assume that the parties have fully and clearly expressed their agreement in the instrument which is the evidence of it, and to add to or take from it by construction would, under the circumstances, be the same as if we should arbitrarily give to it a meaning they did not intend it should have. We must therefore ascertain and enforce their intention as they have expressed it. "Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implications. The presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." *Broom's Legal Maxims* (8th Am. Ed.) p. *652; *Bishop on Contracts* (Ed. 1887) §§ 380, 381; 2 *Parsons on Contracts* (9th Ed.) p. *515. In *Aspdin v. Austin*, 5 Q. B. p. 683 (18 L. J. 155), Lord Denman says: "It is one thing for the court to effect the intention of parties to the extent to which they may have even imperfectly expressed themselves, and another thing to add to an instrument all such covenants as on a full consideration may seem to the court to have been the complete intention of the parties, but which they either purposely or by inattention omitted. It would be but a bad application of

the rule of construction of written instruments to add to the obligation by which the parties have bound themselves. This would be quite unauthorized, as well as liable to create particular injustice in the application." By the contract in question, the plaintiff was bound to sell and deliver to the defendant all the coal that should be required by the latter between the dates mentioned in the writing. Nothing else appearing, this was an absolute promise on the part of the plaintiff, based upon a sufficient consideration, to furnish the coal; and nothing, as we have already seen, would excuse its performance, except the act of God, the law, or the act or conduct of the defendant. But there was one, and only one, limitation upon this otherwise absolute undertaking; and that limitation is found in the clause of dispensation, as it may be called, which exempted the plaintiff from liability for non-performance if by strikes or other uncontrolled causes it should become unable to comply with its contract. This being the case, what right have we to add a further clause of exemption, and provide that the plaintiff should not only be excused from full performance by strikes and other causes beyond its control, but that the defendant should be required to submit to a reduction of the quantity of coal to which it was entitled under the contract, by prorating with other patrons of the plaintiff company, when there is no such stipulation in the contract, and nothing from which it can be clearly inferred that the parties intended such a settlement under it. If the defendant's rights can be impaired by the fact that the plaintiff has entered into other contracts of the same kind, why could they not as well be affected by any other contractual relation the plaintiff may have assumed? The plaintiff's contract was not, as to its customers, a joint one, but must be treated and dealt with as several; and the rights of each customer are to be determined solely with reference to the contract made with him, and it was the duty of the plaintiff to take care that it did not go beyond its ability to perform, and to provide against any and all contingencies in the contract itself. We cannot release the plaintiff from any part of its liability because it has failed to do so in this case, but must leave the loss where the contract places it. To do otherwise would be to make the contract, and not to construe it.

We are not permitted to interpret a contract according to our notion of what may be fair and just, unless, perhaps, in a case where the terms of the contract are in themselves ambiguous. In this case they are not so. The contract is plainly one to furnish a stipulated quantity of coal at a fixed price, without any reference to other contracts made or to be made by the plaintiff, and subject only, in the ultimate settlement between the parties un-

der its provisions, to any failure by the plaintiff to perform its undertaking which it could show to be the result of the causes beyond its control specified in the contract. It was not the duty of the defendant to protect itself against other contracts made by the plaintiff, but it was the latter's duty to make suitable provision in the contract for his own protection in respect to them. If the rule laid down by the court below is adopted, any reduction in the quantity of coal to be delivered under the contract will be made to depend, not upon causes beyond the control of the plaintiff, but upon causes of his own creation. The reduction will be in proportion to the number of contracts that its interest or cupidity might lead it to make. When the question is properly considered, there is no more reason for applying the pro rata rule in a case where the coal dealer is protected by a clause of exemption against any failure which results from causes beyond his control, than there would be for enforcing it when there is no such clause of exemption in the contract. We must remember that a contract is to be construed according to the intention of the parties as expressed in it, upon the principle that every one of age and discretion, and qualified to do so, can make any contract he pleases, and we have no right to give the contract a meaning based upon any idea or consideration of abstract justice. When there is no allegation of fraud or undue influence, or of any other circumstance which can form the basis of an equity for setting aside the contract, we must assume that the parties understood what was fair and right when they entered into it, and were fully mindful of its obligations. If the capacity of the plaintiff's mine was so reduced "by causes beyond its control" that it could not furnish the quantity of coal agreed to be furnished, it was entitled to the benefit of the clause of exemption; but if, by reason of our construction, which we think is in accordance with the plain words of its agreement, it suffers any loss, or will be made to respond in damages to this defendant or any of its other customers, it will be the result of its own folly in making a contract which, as it turns out, cannot be performed. This does not present an unusual case in the enforcement of contracts. It is a mistake to suppose that, by construing the contract according to the ordinary and well-settled rules, the clause of exemption will be rendered nugatory. It may not have the meaning or effect that the plaintiff now thinks it ought to have, but it will have full operation in accordance with the intention as expressed in it, and that intention must be our only guide in ascertaining the rights and liabilities of the parties.

We have discovered no error in the other instructions given by the court to the jury. We do not think that the plaintiff was required, under the circumstances, to buy any coal from other miners, in order to fill the contract which was made with reference to its

own mine in Jellico; that is, in so far as the plaintiff was prevented from delivering upon orders by causes beyond its control.

The ordinary rule as to damages undoubtedly is that, when a vendor fails to comply with his contract, the vendee is entitled to recover the difference between the contract and market price at the time of the breach. *Spiers v. Halsted*, 74 N. C. 620; *Holmesley v. Elias*, 75 N. C. 564; *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302; *McHose v. Fulmer*, 73 Pa. 365; 8 Ad. & El. 604; *Gravel Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71. But the general rule is subject to the qualification that a party to a contract is required to use reasonable diligence to mitigate the damages caused by the breach, and in contracts of this kind the vendee should provide himself as cheaply as he conveniently can, from the most accessible sources, and thus lighten the loss, and his recovery will be curtailed by the sum which thus might have been saved. *Oldham v. Kerchner*, supra; *C. C. L. Ice Co. v. Tamm*, 90 Mo. App. 189; *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117. It is true that the injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong or breach had not been committed, and that when a wrong has been done, and the law gives a remedy, the compensation should be equal to the injury; but this is only another way of stating the same rule of damages, and it is therefore subject to the same qualification. *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752; *Hazzard-Short v. Hardison*, 114 N. C. 482, 19 S. E. 232; 1 *Sutherland on Damages* (3d Ed.) § 89. There must, of course, be evidence to which the rule can be applied.

While it is not necessary to consider the other exceptions, we have examined them, and think that they are without merit.

The error in the charge of the court above indicated entitles the defendant to a new trial, but it will be restricted to the fourth issue. New trial.

CLARK, C. J. (dissenting as to measure of damages). The contract provides for an exemption from liability for failure of the plaintiff to ship if "prevented by strikes or other causes beyond the control" of the plaintiff. The judge charged, in substance, that if the plaintiff had contracts with the defendant and others of like purport, covering the same period of time, and there was no contract with the defendant that such contracts should not be made with others, then, if there was a failure to ship to the defendant the quantity required, the plaintiff would be liable only to the extent that it was not prevented from shipping by such strikes or other causes beyond its control; i. e. that the defendant in such case could only claim loss on its pro rata part of what the plaintiff was permitted by the "strike or other causes beyond its control" to mine and ship. This

instruction was eminently fair and just. The defendant knew that the plaintiff was not running its mine solely to fill the defendant's contract, and that the plaintiff had insisted on protecting itself by a provision in the contract for exemption from liability for failure to ship when caused by "strikes or other causes beyond its control." If the defendant wished to get the coal anyhow, if mined, it should have stipulated that its contract should be filled, regardless of the plaintiff's contract obligation to others. It is quite certain that the plaintiff would not have made such contract with the defendant. Suppose, for argument's sake, the plaintiff was prevented "by strikes or other causes beyond its control" from shipping one-half the quantity stipulated by its several contracts, then, clearly, its duty to each of its contractees was to ship them one-half the quantity contracted for. The failure to ship any one such half would not be caused by "the strike or other causes beyond the plaintiff's control," but by the plaintiff's own volition in preferring other contractees; and the plaintiff would be liable to each for its shortage in not shipping the one-half, which upon a pro rata it could have shipped. If the plaintiff should have shipped the full quantity to the defendant, and is liable for the difference, then the plaintiff should have shipped the full quantity to every other one of its contractees, and is liable for failure to do so; and the provision in its contracts for exemption from liability for any failure to ship, "caused by strikes or other causes beyond its control," would be a nullity, and the plaintiff would be liable, just as if that important provision had been left out. No one or more contractees can be selected to bear the total failure to ship. If so, why should it not be the defendant, who in that event would recover nothing? Knowing that the mine owners were not shipping exclusively to itself, the defendant, by agreeing to the usual clause of exemption from liability for failure to ship, caused by "strikes or other causes beyond the shipper's control," must have understood that it had no right to complain if the plaintiff abated the contract quantity pro rata according to the quantity it was prevented from shipping by such strikes or other causes beyond its control. This is the ruling always made as to shipments by common carriers, which is justified upon the above reason, arising out of the contract, as well as upon public policy, which forbids discrimination by quasi public corporations. This is not the case of an unqualified agreement to ship a certain quantity of coal, but there is an agreement for an exemption if prevented by certain causes, and the defendant should bear its pro rata part of the failure to ship caused by the happening of such stipulated contingency.

No precedent either way has been presented to us, but this is a reasonable and just construction of the clause in the contract, which otherwise is nugatory as a protection to the

shipper for whose benefit it was inserted. It happens, it would seem, that this court is the first to construe such contract, and there is every reason we should make a just and proper construction.

(234 N. C. 552)

GWALTNEY et ux. v. PROVIDENT SAV. LIFE ASSUR. SOC.

(Supreme Court of North Carolina. April 5, 1904.)

On petition for rehearing. Petition dismissed.

For former opinion, see 44 S. E. 659.

CLARK, C. J. This is a petition to rehear the former decision in this case. 132 N. C. 925, 44 S. E. 659. The same propositions of law as now were presented and argued on the former hearing. No material point of law or fact has been shown to have been overlooked, and our opinion would be simply a reiteration, substantially, of what was written on the former hearing. Whatever difference of view there may be as to the facts, the jury, in their province, have determined the truth or falsity of the averment on both sides, and we cannot disturb their finding. The case had been previously before this court (130 N. C. 629, 41 S. E. 795), and has been heretofore fully considered.

It is now ordered: Petition dismissed.

MONTGOMERY, J. (dissenting). The defendant company canceled the plaintiff's policy of insurance because of a refusal on the part of the plaintiff to pay premiums which the defendant averred that the plaintiff owed, and this action was brought to recover the amount paid by the plaintiff as premiums before the cancellation of the policy. The complaint embraces two causes of action utterly antagonistic to each other, and, in my opinion, cannot be properly joined in the same action. The gravamen of the first cause of action is that the defendant, through one of its general agents, by means of false representations, induced the plaintiff to accept a policy of insurance unlike the one which the defendant, through its agent, verbally agreed to issue and deliver to him.

The particulars of the first cause of action appear substantially in the following allegations: That the plaintiff told the agent that he desired a policy, and would accept none other, based upon a level premium from year to year, and which would not increase with advancing age; that the agent promised to deliver to the plaintiff such a policy, and that upon that representation the plaintiff made application in writing for the policy; that shortly thereafter the agent delivered to the plaintiff a policy in accordance with the application, which did not provide for the payment of a level rate pre-

mum until the death of the plaintiff, but did provide for an increase in the rate of the premiums due on the policy with the yearly advance in the plaintiff's age; that the agent (in the language of the complaint) represented to the plaintiff and assured him that the policy so presented was such a policy as the plaintiff had, in his former conversation, stated that he (plaintiff) would accept, and that the policy so presented by him provided for the rate of a level rate premium, to wit, \$22.40 per quarter, and that the insurance provided in said policy would be extended during the life of the plaintiff upon the payment of a regular premium of \$22.41 per quarter. There was another allegation that those representations were false, and that the agent knew they were false. As bearing more particularly upon the alleged fraudulent intent of the agent, we quote the eighth and ninth allegations of the first cause of action: "(8) That Jones, the general agent of defendant, made the said false, deceitful, and fraudulent representation wickedly and fraudulently, scheming and contriving, designing and intending, as plaintiff believes and alleges, to prevent the plaintiff from examining the policy and investigating the terms thereof, he (the said general agent), well knowing that the plaintiff would refuse to accept the policy if he (plaintiff) should learn its terms, conditions, stipulations, and provisions; and the plaintiff explicitly alleges that he would have refused finally and peremptorily to accept the policy if he (plaintiff) had known the terms, conditions, stipulations, and provisions of the policy tendered him by Jones, the general agent as aforesaid. (9) That the plaintiff, knowing said Jones to be the general agent of the defendant, being not at all familiar with the terms, conditions, stipulations, provisions, or language of insurance policies, and being totally unskilled in interpreting the same, relied upon and believed the said wicked, false, deceitful, and fraudulent representations of the said Jones, hereinafter set forth, and was by the said wicked, false, deceitful, and fraudulent representations misled, deceived, and prevented from investigating the terms, conditions, stipulations, and provisions of the said policy, and finding out for himself and by the aid of friends or counsel what said terms, conditions, stipulations, and provisions really were, and in consequence thereof accepted the said policy." The plaintiff further alleges that, believing for nine years these fraudulent representations, he paid during that time \$22.41 per quarter, and that only at the beginning of the tenth year was any demand made for an increased premium; that for two years he paid the increased premium, but refused after that time to pay any further increase. The plaintiff has paid \$1,030.84 as premiums to the defendant. The second cause of action has its foundation in an allegation that the plaintiff took out

the policy just as it read when delivered to him by the agent; that is, a policy providing for an increase in the rate of the premium due on the policy with the yearly advance in the plaintiff's age; but that before the second annual premium in quarterly equivalents became due, to wit, in December, 1890, the defendant, through its general agent, verbally agreed to renew and extend said policy for the plaintiff during each successive year of his life, upon the payment of a level annual premium in quarterly equivalents of \$22.41 each, and to waive the conditions of said policy providing for an increase of the rate of premium for the actual age attained. The complaint was duly verified by the plaintiff.

A few words will be sufficient to dispose of the matters pertaining to the second cause of action. His honor submitted this issue (seventh) raised by the second cause of action in the complaint: "Did the defendant, through its general agent, some time after the execution and delivery of the policy, waive the provisions in the policy permitting an increase of the premiums, and agree to continue the policy upon payment of \$22.41 per quarter during the life of the plaintiff, as alleged in the complaint?" Upon that issue his honor told the jury that it was incumbent upon the plaintiff to go further, and establish the affirmative of the same to their satisfaction by proof clear, strong, and convincing. The jury responded to that issue under that instruction "Yes." I have examined carefully every word of the evidence bearing on that issue, and there is not a scintilla, even, to support it. The allegation in the second cause of action is that the agent, in December, 1890, waived the conditions of the policy providing for an increase of the rate of premium for the actual age attained, and agreed that he (plaintiff) should pay \$22.41 quarterly as a level rate until his death, instead of increased premiums as he advanced in age, as the policy provided. In his examination in chief he testified that: "Jones came to Wake Forest in November, I think, and stayed several days, and insured several parties. After he returned to Greensboro, I had a conversation with a Mr. Powell, in consequence of which I told Jones that Mr. Powell told me that he had examined a policy like mine at my request, and he said there was some doubt as to its running level in all the premiums till my death. I told him that Mr. Powell said he was not satisfied, as he had not examined it carefully, and there might be a rising premium in it. I said I told Powell that there was no possibility that there was a rising premium on it, for I had been assured there would be none. I said: 'Now, Mr. Jones, my people live to be very old. Suppose I live beyond 75. Is there any possibility of a rise in that premium?' He told me emphatically that I need give myself no uneasiness. I went back home thoroughly satisfied that it never would rise on me.

Q. Did he say anything more that you recollect? A. I thoroughly impressed upon him the fact. I went away assured." On his cross-examination he was asked: "I believe you stated that you never examined this policy, and never knew that it was not a level rate policy, till 1898, when they made a demand on you? A. That is right. Q. You allege here that heretofore in the second year you knew it was a level rate policy? A. Exactly as it was issued. Q. But that this company, acting through its general agent, made a verbal agreement with you to extend this policy? A. I thought that was the policy. Q. What you say in this complaint is correct, is it not? A. It is, as I understand it. Q. You have sworn to the complaint, have you not? A. Yes. Q. Did you not say in your answer a while ago that about November, 1890, you had a conversation with Jones, and he said you need not be uneasy about your policy? A. Yes. In 1890 he came to where I was living, and in consequence of Powell's statement I went there again in January. He came in November to the college, and went back before Christmas. Q. Then the only conversation you had with Jones some time in the second year caused him, in reply to something you said, to say that you need not give yourself any uneasiness about the policy? A. Yes. Q. So that, if this allegation means that you knew what the policy was at the end of the second year, it is a mistake, is it not? A. I did not come to that knowledge, I am sure, at the end of the second year, that it was not a level rate." The defendant denied the allegations of fraud, and averred that the plaintiff received a policy of the nature applied for, and in accordance with the application signed by the plaintiff; that all verbal understandings or negotiations entered into between the plaintiff and Jones during the consultation about the policy were merged in the written policy when it was issued by the company and delivered; that no attempt was made by the agent to prevent the plaintiff from reading the policy when it was delivered, and that the plaintiff should have read it, and, if he had read it, he would have understood from reading it that it did not provide for a level rate; that the plaintiff kept the policy for years without reading it; that he knew that the agent did not issue the policy, but that the same was issued in New York, the home office of the company, and sent to the agent at Greensboro for delivery to the plaintiff; and that the agent had no power to change the terms of the policy; and that the plaintiff is estopped by his conduct from rescinding the contract and demanding a return of the fees. The defendant denied also that the agent, Jones, was a general agent of the defendant.

It is to be seen from a reading of the complaint that the fraud charged upon the agent is in reference to the assurances and representations made by him at the time of the delivery of the policy. Allegations 8 and 9 of

the complaint on that point have been quoted in this opinion, and sections 6 and 7 of the complaint specifically refer to the fraudulent representations alleged to have been made by the agent as confined to the delivery of the policy. Nowhere in the complaint is it alleged that the agent practiced any fraud upon the plaintiff in the procuring of his signature to the application. The allegation of the fraud practiced upon the plaintiff by the agent, to which we have already called attention, was that the agent "represented to the plaintiff and assured him that the policy so presented was such a policy as the plaintiff had, in his former conversation, stated that he (plaintiff) would accept, and that the said policy so presented by Jones provided for the rate of a level rate premium, to wit, \$22.41 per quarter, and that the insurance provided in said policy would be extended during the life of the plaintiff upon the payment of a regular premium of \$22.41 per quarter." The evidence did not measure up to the allegation. The plaintiff testified that when the agent delivered the policy to him, he said, "Here is your policy," or "This is your policy," and nothing more. It was not contested that the policy was strictly in accordance with the application; that the application was not for a level rate policy, but called for one upon the annual renewal term plan, with surplus applied to keeping premiums level; that attached to and forming a part of the policy was a schedule of rates showing exact premiums to be paid with advancing age, and also providing that the surplus was to be applied to keeping premiums level; and that the defendant issued the policy and sent it to Jones to be delivered by him to the plaintiff. The plaintiff testified that he neither read the application at the time he signed it nor did he read the policy and copy of the application attached thereto until about nine years after the issuance of the policy, although it was in his possession all that time; and that no one attempted to prevent him from reading the policy or application, and he could have read and understood the contract as to increasing premiums if he had examined it. Witness further stated that he knew nothing about the insurance business, and relied entirely upon the agent in the matter; that he had great faith in him. He was asked on cross-examination: "The clause in that policy about the several premiums for each successive year or each year that you should live is perfectly plain, is it not?" His answer was, "Yes, I suppose it is plain enough, if I had not had the confidence that blinded me." And further he was asked: "There is a schedule of rates in the policy setting forth the amount for each year. If you had read that policy, you could have understood it, could you not?" He answered, "Yes." There is no evidence whatever in the case that the plaintiff asked a single question of the agent about the policy at the time of its delivery, nor did the

agent express any opinion or make any assurance or representation about it. In my opinion, the plaintiff should have read the policy under the circumstances of its delivery. The agent, Jones, was the agent of the defendant, and did not occupy any relation of trust or confidence as to the plaintiff. They were engaged in a business transaction, in which the plaintiff was acting for himself and the agent for the defendant. It appears from all the evidence that the plaintiff had ample opportunity to read the policy before he paid the first premium, for he gave his note for that premium, payable more than a month after the policy was delivered; and there is no evidence that the defendant at any time afterwards did anything to induce him not to read it, and if he did not read it he can blame himself alone. There is not a particle of evidence of fraud at the time of the delivery of the policy or afterwards, and the contention of the plaintiff that his implicit and blind confidence in the agent warranted him in trusting that the policy was what he had verbally and previously contracted for is met by the safe and general rule that, where there is no fraud, parol negotiations leading up to a written contract are merged in the subsequent written contract; such written contract being presumed to embrace the whole, the final agreement of the parties, and to embody their intentions. When, therefore, one of the parties to an agreement delivers to the other a contract in writing, and that other party, when he receives the paper, understands that it is handed to him as a contract between them, then the one accepting the document and keeping it assents to its terms, conditions, and stipulations as they are therein expressed, although he does not read it, and even be ignorant of the contents. This view of the law is well expressed in the case of this same defendant against Mowatt, 32 Canada Supreme Court Report, 147, in a quotation from *Parker v. Railroad*, 2 C. P. D. 416. It was there said that when the company handeth the respondent the policy, the law said for them: "Read, examine, be careful, for never mind what we or you may have said previously, we accept your application to insure you, but we cannot give you any other policy but this one, and in that document alone is contained the contract between us. Pay the first premium only if you are satisfied with it. If you accept it without reading it, you will not be allowed to contend hereafter that it does not correctly express the contract between us. Whatever is not found therein will be understood to have been reciprocally waived and abandoned." The contract was formed between the plaintiff only when the policy was delivered. All that had gone before was only preliminary. In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, it was said: "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and, when called up-

on to respond to its obligations, to say that he did not read it when he signed it. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and if he will not read what he signs he alone is responsible for his omission." In *Re Greenfield's Estate*, 14 Pa. 489, Gibson, C. J., for the court, said: "If a party who can read will not read a deed put before him for execution, he is guilty of supine negligence, which, I take it, is not the subject for protection either in equity or in law." In *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538, the plaintiff handed the defendant a written contract, making no attempt to conceal any of its provisions, and practiced no trick to induce him to execute it. This court there said: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it." The defendant's negligence was held inexcusable, and the court said that the introduction of parol evidence in the court below to show that there was a verbal contract before the execution of the written one was erroneous, and that it was nothing but an attempt to contradict the written instrument executed by the defendant concerning the same matter. The same principle was held in *Benedict v. Jones*, 129 N. C. 470, 40 S. E. 221, where a married woman undertook to avoid the legal sufficiency of the probate of a deed executed by herself and her husband, because she did not read it, and was ignorant of its contents. The court said there that "it makes no difference that she said she did not know what the paper contained, that she did not understand its contents, and, if she had, she would not have signed it. She could read and write. The paper was before her, and she was under no coercion." The same view is also expressed in *Dorsett v. Mfg. Co.*, 131 N. C. 254, 42 S. E. 612: "And that where a party can read, and has the opportunity and does not do so, no other circumstances occurring or connected therewith, the party signing cannot have the instrument set aside upon the ground that he was deceived as to its contents." In *Leigh v. Brown* (Ga.) 25 S. E. 621, it was held that it was the duty of the insured, when he found that his policy differed in a material respect from the kind of policy for which he had contracted, if he did not desire to retain and accept the policy received by him, to return or offer to return the same within a reasonable time to the company. The case of *Bostwick v. M. Life Ins. Co.* (Wis.) 92 N. W. 246, is a most interesting case, and the main facts very much like the one before us. The defendant there induced the plaintiff to sign an application for a policy of life insurance by representing to him that he called for one that would be fully paid in ten annual payments of a specified

amount. He signed and gave to the agent the application, relying on the truth of such representations. During the negotiations between the plaintiff and the agent of the company, with the result above stated, the agent urged the plaintiff to take out what was called a "five per cent. debenture policy," while the plaintiff all the time insisted that he wanted and would purchase only a contract that would be fully performed on his part by ten annual payments. In good time a policy was sent to the plaintiff by mail, ostensibly responsive to his application, accompanied by a letter from the agent to the effect that it was a 5 per cent. debenture policy issued pursuant to the application. The plaintiff put the policy away among his papers without reading it, relying upon its being what the agent assured him the application called for. He paid the first premium, but upon examining the policy about 4½ months after it was delivered to him, he discovered that it was an annual life policy, requiring him to pay the premiums each year during his life. The same plaintiff bought a policy from one Parker and one from A. H. Barrington, issued by the same company in which the insured claimed that he had contracted with the agent for a different policy from the ones they received. However, when the policies were delivered to them, there was no assurance that the policies were in accordance with the understanding between them, but simply a letter advising inclosure of policies. The court held that the plaintiff could not recover on the assigned policies, for the reason that there was no evidence of any assurance on the part of the agent, at the time of the delivery of the policies to the parties, that the policies were in accordance with the agreement. But because the plaintiff, Bostwick, was assured by the letter from the agent accompanying the delivery of the policy that the policy was in accordance with the agreement, the court held that his claim on his own policy should be submitted to the jury to say whether, under all the circumstances, the letter of the agent prevented him from examining the policy at the time of the delivery. In the case before us there were no representations made by the agent when the policy was delivered, and no questions asked by the plaintiff. The agent simply said, "Here is your policy," or, "This is your policy," which was just the same thing as if it had been inclosed with a letter. In the much litigated case of *McMaster v. N. Y. Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119, the fact was that the agent of an insurance company had told the insured, when the application for the policy was made, that the policy itself would give him 13 months' insurance upon the payment of the first annual premium, but the policy, when afterwards issued by the company, did not contain that provision. Upon an action to reform the policy so as to make it conform to the agreement with the agent, it was proved that the insured had accepted it without

reading it. The court there said: "Customary negotiations for insurance do not constitute a contract where there is no intention to contract otherwise than by a policy made and delivered upon payment of the first premium. * * * It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them, but the legal effect of his acceptance is the same as if he had read them. He had the opportunity to read, and to learn their contents, and, if he did not, it was his own gross negligence, and no act of the insurance company or of its agent that concealed them, and misled him as to their effect. The statement of the agent, 14 days before the deceased received the policies, that they would insure him for 13 months from the payment of the first premium, was not a statement of an existing fact. It was not calculated to impose upon him, or to prevent him from reading his policies, and learning for himself whether this promise had been kept or broken. It was not a fraudulent representation, because fraud never can be predicated of a promise or a prophecy. Neither the company nor its agent therefore made any representation or promise, or used any artifice or deceit, to prevent the insured from learning the terms of his policies. Their contents were not concealed. They were not misrepresented. The deceased must accordingly be conclusively presumed to have known their terms when he accepted them. If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement." That case was afterwards reviewed by the Supreme Court of the United States (183 U. S. 25, 22 Sup. Ct. 10, 48 L. Ed. 64), and the result of that decision was that the plaintiffs were allowed to recover. The principle of law, however, announced by the Circuit Court, which we have quoted, was not overruled.

The Supreme Court of Canada, in *Mowatt's Case*, supra, referred to the case of *McMaster v. N. Y. Life*, supra, as it was reported both in the Federal Reporter and in the United States Reports, and in reference to the effect of the opinion of the Supreme Court upon that of the Circuit Court his honor who wrote the opinion of the court said: "Since the argument I have noticed that the United States Supreme Court has reversed the decision of *McMaster's Case*. But the court exclusively based its conclusions first upon the fact that the agent of the company had inserted material words in the application after it had been signed, without the applicant's knowledge; secondly, upon the fact that the agent of the company, when delivering the policy, had deliberately put the insured off his guard, and induced him not to read it, by the express assertion in answer to the insured that the policy was in the

terms agreed upon. Had it not been for these two facts, to which sufficient weight had not been given in the lower courts, their judgment against the plaintiff's contentions, as I read Chief Justice Fuller's opinion, would have been sustained by the Supreme Court." In *Bostwick's Case* the Supreme Court of Wisconsin took the same view of the effect of the decision of the Supreme Court in *McMaster's Case*. That court, referring to that matter, said: "Returning to *McMaster's Case*, we will say and endeavor to demonstrate that counsel is in error in his view that the Supreme Court, in reversing the decision of the Court of Appeals, 99 Fed. 856, 40 C. C. A. 119, held that possession of a policy of insurance does not impute knowledge of its contents, in the absence of any deception practiced upon the possessor subsequent to his making the application therefor, reasonably calculated to deter him from examining such policy at the time of its receipt. The court, as it seems to us, held directly to the contrary." These analyses, in our judgment, are correct expositions of the decisions of the two courts, the United States Supreme Court and the Circuit Court of Appeals. From the opinion of the Supreme Court of the United States we will make the following quotations in verification of these analyses: "But the company says that *McMaster* requested that the policy should go into effect on December 12, 1893, and that his representative is estopped from denying that that is the operation of the policies as framed and accepted, or that the second premiums matured December 12, 1894. It was found from the evidence that, after *McMaster* had signed the applications, and without his knowledge or consent, the agent of the company inserted therein, 'Please date policy same as application,' and it was further found that the policies were returned to Sioux City, and were taken by the company's agent to *McMaster*, he 'asking agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him,' and thereupon *McMaster* paid the agent the full annual premium, of the sum of \$21, on each policy, and without reading the policies he received them, and placed them away. We think the evidence of this unauthorized insertion and of what passed between the agent and *McMaster* when the policies were delivered, taken together, was admissible on the question whether *McMaster* was bound by the provision that subsequent payments should be made on December 12th, commencing with December 12, 1894, because requested by him, or because of negligence on his part in not reading the policies." So we see that the decision of the Supreme Court of the United States, in its reversal of the judgment of the Circuit Court of Appeals, did so solely on the ground that the assurance and representations made by the agent to *McMaster*, when he delivered the policies,

rendered the question whether keeping them, as he did, without reading them and rejecting them, constituted an acceptance in satisfaction of what was bargained for, one of fact for the jury. The general principles of law decided in both courts were, as we have set them forth in this opinion, approved; but in the Supreme Court it was held that the false representations made at the time of the delivery of the policies had a tendency to throw *McMaster* off his guard, and that the court below ought not to have held as a matter of law that he was inexcusably negligent. In my opinion the court below ought to have granted the motion made by the defendant for a judgment of nonsuit against the plaintiff.

WALKER, J., concurs in the dissenting opinion.

(135 N. C. 59)

F. S. ROYSTER GUANO CO. v. MARKS.
(Supreme Court of North Carolina. April 12, 1904.)

NOTES—ACTION—PAYMENT—EVIDENCE — QUESTION FOR JURY.

1. Where, in an action on notes, their execution is admitted, the burden of showing payment is on defendant.

2. In an action on three notes, each for \$100, defendant offered in evidence receipts, dated after the maturity of the notes, but which did not show what the payments were for. There was no evidence of any other indebtedness between the parties. *Held* that, as they tended to show payment upon the notes, they should have been admitted, without putting the defendant on further proof that the credits were not made as part payments on other debts of the defendant, if such existed.

3. In an action on notes, where defendant introduced receipts in evidence given by plaintiff after maturity of the notes, the question whether the evidence showed a mutilation of the receipts should have been submitted to the jury, that they might pass upon the fact whether the amounts mentioned in the receipts should have been credited on the notes.

Appeal from Superior Court, Stanly County; Neal, Judge.

Suit by the F. S. Royster Guano Company against W. A. Marks. Judgment in favor of plaintiff, and defendant appeals. Reversed.

Z. B. Sanders, for appellant. R. L. Smith and R. E. Austin, for appellee.

MONTGOMERY, J. This action was a consolidation of two appeals by the plaintiff from two judgments of a justice of the peace. On the trial below, the plaintiff introduced in evidence three promissory notes executed by the defendant to the plaintiff on the 10th April, 1900, each in the sum of \$100, and payable one day after date. The defendant admitted the execution of the notes, and offered in evidence a receipt in the nature of a letter written from Norfolk, Va., to him by the plaintiff, dated on the 19th November, 1900,

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 1636.

in the following words and figures: "We beg to acknowledge the receipt of yours of 19th enclosing check for \$103 for which you will please accept our thanks"—and also another receipt by way of letter in the precise words and figures of the first, except that it was dated November 28th, and referred to the receipt of the \$100 check as having been sent by the defendant on the 24th. It appears from the record that the plaintiff objected to those receipts, but it does not appear upon what grounds; and his honor then remarked that he would permit the defendant to tender these receipts, and see if he would make them competent later on by showing what debts those remittances were to be applied to by agreement of the parties. The defendant thereupon closed his case. His honor then intimated that he would charge the jury that, if they believed the evidence, they would allow the plaintiff the full amount demanded, according to the face of the notes. Upon that intimation the defendant moved to reopen the case, the motion was overruled, and the court instructed the jury that, if they believed the evidence, the first issue, "Is the defendant indebted to the plaintiff?" should be answered, "Yes;" and the second, "If so, in what amount?" "\$325.55, with interest."

We think there was error in the proceedings. There was no evidence of any transaction between the parties, except the indebtedness above set forth, and the receipts bear dates subsequent to the maturity of the notes sued upon. Those receipts, therefore, in our opinion, furnish some evidence tending to show payment upon the indebtedness, and they were competent for that purpose. They should have been admitted without putting the defendant upon the further proof that the credits were not made as part payments on other indebtedness of the defendant, if such existed. When the defendant admitted the execution of the notes, the onus of proving payment was put upon the defendant. The evidence offered by him for that purpose was sufficient to have been submitted to the jury, to show that the amounts mentioned in the receipts had been applied to the payment of the notes. In his instructions to the jury, his honor considered that the receipts furnished no evidence of payment, but we are not of that opinion. In a memorandum attached to the statement of the case on appeal, his honor, in explanation of his ruling on the question of evidence, stated that he would, in his discretion, have reopened the case, but, upon an investigation of the facts, he was of the opinion that the receipts tendered had been mutilated, that they were to be applied to other indebtedness of the defendant to the plaintiff, and that those parts of the receipts showing that fact had been detached from the receipts. Those facts which his honor found upon investigation, showing a mutilation of the receipts, ought to have been submitted to the jury, in order that they might pass upon the fact as

to whether the amounts mentioned in the receipt should have been credited upon the debts sued upon.

New trial.

(135 N. C. 10)

BROWN et al. v. HAMILTON et al.
(Supreme Court of North Carolina. April 12, 1904.)

WILLS—STATUTES—DEVISE OF LAND—LANDS INCLUDED.

1. Code, § 2141, declares that a will shall be construed to speak as if it had been executed immediately before the death of the testator, unless a contrary intention appears. *Held*, that where testator's will devised all his property, and gave one daughter the lands lying south of a specified line, and thereafter, and two years before his death, he purchased other lands south of that line, such lands were included in the devise to the daughter.

2. Where testator's will devised to a daughter a tract of land south of a certain line—the land south of that line, as a matter of fact, consisting of three contiguous tracts—and subsequently he purchased other lands south of the line, the phrase in the will, "all that tract south of said line," furnished no ground for a contention that the land subsequently purchased should not be included in the devise.

3. Where testator devised his lands south of a certain line, "containing by estimation 200 acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise; the reference to the number of acres not controlling.

Appeal from Superior Court, Randolph County; W. R. Allen, Judge.

Partition by Thomas Brown and others against Caroline Hamilton and another. From a judgment in favor of petitioners, defendants appeal. Reversed.

Oscar L. Sapp, for appellants. Hammer & Spence, for appellees.

CLARK, C. J. The testator devised to the defendant, his daughter, "all that tract or parcel of land which lies south of the line beginning at the northeast corner of K. L. Winningham's land and running thence east to the Wiley Cox line, containing by estimation 200 acres." In his will he divided and devised the rest of his land—marking it out by boundaries in the same way—to his other three children. The will was executed May 14, 1897, at which time the testator owned three contiguous tracts south of said line, aggregating about 250 acres. On 9th September, 1898, the testator acquired 66½ acres more, touching in its whole length the said 250 acres, and on the south thereof, and died 25th September, 1900. This is a petition by the other children, alleging that the testator died intestate as to said 66½ acres, and asking that it be sold for partition.

It is provided by Code, § 2141, that a will shall speak as of the death of the testator. It is also well settled that the presumption is against one's dying intestate as to any part of his estate. Of course, these rules are subject to the stronger rule that the intent

of the testator, clearly expressed, shall govern. But here the will shows an intent on its face to specifically dispose of all the testator's property. The testator knew that he had given by his will all his land south of a designated line to his daughter, and, when he bought this land south of said line the following year, he also knew that it fell within the devise to his daughter (the defendant); and, if he had wished it to be taken out of such devise, he would have added a codicil. On the contrary, though he lived more than two years after the purchase of said land, he made no change in his will. We attach no importance to the argument that these words were used, "all that tract south of said line," for, when the 66¼ acres adjoining were bought, it became a part of the land south of the line. The said tract at the date of the will consisted of three contiguous tracts, but were treated as one. Laws 1844-45, p. 126, c. 88, § 3, now Code, § 2141, requires that the will shall be construed "to speak and take effect, as if it had been executed immediately before the death of the testator unless a contrary intent shall appear by the will," and none here appears. A case very much in point is *In re Champion*, 45 N. C. 246. *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106, is not in point, for there the subsequently acquired land did not come within the terms of the specific devise, and, besides, there was a residuary clause. The reference to the number of acres—200 acres—cannot control the boundaries described in the deed. *Lyon v. Lyon*, 96 N. C. 439, 2 S. E. 41. There is no doubtful boundary, to render the number of acres material to be considered, as in *Cox v. Cox*, 91 N. C. 256.

Error.

(136 N. C. 1)

STATE et al. v. COOPER.

(Supreme Court of North Carolina. April 12, 1904.)

LIVERY STABLE KEEPERS—LICENSES—POWER OF MUNICIPALITY—REASONABLENESS.

1. A municipal ordinance requiring a license of liverymen, and providing that it shall include any persons making contract for hire in town, "or carrying any person with a vehicle out of the town for hire," is void, as unreasonable.

2. Const. art. 5, § 3, provides that the General Assembly may tax trades, professions, franchises and incomes. Code 1883, § 3800, authorizes municipalities to lay taxes for municipal purposes on all persons, property, privileges, and subjects within the corporate limits "which are liable to taxation for state and county purposes." *Held*, that the city had no authority to require a license for the single act of carrying a person out of the town in a vehicle for hire, pursuant to a contract made elsewhere; such transaction not amounting to the conducting of a livery business within the town.

Montgomery, J., dissenting.

Appeal from Superior Court, Washington County; Council, Judge.

W. D. Cooper was convicted or carrying, on

47 S. E.—9

a livery business without a license, in violation of a city ordinance, and appeals. Reversed.

This action comes upon a special verdict, of which the following are the material parts: "That on July 20, 1903, and for many years prior thereto, the defendant was, and had been, and still is, a resident of Roper, N. C., a village nine miles from Plymouth, N. C. That said defendant was on said July 20, 1903, engaged in livery business at Roper, N. C.; having obtained from the county and state the license required by law. That several days prior to July 20, 1903, the defendant, while at Roper, N. C., received a letter from Chas. Balfour, a traveling salesman for J. H. Le Roy Company, at Elizabeth City, N. C., asking defendant to meet him at Plymouth, N. C., and convey him to Roper, and thence to Creswell and Columbia, on said 20th July, which the defendant wrote him he would do, and did do so; charging the said Balfour for said services his customary price. That on June 1, 1903, the commissioners of Plymouth passed the following ordinance, among others, in reference to taxation: 'On livery stables and persons keeping a horse or horses for hire, or doing any livery business or hiring of horses in the town, \$7.50. This shall include any persons making contract for hire in town, or carrying any person with a vehicle out of the town for hire.' This ordinance was in force on July 20, 1903, if said commissioners had authority under the law to pass it. The defendant has never paid said tax." Under the instruction of the court, the jury thereupon returned a verdict of guilty, and the defendant was fined \$25, in accordance with the ordinance.

A. O. Gaylord, for appellant. The Attorney General and Bragaw & Ward, for appellees.

DOUGLAS, J. (after stating the case). We are of opinion that upon the special verdict the defendant was entitled to a judgment of not guilty, inasmuch as the town commissioners did not have the power to pass the ordinance, and that the ordinance is unreasonable. We refer to that part of the ordinance under which the defendant is convicted, and which includes among those taxed for the privilege of doing a livery business "any person * * * carrying any person with a vehicle out of the town for hire." This is the only question before us. It is found that the defendant is a resident of the village of Roper, N. C., where he is carrying on the livery business; having paid both the state and county tax. There is no allegation that he is carrying on the livery business at Plymouth, or that he is in the habit of taking people out of Plymouth. As far as we can see, this is his first passenger, and he was carrying him under a contract made at Roper or at Elizabeth City—certainly while neither of the parties were at Plymouth. It seems

there is no harm in taking people into Plymouth in a vehicle, provided you put them out and leave them there. People may pay a man to bring them into town, but must walk home, unless they conclude to make the town their permanent residence, or can get some local inhabitant to take them away. This may sound like a *reductio ad absurdum*, but it is a plain statement of the possible operation of the ordinance if sustained and carried to its legitimate result. Suppose a man living in Roper were compelled to visit Plymouth for an hour or two on some business. He could hire the defendant to carry him into the town, but he could not return by the same vehicle. Again, a man might hire a conveyance to take him from Roper to some place beyond Plymouth. If Plymouth lay directly in the way, he would have to go out of his way to drive around the town, or get out and hire a Plymouth man to take him the rest of the way. Surely the Legislature never intended any such result, nor should the courts place such a construction upon the law as to legalize such action. It would require a liveryman who had paid all the taxes at his home to pay an additional tax in every town to which he happened to send a vehicle, even if only once a year.

The ordinance is not only unreasonable, but, in our opinion, is clearly unlawful.

The question of the general power of the town to tax trades, occupations, and professions is not before us, and we therefore confine ourselves to that part of the ordinance under which the defendant was convicted.

It seems to be assumed in behalf of the town that the numerous class of cases holding invalid certain forms of municipal taxation have in some way been done away with by the change in the law. We do not so understand it. The principle of those cases remains in full force, to the effect that "the authorities of a town can impose no taxes except as authorized by its charter," or general laws applicable thereto. Section 3800 of the Code of 1883 says nothing to the contrary, but simply specifies what may be taxed. It says, "They may also lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for state and county purposes." This section requires two prerequisites. The subject of taxation must be within the corporate limits, and must be identically liable to state and county taxes. Is the act of "carrying any person with a vehicle out of the town [of Plymouth] for hire" liable to state and county taxes? If not, then it is not liable to town taxes. It is evident that the permissive taxation extends only to a trade, profession, or ordinary occupation, and not to a single act. It is intended to comply with article 5, § 3, of the Constitution, which reads in part as follows: "The General Assembly may also tax trades, professions, franchises and incomes." We are referred to the reasoning in *Winston v. Taylor*, 99 N. C. 210,

6 S. E. 114, but we must not overlook the facts of that case. There the jury found that the defendants "made a business of purchasing their stock of leaf on the floors of the tobacco warehouses in the town of Winston, and carrying the same on drays to their factory in Salem," and that "they attended the auction sales of leaf tobacco regularly for the purpose above indicated." If the defendant had made a business of sending his hacks regularly into the town of Plymouth, the case would be different, but there is neither evidence nor suggestion of such a fact. Neither a municipal corporation, nor even the Legislature, can change the meaning of words so as to make that a crime which would not be a crime if called by its proper name. In the case at bar the town could tax the livery business, and could define the business, provided it did not carry the definition beyond the limits of its taxing power. When it said that the livery business should include the single act of carrying a passenger out of town for hire, it simply said, in legal effect, that such an act should be taxed to the same extent as the livery business. If the town had the right to tax that single act, then the ordinance was valid; but calling that single act a "business" did not make it so, nor did it create the right to tax where it did not already exist. This is clearly laid down in *State v. Ninestein*, 132 N. C. 1039, 43 S. E. 936, where the court says on page 1042, 132 N. C., page 938, 43 S. E.: "Ordinarily the General Assembly has no power to construe an act, but when it imposes a tax upon peddlers, and in the same act defines who are peddlers, it is equivalent to imposing a tax upon all persons engaged in the occupations therein specified." In that case the definition was legal, because the state had the right to tax the occupations it construed to be peddling. But suppose the act had declared that all foreign drummers should be peddlers, and should be taxed accordingly; it would not have made them peddlers, nor would it have legalized their taxation. The power of taxation cannot rest upon legal fictions or irrebuttable presumptions. Moreover, all municipal powers are strictly construed, and especially those relating to taxation. In *Latta v. Williams*, 87 N. C. 126, Ashe, J., speaking for the court, says: "In the construction of municipal powers, it is held to be a general rule that the powers of a municipal corporation are to be construed with strictness; and Judge Cooley, in his work on Taxation (page 387), says this rule is peculiarly applicable to taxes on occupations. 'It is presumed,' he adds, 'the Legislature has granted in plain terms all it has intended to grant at all. If it is not manifest that there has been a purpose by the Legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal.'"

We think that upon the special verdict the defendant is entitled to a judgment of not guilty. Reversed.

MONTGOMERY, J. (dissenting). For a violation of an ordinance of the town of Plymouth, the defendant was convicted in the mayor's court, sentenced to pay the fine imposed by the ordinance, and appealed to the superior court of Washington county. In that court the jury rendered a special verdict, the material facts found being as follows: That on June 1, 1903, the town commissioners passed an ordinance as follows: "On livery stables and persons keeping a horse or horses for hire, or doing any livery business or hiring of horses in the town, \$7.50. This shall include any person making contract for hire in town, or carrying any person with a vehicle out of the town for hire." That the defendant was a resident on July 20, 1903, of Roper, N. C., a village nine miles from Plymouth, and was engaged in the livery business at that time at Roper, having obtained license from the county and state to engage in the business, and that the defendant received a letter at Roper from a Mr. Balfour, posted at Elizabeth City, in which letter the defendant was asked to meet Balfour at Plymouth, and convey him thence to Roper, and thence to other places, which the defendant did, making his customary charge for such service. Judgment of guilty was rendered upon the verdict, and the defendant appealed.

The defendant, in this court, through his counsel, rested his defense on the grounds, first, that the town commissioners did not have the power to pass the ordinance; and, second, that it was unreasonable and oppressive. Under the first line of defense the contention was that in the articles of incorporation of Plymouth (chapter 213, p. 477, of the Private Laws of 1903) there was no specific power granted to the town to levy such a privilege tax as that mentioned in the ordinance, and that, as that power was not specifically granted in the charter, the act of the commissioners in enacting the ordinance was ultra vires, and therefore null and void. And numerous cases, like Pullen v. Raleigh, 68 N. C. 451, and Latta v. Williams, 87 N. C. 128, were cited in support of the position. But at the time those decisions were made the power to levy such a tax as that imposed by the ordinance was not authorized by the general law, as it was when the commissioners in the case before us passed the ordinance. In the last-mentioned case, Judge Ashe, for the court, said: "The construction we have given to the charter of the town of Davidson College is in consonance with the policy of the Legislature in regard to powers of taxation by municipal corporations, as indicated in the act entitled 'Towns.' Bat. Rev. c. 111, § 16. There it declares that towns may lay a tax on real estate situated within the corporation; on such polls as are taxed by the General Assembly for public purposes; on all persons (apothecaries and druggists excepted) retailing or selling liquors or wines of the measure of a quart or less; a tax not exceeding \$25 on such shows and exhibitors for reward as are

taxed by the General Assembly; on all dogs; and on swine, horses, and cattle running at large within the town. There is nothing in the act to authorize the right to tax trades or occupations, and, when the Legislature has refrained from granting such power in a general law, it would not be reasonable to presume, in the absence of any express declaration to that effect, it intended to do so when it was granting special power of taxation." Section 16 of chapter 111 of Battle's Revisal was brought forward in the Code, and, with an addition thereto made by the Code commissioners, is now section 3800 of the Code of 1883, and that addition made by the Code commissioners confers on the town authorities the power to levy such privilege taxes. The language is: "They may also lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for state and county purposes." Under Schedule B of the revenue act of 1903 (Pub. Acts 1903, p. 331, c. 247), the imposition of a license tax on the livery business was provided for; and, besides, in the act of incorporation of the town of Plymouth (chapter 213, p. 477, Private Acts of 1903), by section 10, it is specially declared that section 3800 of the Code shall apply to the town of Plymouth. In Guano Co. v. Tarboro, 126 N. C. 68, 35 S. E. 231, and State v. Irwin, 126 N. C. 989, 35 S. E. 430, this court has held that, under section 3800 of the Code, although such a power may not exist in the subjects of taxation enumerated in their charters, towns and cities may tax trades and professions and other privileges.

The second ground of defense (that is, that the tax is void on the ground that it is unjust, oppressive, and unreasonable) cannot, in my opinion, be maintained. The fact that the defendant is a nonresident of Plymouth cannot relieve him from liability to pay the tax prescribed by the ordinance, if he undertakes to do the livery business in Plymouth by carrying passengers out of the town. If so, he might keep his vehicles and stables just outside the town limits, and thereby escape the privilege tax, as well as by competition injure or destroy the business of other liverymen who live inside the town and pay the tax. "The Legislature may authorize municipal corporations to impose taxes upon persons whose ordinary avocations are pursued within the corporate limits, although residing beyond those limits, the same as upon residents." 2 Dillon, Mun. Corp. (4th Ed.) § 791. And the same principle is decided in City of Memphis v. Battelle & Co., 55 Tenn. 524, 24 Am. Rep. 285. In Winston v. Taylor, 99 N. C. 210, 6 S. E. 114, Judge Davis, for the court, in illustrating the decision in that case, said: "If a liveryman or drayman, resident in Greensboro, should send his omnibus and hacks or drays into the town of Winston, and claim and be allowed the privilege of doing business there without the payment of taxes because he was a nonresident, it would

be deemed a very unjust discrimination by the resident liverymen and draymen." And we adopt his reasoning on that point in the case before us.

(135 N. C. 19)

MILLIKEN v. DENNY.

(Supreme Court of North Carolina. April 12, 1904.)

STREETS AND ALLEYS—ADJOINING PROPERTY OWNERS—RIGHTS—INJUNCTION OF OBSTRUCTIONS—PLEADINGS—SUFFICIENCY—JUDGMENT—CONFORMITY TO PLEADING.

1. An "alley" is not necessarily a street, and the public have not necessarily a right to its use.

2. An allegation in a complaint that a deed called for a "stone, thence north * * * along the south side of the ten-foot alley," in the absence of an averment that an alley of that width had been opened and dedicated for the use of the owners of the property conveyed, is not sufficient to show an easement in the grantee in such deed, or to entitle him to enjoin the obstruction of the alley.

3. Where a lot conveyed fronts on two streets, no implied easement by necessity in an alley connecting the streets arises in favor of the grantee.

4. A judgment enjoining the obstruction of an alley at suit of an adjoining property owner cannot be sustained on the theory of public rights in the alley, where the complaint contains no allegation that the alley was dedicated to a public use.

Appeal from Superior Court, Guilford County; O. H. Allen, Judge.

Action by J. M. Milliken against G. W. Denny. From a judgment for plaintiff, defendant appeals. Reversed.

Scales, Taylor & Scales and R. D. Douglas, for appellant. E. J. Justice and King & Kimball, for appellee.

CONNOR, J. The plaintiff alleged: That on the 14th day of August, 1890, George A. Dick, trustee, and Mary E. Dick, by and with the consent of her husband, R. P. Dick, executed to Julia P. Dick a deed for about three acres of land, in the city of Greensboro, "which said land was bounded on the north by a ten-foot alley, connecting Percy street and Chestnut street, on the east by Percy street, and on the west by Chestnut street; more particularly described in said deed as beginning at a stone on Chestnut street ten feet south of the southwest corner of George A. Dick's home lot; running thence along Chestnut street south, 3 degrees and 45 minutes west, 378½ feet, to a stone; thence south, 84 degrees and 22 minutes east, 316½ feet, to a stone on Percy street; thence north, 6 degrees and 39 minutes east, 383½ feet to a stone; thence north, 84 degrees and 22 minutes west, 340 feet, along the south side of a ten-foot alley—containing three acres," etc. Said deed was duly recorded. That subsequently the said Julia P. Dick conveyed the said land by deed

containing like calls to those above set out to George A. Dick, which said deed was duly recorded. That thereafter George A. Dick, by deed containing a like description to that set out in the two deeds above mentioned, conveyed said land to Caesar Cone, which deed was duly recorded. That subsequently Caesar Cone and wife conveyed a part of said land to the plaintiff by deed containing the following description: "Beginning at a stone in the north side of Summit avenue and 75 feet westerly from a stone in the northwest intersection of Summit avenue and Percy street, running thence north, 36 degrees and 56 minutes west, 66.25 feet, to a stone on the north side of a ten-foot alley; thence north with the south side of said alley, 84 degrees and 49 minutes west, 80 feet to a stone," etc. "That the ten-foot alley called for in the description in the said deed to the plaintiff is the same alley running between Percy and Chestnut streets north, 84 degrees and 49 minutes west, which is established, called for and set out in each of the deeds above referred to, prior to the conveyance to the plaintiff of the land described in said deed to him. That subsequent to the execution and registration of the first three above-mentioned deeds Mary E. Dick and George A. Dick, trustees, who were the grantors in the deed first above mentioned to Julia P. Dick, executed to the defendant, G. W. Denny, a quitclaim deed for the alley above referred to, describing the land thereby conveyed as beginning on the east side of Chestnut street at the southwest corner of the home place formerly owned by George A. Dick, and running about 350 feet to Percy street; thence southerly with Percy street ten feet to the corner of the lot sold by George A. Dick to Caesar Cone; thence westerly with the north line of said lot about 350 feet to Chestnut street; thence northerly with Chestnut street ten feet to the beginning"—which deed was duly recorded. That the defendant had actual knowledge that the said alley was called for in such of the conveyances above mentioned as were executed and registered prior to the execution of the above-mentioned deed to him. That the plaintiff agreed to purchase from Caesar Cone, and took from him a contract in writing to convey, the land described in the deed from said Caesar Cone to the plaintiff long before the defendant received from the said George A. Dick, trustee, and Mrs. Mary E. Dick, the said deed for the said 10-foot alley above described. That the plaintiff, relying upon the fact that the said alley was called for in the deeds above set out, and upon the faith that it would be kept open, was induced to purchase the said lot, and pay therefor a larger sum than he would otherwise have done, the said alley giving to the plaintiff a convenient entrance to his said lot facing on Summit avenue, and upon which he has erected a house which he occupies as a home. That

the defendant has, since the execution to him of the quitclaim deed above mentioned, and after being forbidden by the plaintiff to do so, closed up said alley, and thereby cut the plaintiff off from entering the back portion of his premises from Percy or Chestnut streets, and has damaged him. He prays that the defendant be enjoined from obstructing his right to pass through and over the said alley, and be required to keep it open, etc. The defendant demurred "for that the complaint does not state facts sufficient to constitute a cause of action." His honor overruled the demurrer, and ordered the defendant to open the said alleyway, and enjoined him from ever closing same, or in any way interfering with the free use of the same by the plaintiff and the public who may wish to pass and repass over and along the same. From this judgment the defendant appealed.

The plaintiff contends that this case comes within the principle well settled by this court in *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; *State v. Fisher*, 117 N. C. 733, 23 S. E. 158; *Conrad v. Land Co.*, 126 N. C. 766, 36 S. E. 282; *Collins v. Land Co.*, 128 N. C. 563, 30 S. E. 21, 83 Am. St. Rep. 720—that where an individual sells or conveys a town or city lot bounded by streets or alleys marked out on a plat, and the grantee enters upon it and expends money in improving it, he is entitled to a right of way over such street or alley as appurtenant to the land, and any subsequent conveyance by his grantor or those claiming under him of the portions of such street or alley by which the grantee's lot is bounded is void in so far as such sale may affect his rights. We have no disposition to question the correctness of the law as laid down in these cases. This court, at the present term, in *Hughes v. Clark*, 46 S. E. 956, has reaffirmed the doctrine and cited with approval the cases above named. The right of purchasers to have such streets or alleys kept open for their own use and the use of their grantees is not based so much upon the theory that they have an easement as that the dedication, evidenced by the making of the plat and the reference to it either in the deed or in the negotiations, estops the party from closing up such street or alley or interfering with the use of them for the purpose for which they were dedicated. While there is some conflict in the authorities which we have examined, it may be said that an alley is not necessarily a street, and does not necessarily signify that the public have a right to use it. An alley is defined as "a narrow passage or way in a city, as distinguished from a public street." 2 Am. & Eng. Enc. p. 149. Webster defines it as "a narrow passage, specially a walk or passage in a garden or park, bordered by rows of trees or bushes; a bordered way. A narrow passage or way in a city, as dis-

tinct from a public street." The distinction between a private and a public alley is recognized by the Supreme Court of Maryland in *Witsen v. Gutman*, 29 Atl. 608, 24 L. R. A. 405. It is not alleged in the complaint by whom, or at what time, this alley was opened, or for what purpose. The language is "that the said land was bounded on the north by a ten-foot alley connecting Percy and Chestnut streets." Whether it was opened at the time the deed was made, and for the use of the two lots, or whether it had been opened before that time, and dedicated to that purpose, does not appear. The nearest approach to an allegation that the alley was opened is found in the fifth paragraph: "That the ten-foot alley called for in the description in the said deed to the plaintiff is the same alley which is established, called for, and set out in each of the deeds above referred to prior to the conveyance to the plaintiff of the land described in said deed to him." We do not think that the mere fact that the deed from George A. Dick to Julia P. Dick called for a "stone," "thence north, 84 degrees and 22 minutes west, 340 feet along the south side of the ten-foot alley," in the absence of any allegation that an alley of that width had been opened and dedicated for the use of the owners of the property conveyed, is sufficient to pass an easement to the grantee, or to entitle him to enjoin the closing of such alley. No right of way or other easement is expressly granted; therefore the plaintiff's claim to such right or easement is based upon the contention that it is granted by implication upon the well-settled principle that, if a man grant a piece of land surrounded by other lands belonging to him, the grantee will have by implication a right of way to pass to and from the land granted. This right arises out of the necessity of the situation of the grantee in respect to the land granted. By the complaint in this case it appears that the lot conveyed fronted on two streets, being 216 feet apart, and fronting about 378 feet on each street. It would seem, therefore, that no easement or right of way would arise by implication by reason of necessity. In the present condition of the pleadings we prefer not to discuss or decide the rights of the parties except for the purpose of disposing of the demurrer. It may be that the plaintiff can, by amendment of his complaint, set forth more clearly the basis and extent of his alleged right. The judgment of his honor cannot be sustained, for that it assumes not only that the plaintiff was entitled to an alley, but that the public had a right to pass and repass over and along the same. We find no suggestion in the complaint that the alleged alley was dedicated to any public use; nor does the judgment recognize or protect such rights, if any, as the owner of the adjoining lot may have to the use of the alley. It may well be that, if opened at all,

the alley was for the benefit of the lot conveyed and the adjoining lot. How this is, will, we presume, be made to appear by an amendment to the complaint. Upon the pleadings we simply decide that his honor should have sustained the demurrer, and given the plaintiff an opportunity to amend his complaint as he may be advised. Although no objection was taken to the form of the demurrer, and we therefore treat it as sufficient, we have not overlooked the fact that it does not conform to the requirements of section 240 of the Code, as construed by this court in the cases cited in Clark's Code, § 240. As the defendant may, notwithstanding the defect in form of his demurrer, have made a motion in this court for the same causes, we treat the case as if such motion had been made. *Tucker v. Baker*, 88 N. C. 1.

Error.

(135 N. C. 49)

GRAVES et al. v. MOORE COUNTY COM'RS.

(Supreme Court of North Carolina. April 12, 1904.)

RAILROAD BONDS—ISSUANCE UNDER VOID STATUTE—RIGHTS OF BONA FIDE HOLDERS—AUTHORITY UNDER OTHER STATUTORY PROVISIONS—BURDEN OF PROOF—CONSTRUCTION—RECITALS IN BONDS—ENJOINING TAX—RIGHT OF TAXPAYER TO SUE.

1. Const. art. 2, § 14, provides that no laws shall be passed to pledge the faith of the state for the payment of any debt, or to impose any tax, or allow the counties, cities, or towns to do so, unless the bill shall have passed three several readings, etc., and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal. Laws 1885, p. 400, c. 215, § 7, authorized any township in M. county through which a railroad might pass to subscribe to its capital stock, issue bonds therefor, etc., but the yeas and nays on the passage of the statute were not recorded on the journals. Prior to this statute, decisions of the Supreme Court construing other constitutional provisions tended to establish the principle that a statute ratified and signed by the presiding officers of the two houses was conclusive evidence that the bill had been constitutionally passed. *Held*, that these decisions did not apply to article 2, § 14, so as to protect the bona fide purchasers of bonds issued under Laws 1885, p. 898, c. 215, on the theory that the decisions became a part of the contract of purchase, and that a subsequent decision holding the bonds invalid would impair the obligation of the contract.

2. Code, § 1996, providing that the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company "when necessary to aid in the completion of any railroad" in which the citizens of the county are interested, cannot be applied to authorize the issuance of bonds by a township in aid of a road not yet begun.

3. Code, c. 17, § 707, subsec. 14, provides that no townships shall have or exercise any corporate power whatsoever unless authorized by an act of General Assembly, to be exercised under the supervision of the board of county commissioners. *Held*, that an issue of township bonds in aid of a railroad under a void statute could not be justified under section 1996, providing that the boards of commissioners of the several

counties shall have power to subscribe stock to any railroad company in which the citizens of the county are interested.

4. Township bonds issued in aid of a railroad pursuant to Laws 1885, p. 898, c. 215—the same being an unconstitutional statute—recited that they were issued by virtue of that act, and by authority of a township election in pursuance thereof, the purpose and intent of which was to raise a fund to pay the township's subscription to the railroad company's capital stock, "for the construction and equipment of the same." The court below found that the bond election was held under Laws 1885, p. 898, c. 215, and expressly declined to find that it was held under Code, § 1996, providing that the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company in which the citizens of the county are interested. The preliminary steps prescribed by Laws 1885, p. 898, c. 215, and by Code, § 1996, are entirely different. *Held*, that the bond issue could not be justified under Code, § 1996, on the theory that recitals in bonds that they are issued under a statute will be held, in favor of bona fide purchasers, to import full compliance with the statute.

5. In an action by a taxpayer to enjoin a township tax levied to pay interest on railroad bonds issued under a void statute, the burden is on the defendant county commissioners to show that the bonds are valid under some other act.

6. A taxpayer may enjoin county commissioners from making a tax levy to pay interest on township railroad bonds issued under an unconstitutional statute, without restoring to the bona fide holders of the bonds the consideration paid therefor.

Appeal from Superior Court, Moore County; M. H. Justice, Judge.

Suit by G. C. Graves and others against the commissioners of Moore county. Decree for plaintiffs, and defendants appeal. Modified.

The Carthage Railroad Company was chartered by chapter 215, p. 898, Laws 1885. By section 7 of said act the commissioners of Moore county, or any township through which said railroad might pass, were authorized to subscribe to its capital stock such an amount as, upon a vote at an election to be held as in said act provided, should be named. The said commissioners, upon taking such vote, were authorized to issue bonds for the purpose of borrowing money to pay such subscriptions as might be made pursuant to the provisions of said act. The commissioners were authorized to levy taxes to pay the interest on such bonds, and to provide a sinking fund to pay the principal. The bill constituting said act was not passed either in the Senate or House of Representatives in accordance with the provisions of section 14, art. 2, of the Constitution, in that the names of the Senators and members voting for and against said bill were not recorded on the journals. The commissioners, in accordance with the provisions of said act, caused an election to be held in Carthage township, in said county, in regard to subscribing \$10,000 to said railroad, at which a majority of the qualified voters voted for said subscription. Pursuant thereto the commissioners issued the bonds of said township to the amount of \$10,000. Said election was held between March 4, 1885, and No-

ember 1, 1886. The said bonds were in proper form, and attested according to law. They were put upon the market and sold and purchased in good faith for their full value, and without any notice, express or implied, to the purchasers of any infirmity therein, except such facts as appeared upon the record on the journals of the Senate and House, and of this the purchasers had no actual notice. The money derived from the sale of said bonds was spent in the construction and equipment of said railroad company, extending through said Carthage township. The stock of said company to the amount of \$10,000 was issued to the board of commissioners for the benefit of Carthage township, and is now held by said board for said township, and the people of said township have enjoyed and continue to enjoy the benefit of said railroad. The defendant board of commissioners has each year since the issuance and sale of said bonds levied a tax upon the taxable property in Carthage township sufficient to pay the interest on said bonds, and has paid such interest, and it is the purpose of said board at the meeting on the first Monday in June to levy a tax upon the property and polls in said township for the purpose of paying the interest on said bonds accruing during the year 1903, and they will levy said tax unless restrained, etc. The bonds contain the following recital: "This bond is issued by virtue of an act of the General Assembly of North Carolina, ratified March 4, 1885 [Acts 1885, p. 398, c. 215], and by authority of an election held in Carthage township in pursuance thereof ratifying the same," etc. The defendant board in apt time requested the court to find from the affidavits the following facts: "That when the said bonds were issued and sold, November 1, 1886, they were valid by the laws of North Carolina, as then expounded by all the departments of the government, and administered in its courts of justice. That said bonds were issued and sold prior to the decision in the case of *State v. Patterson*, 98 N. C. 600, 4 S. E. 350, and prior to the decision of said case every decision of the Supreme Court of said state had been in favor of the validity of said bonds and the act of the General Assembly under which they purport to be issued. That said bonds were sold for value and in good faith, and are now owned by the Jacob Tome Institute of Baltimore, not a party to this suit. That the validity of said bonds cannot be impaired by the decision of the courts of the state made subsequent to the issue and sale of the bonds." The court declined to find said facts and to hold as requested, and the defendants excepted. His honor, being of the opinion that chapter 215, p. 398, Laws 1885, had never been passed in accordance with the provisions of section 14, art. 2, of the Constitution, and was invalid, and that the election held pursuant thereto, and the bonds issued by authority thereof, were void, enjoined the defendant board of commissioners

from levying the tax to pay the interest or principal of said bonds. The defendants appealed.

U. L. Spence, for appellants. H. F. Seawell and W. J. Adams, for appellees.

CONNOR, J. The defendant concedes that his honor's ruling in respect to the invalidity of chapter 215, p. 398, Laws 1885, is sustained by the decisions of this court in *Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 968, *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, *Rodman v. Washington*, 122 N. C. 39, 30 S. E. 118, and *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711, but contends that said bonds are valid under the decisions of the Supreme Court of the United States in *Commissioners of Wilkes County v. Coler*, 180 U. S. 107, 23 Sup. Ct. 738, 47 L. Ed. 971, and *Commissioners of Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126. They say that prior to the passage of the act of 1885, p. 398, c. 215, and the issuance and sale of the bonds November 1, 1886, every decision of this court construing the Constitution tended to establish the principle that, when an act had been ratified and signed by the presiding officers of the Senate and House of Representatives, it was conclusive evidence that the bill had been passed in accordance with all of the provisions of the Constitution; that purchasers of bonds issued pursuant to such act are presumed to have contracted with reference to such decisions, and that they entered into and became a part of the contract; that to hold the bonds issued in pursuance of such acts invalid, in the light of such decisions, impairs the obligation of the contract, etc. If the premise be true, the conclusion must be conceded. The principle is well settled by numerous authorities, and commends itself to the judicial mind. This identical question, however, is decided by the Supreme Court of the United States in *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. The Circuit Court of Appeals, under the judiciary act of 1891, certified to the Supreme Court three questions, two of which were: (1) Whether, if the bonds and coupons in question were issued, put in circulation, and came into the hands of purchasers for value and without notice, in due course of trade, and if there were at that time no decisions of the Supreme Court of North Carolina adverse to these bonds, or bonds issued under similar statutes, they are valid, etc.; (2) whether there was any decision adverse to the validity of these or other identical bonds, or any construction of the Constitution or law of North Carolina which affected the question of their validity. Mr. Justice Harlan, for the court, proceeds to examine the cases relied on by the bondholders to sustain their contention; being the same cases relied on by the defendant herein. *Brodnax v. Groom*, 64 N. C. 244; *Gatlin v. Tarboro*, 78 N. C. 119;

Scarborough v. Robinson, 81 N. C. 409—all of which were decided prior to November 1, 1886. The learned justice carefully analyzes these cases, and comes to the following conclusion: "It thus appears that no one of the cases cited by the defendants involved a construction of article 2, § 14, of the state Constitution. Those cases arose under other provisions of the Constitution." The question is so fully discussed, and the conclusion so clearly stated, that we think it unnecessary to do more than refer to the opinion in that case. This court has since the decision of those cases kept the distinction between acts of ordinary legislation and acts coming within the provision of article 2, § 14, of the Constitution, clearly in view. *Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966; *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023. The distinction was clearly defined in *Bank v. Commissioners*, *supra*.

2. The defendant says that if the bonds are not valid under chapter 215, p. 398, Laws 1885, the commissioners had power and authority to order the election, and pursuant thereto to issue the bonds, under section 1996 et seq. of the Code, which provides that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company, or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." This court, in *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, discussed and decided this identical question, holding that the extent of power conferred upon the commissioners by section 1996 of the Code was confined by the express language used "to aid in the completion of any railroad," etc. This view was reaffirmed in *Commissioners v. Call*, 123 N. C. 308, 323, 31 S. E. 481, 44 L. R. A. 252. The defendant says this construction was repudiated by the Supreme Court of the United States in *Stanly Commissioners v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126, and by the Circuit Court of Appeals in *Commissioners of Stanly Co. v. Coler*, 113 Fed. 705, 51 C. C. A. 379. It is true that these courts held that, while the general rule required the federal courts to accept the construction put upon state Constitutions and state statutes by the courts of the state, there were exceptions thereto, and that the case presented one of such exceptions; citing *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 859. The federal courts rejected the construction put by this court upon the word "completion"; holding that, read in the light of the context, it was to be construed as synonymous with "construction." We have examined with care the opinions of the learned judges, and the reasoning advanced to sustain their views. We are constrained,

with all possible deference, to say that we find in them no reason advanced which causes us to change the view expressed by this court. We do not find it necessary to follow this discussion, because, in our opinion, section 1996 cannot, in any point of view, be called in aid of the bonds involved in this case. It will be observed that authority is given "boards of the several counties" to subscribe, etc. The subscription here is made by Carthage township, and certainly no power is given by the Code for townships to make such subscription otherwise than by a special act of the General Assembly. It is expressly provided that "no township shall have or exercise any corporate power whatsoever, unless authorized by an act of the General Assembly to be exercised under the supervision of the board of commissioners." Code, c. 17, § 707, subsec. 14. While it is true, as contended, that the county commissioners, as the governing board of the county, by the terms of chapter 215, p. 398, Laws 1885, represent and direct the action of the township in respect to the subscription, etc., it will hardly be seriously contended that they may, under the terms of section 1996 of the Code, submit the question of issuing bonds to the people of the township, except by positive direction of the General Assembly. These bonds expressly recite upon their face that they are "issued by virtue of an act of the General Assembly" ratified on the 4th day of March, 1885 (Acts 1885, p. 398, c. 215), "and by authority of an election held in Carthage township in pursuance thereof ratifying the same, the purpose and intent of which is to raise a fund sufficient to pay the subscription of said Carthage township to the capital stock of the Carthage Railroad Company for the construction and equipment of the same." It would be difficult to use stronger terms in which to set forth the subscription to the road, and the purpose for which it was made, "for construction and equipment of the same," expressly excludes any idea that the people of Carthage township or the commissioners of the county supposed that they were subscribing "to aid in the completion" of a railroad. We therefore conclude that even if we were to adopt the interpretation placed upon the statute by the Supreme Court of the United States, which we cannot do, these bonds would not come within the protection of section 1996 of the Code. Again, much emphasis is laid by Mr. Justice McKenna, in the *Stanly Bond Case*, upon the fact that there the bonds expressly recited that they were issued pursuant to the provisions of section 1996 et seq. of the Code. Purchasers were justified, therefore, in assuming that all provisions and conditions, the performance and existence of which are necessary to authorize the issuing of the bonds, had been complied with and existed; citing *School District v. Stone*, 106 U. S. 183, 1 Sup. Ct. 84,

27 L. Ed. 90, wherein it is said that "when a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions to execute bonds in aid of the construction of a railroad * * * and imposes upon certain officers * * * power to determine whether such conditions have been performed, recitals that the bonds are issued pursuant to or by authority of the statute have been held, in favor of a bona fide purchaser for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued." This well-settled principle can have no application here, because there is not the slightest reference to the Code or any statute, other than chapter 215, Laws 1885, as the authority under which the bonds were issued. If the power was vested in the commissioners of Moore county to submit to the voters of Carthage township the proposition to make the subscription, and it was so recited in the bonds, such recitals, in the hands of bona fide purchasers for value, would be conclusive evidence that the conditions existed upon which the authority to issue them could be exercised; but the recitals could not create or confer the power, if there was an absolute want of it. Every purchaser of the bonds would take them with notice of that fact. *Wilkes Com'rs v. Coler*, 190 U. S. 107, 23 Sup. Ct. 738, 47 L. Ed. 971.

His honor finds as a fact that the election was held under the provisions of the act of 1885, p. 398, c. 215, and expressly declines to find that said election was held pursuant to the provisions of sections 1996, 1997. There being no evidence in the record tending to show that the provisions of section 1997 in regard to ordering and holding the election were complied with, and no finding of fact to that effect, and no recitals in the bonds that they were issued pursuant to or by authority of said sections, it is difficult to perceive how we could say either that they were so issued, or, if so issued, that the provisions of the sections were complied with. On the contrary, we can see, from the facts found and the recitals, that the election was held pursuant to chapter 215, p. 398, of the Laws of 1885. Section 12 of said act prescribes the preliminary steps to be taken before an election can be held; that 25 taxpayers petition in writing that an election be ordered, etc. The recital in the bonds conclusively fixes the fact that such steps were taken, and all things necessary were done in respect to the election. *Stanly Bonds Case*, supra. It is difficult to see how the same recitals can conclusively fix the fact that the bonds were issued pursuant to and in compliance with another statute, the terms and provisions of which

in regard to the preliminary steps to be taken are entirely different. The burden is upon the defendant to show that, although void under the act recited in the face of the bonds, they are valid under some other statute, and to show further that all things necessary to be done under such statute were done, which is practically to contradict the recitals. We conclude that no power is conferred upon the commissioners by section 1996 of the Code to submit to the people of a township the question of subscribing to a railroad; that, in the absence of any such power, his honor correctly declined to find the fact that the commissioners undertook to order the election under said section. To have so found would have been error, because there was no evidence thereof. On the contrary, the record expressly showed the contrary.

The defendant says that the plaintiff has no standing in a court of equity; that before he, as a taxpayer, can invoke the equitable aid of the court, he must offer to restore to the holders of the bonds the proceeds or the property received in consideration thereof. It is well settled that a taxpayer may maintain a bill to enjoin the collection of an illegal tax, or a tax levied for an illegal purpose. If the bonds are absolutely void, a tax levied to pay them would be equally so. No estoppel can grow out of a void act of the General Assembly, or any act done by authority thereof. If the bondholders are so advised, we can see no reason why they may not make themselves parties, and assert their right to the stock now held by the commissioners in trust for the township. The plaintiff simply asks that a tax levy be enjoined. We pass upon the legal aspects of this record, without regard to the moral element involved. Certainly this court does not sympathize with repudiation of public obligations, but our duty is to construe the Constitution and laws of the state. Suitors must look to other tribunals—either their own consciences or the judgment of an enlightened public conscience—to find vindication for their actions. We deem it not improper to say that we commend the action of the defendant board of commissioners in defending the rights of the holders of the bonds, and setting up in the strongest possible view the grounds upon which, if at all, the bonds could be sustained. The case was well argued, and the briefs well and carefully prepared. The defendant contends that the injunction should not have been made perpetual, but, in any point of view, only continued to the hearing. The order may be so modified to the end that any other parties in interest may, if so advised, come in and litigate their rights.

The judgment is modified and affirmed.

(68 S. C. 260)

FAIREY et al. v. KENNEDY et al.

(Supreme Court of South Carolina. March 21, 1904.)

JUDICIAL SALES—AGREEMENT OF PARTIES—CHILLING BIDDING—RIGHTS OF PURCHASER—PLEADING—AMENDMENT.

1. At a judicial sale, an agreement, to which all parties in interest are parties, intended to chill the bidding, will not invalidate the sale.

2. Where the parties to the judicial sale had agreed before the sale with another as to a purchase on their behalf, and in consequence of the agreement and a reliance on the performance of it the land had been purchased by the other party to the agreement at much less than its real value, and the purchaser refused to carry out the agreement, and it could not be enforced because of the statute of frauds, he will not be allowed to hold the land.

3. After the admission of evidence and argument, an amendment to the pleading which does not present a different cause of action requiring new proof is properly admitted.

Appeal from Common Pleas Circuit Court of Barnwell County; J. E. McDonald, Special Judge.

Action by Julia L. Fairey and others against W. H. Kennedy and others. From the decree, defendants W. H. Kennedy and A. M. Kennedy appeal. Affirmed.

J. O. Patterson and Allen J. Green, for appellants. B. T. Rice, for respondents.

WOODS, J. A synopsis of the pleadings is necessary to a clear understanding of the issues involved in this cause. The following are substantially the allegations of the complaint: Mrs. Elizabeth Wade executed a mortgage to the defendant W. H. Kennedy in 1886, and died intestate in 1896, leaving her husband and a number of children as her heirs. The husband afterwards died, leaving the children as his heirs. Two daughters, Mrs. McCurley and Mrs. Nipson, died intestate after their mother, the first leaving as her heirs her husband and one minor child, and the second her husband and two minor children. Kennedy, the mortgagee, recovered a judgment of foreclosure in 1897 in an action to which all who claimed an interest in the land through Elizabeth Wade were parties. The master sold under this judgment, and "W. H. Kennedy became the purchaser thereof by and through his son and partner in business, A. M. Kennedy, one of the defendants herein." Before the sale was made, W. H. Kennedy agreed with W. D. Wade, a son of Mrs. Wade, and F. A. Fairey, husband of one of her daughters, acting for all the heirs of Mrs. Wade, that he would bid off the land, and allow the heirs two years to redeem it by paying the judgment and \$200 owing to W. H. Kennedy by W. D. Wade individually. Fairey and W. D. Wade were to hold and cultivate the land and apply the profits to the debts. In pursuance of this agreement, W. H. Kennedy, through

A. M. Kennedy, bought the land for \$1,210, and W. D. Wade alone, with Fairey's consent, went into possession, and made payments to W. H. Kennedy on the indebtedness. The other parties for whose benefit the agreement was made also made payments. After receiving these payments, W. H. Kennedy violated and renounced the agreement, concluded with W. D. Wade to exclude all the other heirs from participation in the benefits to be derived from the redemption of the property, and W. D. Wade is now in possession of the land under some separate agreement to purchase. The property mentioned "is worth \$3,000 or more, and in consequence of said agreement entered into between the said W. H. Kennedy and the heirs at law of Mrs. Elizabeth Wade the same was sold at a great sacrifice, as it was understood at said sale that said land was to be bid off for the benefit of the said heirs at law, and the bidding was chilled by reason of said agreement." The plaintiffs allege their readiness and desire to carry out the terms of the contract made with Kennedy for the benefit of all the heirs, and demand judgment for an accounting for all rents and other payments made by W. D. Wade and the other heirs; that plaintiff be allowed to pay the indebtedness remaining due under the contract, and that upon such payment, W. H. and A. M. Kennedy be decreed to execute fee simple title to the heirs of Mrs. Wade. All who claim through Mrs. Wade are parties plaintiff or defendant. The infant defendants, in their answer, join in the prayer of the complaint. W. D. Wade and C. L. Wade, in their answers, allege that the land brought a fair price at the master's sale, and deny that the bidding was chilled. They deny that any contract was made with W. H. Kennedy before the master's sale for the redemption of the land, and allege that after the sale W. D. Wade made a contract of purchase with A. M. Kennedy, which was to be for the benefit of all the Wade heirs; that he paid about \$400 on this contract, a part of which came from some of the other heirs; that he has not been able to pay the remainder of the purchase money, and the heirs have not come to his assistance. They ask for an accounting by A. M. Kennedy of the sums received, and that he be required to execute a deed to W. D. Wade and such other of the Wade heirs as shall come in and contribute their portion of the purchase money. W. H. Kennedy, in his answer, denies that he made the contract set up in the complaint, or that A. M. Kennedy purchased the land for him, or that he has any interest in it, or that he has received money from any of the Wade heirs on a contract of purchase. The answer of A. M. Kennedy sets up an independent purchase by him of the land at the master's sale, and contains an allegation that he has no knowledge or information sufficient to form a belief as to the alleged contract with

W. H. Kennedy. Both the Kennedys allege the land was bought for a fair price at a fair sale, without any chilling of the bidding.

Upon the call of the case for trial, the defendants interposed the following demurrer: "The defendants now move to dismiss the complaint herein on the ground that the case does not state facts sufficient to constitute, a cause of action, in this: (1) That it appears from the face of the complaint that the agreement or contract sought to be enforced and set up in the complaint by the plaintiff is one that contravenes established principles of public policy, in that it tends to prevent and did prevent full and free competition at the judicial sale, as alleged in the complaint, and hence is alleged illegal and void, and cannot be enforced in a court of justice; and (2) it also appears from the complaint that the plaintiffs are in pari delicto with the defendants, and the court will not lend its aid to either party, but will leave them where it found them." The circuit judge overruled the demurrer. W. H. Kennedy and A. M. Kennedy are the only appellants, and their first and second exceptions involve the correctness of this ruling.

The demurrer is based on the proposition that an agreement intended to chill bidding at a judicial sale is, under all circumstances, regarded such a legal wrong that no rights can be claimed under it. Such agreement is denounced by the law as contrary to public policy, for the reason that it operates as a fraud upon those interested in the sale of property. *Hamilton v. Hamilton*, 2 Rich. Eq. 384; *Barrett v. Bath Paper Co.*, 13 S. C. 158; 15 Am. & Eng. Ency. 950. When all parties interested unite in the contract, or subsequently sanction it in the promotion of their interests, the rule has no application, for the obvious reason that there is nobody left to be defrauded. In this case the complaint alleges the contract to bid in the property which resulted in chilling the bidding was made by the judgment creditor with two of the heirs acting for all other interested parties. The object was to secure time to buy back the property for the benefit of all concerned. It is true the infant defendants were not bound by the agreement, though it was intended for their benefit, and they could have repudiated it; but by their answer through their guardian ad litem they have asked the court to enforce their rights under it. For these reasons we think the demurrer was properly overruled, and the first and second exceptions cannot be sustained.

In the third exception the appellant submits that the circuit judge should have dismissed the complaint after hearing the evidence, on the same ground as that stated in the demurrer, and this exception falls with the first two.

After discussion of the merits of the case, the circuit judge held that the plaintiffs "failed to establish, by satisfactory proof such

a clear, definite, and certain contract as entitles them to the specific performance thereof," and also that there was no such proof of part performance as would take the contract out of the operation of the statute of frauds; and that for these reasons specific performance, the particular relief demanded in the complaint, could not be granted. The circuit judge, however, found further that, though the verbal contract was not sufficiently definite for enforcement, and there had been no such performance as would prevent the application of the statute of frauds, yet that the Wade heirs had relied on the agreement made before the sale by W. H. Kennedy with W. D. Wade on their behalf, and that in consequence of this agreement and the reliance of the Wade heirs on it, the land had been purchased by A. M. Kennedy at much less than its real value, with full knowledge of the agreement. We think this finding is sustained by the great preponderance of the testimony. Not only is there direct proof of some agreement or understanding before the sale, but disinterested witnesses swear that W. H. Kennedy, after the sale, declined to consider any outside offer to purchase, giving as a reason that he had agreed to allow the Wade heirs to redeem or buy back the land. W. H. Kennedy does not deny the contract set up in the complaint, but merely says that he does not remember it. It is manifest from the conversation after the sale that W. H. Kennedy regarded himself in control of the land after the purchase by his son. From a review of the testimony we think it clear the father and son were acting throughout the whole transaction in concert, and not independently, and that A. M. Kennedy is in no position to disavow his father's actions or promises before the sale. In addition to this, a number of the Wade heirs paid in the aggregate, through W. D. Wade, to A. M. Kennedy, about \$300—their share of the surplus proceeds of the master's sale—on this agreement for redemption made before the sale, and these payments have never been refunded to them. The owners of the property were lulled into allowing the property to be bought for much less than its value by the promise or representation of the purchasers that they should have a chance to redeem it. To have their bargain, the purchasers must carry out the promise or representation which they made, and it is of no consequence that the promise or representation did not amount to a legal contract. Having escaped from the promise under the statute of frauds, and because the promise was not sufficiently definite for legal enforcement, they cannot hold the bargain obtained by the promise, for that would be a fraud. *McDonald v. May*, 1 Rich. Eq. 91; *Schmidt v. Gatewood*, 2 Rich. Eq. 177; *Rorer on Judicial Sales*, § 1111. In this view the question whether the Kennedys participated in the steps taken to chill the bidding is of no consequence.

With this application of the law to the facts

of the case, we now consider whether it was error for the circuit judge, at the conclusion of his decree, to allow the plaintiffs "to amend the complaint in such particulars as they may be advised necessary to raise the question of the validity of the sale of the tract of land described in the complaint." Amendment of pleadings to conform them to the facts proved, when the amendment "does not change substantially the claim or defense," is in the discretion of the circuit judge. *Association v. Waters*, 50 S. C. 459, 27 S. E. 948; *Whitmire v. Boyd*, 53 S. C. 815, 31 S. E. 306. In this case the allegations of the complaint as against W. H. Kennedy and A. M. Kennedy were as appropriate to a demand that the sale be set aside as to a demand for specific performance. Scrutiny of the complaint leads to the conclusion that no allegation necessary to a judgment annulling the sale is omitted. The promise, the reliance of plaintiffs on it, the repudiation of it by defendants, the resulting loss to plaintiffs and gain to defendants, are all alleged. The proof was directed to these issues. It is true, in their demand for judgment the plaintiffs ask for specific performance, and not to have the sale set aside; but the demand is not a part of the cause of action, and is not controlling. *Westlake v. Farrow*, 34 S. C. 273, 13 S. E. 469. As is said in *Sheppard v. Green*, 48 S. C. 175, 23 S. E. 228: "It is well settled that the plaintiffs may obtain any relief appropriate to the case made by the pleadings and evidence, without regard to the form of the prayer for relief." The amendment allowed will not present a distinct and different cause of action which would have to be established by different and distinct proof, and therefore does not come within the rule laid down in *Whaley v. Stevens*, 24 S. C. 479, and other similar cases. It is manifest from his decree that the circuit judge declined to set the sale aside without the amendment in careful concern that the defendants interested in sustaining the sale might have no ground to complain that the sale had been set aside without full opportunity being given to them to be heard as to the propriety of that particular relief.

The judgment of this court is that the judgment of the circuit court be affirmed.

(68 S. C. 257)

MARION v. CITY COUNCIL OF CHARLESTON.

(Supreme Court of South Carolina. March 23, 1904.)

COMPLAINT—DEMURRER.

1. A complaint is not subject to demurrer on the ground that from the face of the complaint it appears that several causes of action have been improperly joined, where the allegations are set forth in form as a single cause of action.

Appeal from Common Pleas, Circuit Court of Charleston County; Purdy, Judge.

Action by Sophia S. Marion against the city council of Charleston. From order overruling demurrer, defendant appeals. Affirmed.

George H. Moffett, for appellant. John R. Bellinger, for respondent.

GARY, A. J. The question presented by the exceptions in this case is whether a complaint is subject to a demurrer on the ground it appears upon the face of the complaint that several causes of action have been improperly united, when the allegations are set forth, in form, as a single cause of action. This question is conclusively settled by the case of *Cartin v. R. R.*, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829, in which the court uses this language: "If two causes of action were set forth in the complaint, without being separately stated, the defendant, it is true, had the right to make a motion that the complaint be made more definite and certain, or, if allegations were made which were unnecessary to sustain the cause of action stated in the complaint, to make a motion to strike out such allegations as irrelevant and as surplusage. *Pom. R. & R. R.* §§ 447, 451. If the defendant waived said objections by failing to make such motions, then the plaintiff had the right to the relief to which all the allegations showed he was entitled." The foregoing case shows that a demurrer was not the appellant's proper remedy.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 258)

STATE v. TIMMONS.

(Supreme Court of South Carolina. March 23, 1904.)

CRIMINAL LAW—APPEAL.

1. An appeal will not lie by defendant in a criminal case from an order setting aside a verdict on motion of the state.

Appeal from General Sessions Circuit Court of Chesterfield County; Buchanan, Judge.

Henry Timmons was indicted for crime. From an order setting aside the verdict on motion of the state, he appeals. Dismissed.

Stevenson & Matheson, for appellant. J. M. Johnson, for the State.

GARY, A. J. The defendant was tried under an indictment containing two counts. The jury rendered the following verdict: "Guilty of the second, not of the first, count." On motion of the solicitor, his honor the presiding judge granted an order that the verdict be set aside and a new trial had. The defendant appealed upon the following exceptions: "(1) Because the court erred in setting aside a verdict of acquittal on the first count, and in ordering a new trial, for the reason that it will subject the defendant to a second jeopardy. (2) Because it is not com-

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 434, 435.

petent for the state to move to set aside a verdict of acquittal and for a new trial, because it enables the state to subject the defendant twice to jeopardy for one offense. (3) Because the acquittal on the first count ended the prosecution as to that count, and no new trial could be granted thereon without the consent of the defendant."

The solicitor raised the objection that the said order was not appealable. This question has been so recently decided by this court in the case of *State v. Hughes*, 58 S. C. 540, 35 S. E. 214, that we deem it only necessary to refer to that case to show that the appeal is premature. The case just cited decides that a defendant in a criminal case cannot appeal except from the final sentence imposed by the court.

It is the judgment of this court that the appeal be dismissed.

(58 S. C. 243)

MILSTER et al. v. CITY COUNCIL OF SPARTANBURG et al.

(Supreme Court of South Carolina. March 18, 1904.)

MANDAMUS TO CITY—ATTORNEY'S FEES—AGENCY.

1 Where a petitioner had brought mandamus to require a city council to collect, and a manufacturing company to pay, back taxes, and the relief is granted, the petitioner is not such a representative of the city as would make his contract for attorney's fees binding on the city.

2 In mandamus proceedings to compel the city to collect taxes, where the relief is granted, the court has no control of the funds, so as to authorize payment of attorney's fees out of the same.

Petition by J. H. Milster and H. G. Abbott for writ of mandamus against the city council of Spartanburg and the Spartan Mills. Motion by attorneys for petitioners to ascertain fee. Refused.

For former opinion, see 46 S. E. 539.

Sease & Hoke, for the motion. Simpson & Bomar, Ralph K. Carson, and Mr. Sanders, opposed.

PER CURIAM. In this petition for mandamus to compel the city council of Spartanburg to collect and the Spartan Mills to pay municipal taxes on property of the Spartan Mills which the city council had undertaken to practically exempt from taxation, the petitioners asked the court to order the payment of reasonable counsel fees to their attorneys. The exemption from taxation was held unconstitutional, and the court ordered a writ to be issued, requiring the Spartan Mills to pay the unpaid municipal taxes on all its property in the city which had fallen due within six years prior to the filing of the petition.

Messrs. Sease & Hoke, attorneys for the petitioners, now move for an order of reference to ascertain what fee should be allowed them from the taxes thus brought into the city treasury. The city council opposes the

motion, insisting that these gentlemen were not attorneys for the city of Spartanburg or for the city council, and that, even if they had been, the court is not in control of any funds from which it could, on motion, order the fee paid. In the case of *Park v. Laurens* (S. C.) 46 S. E. 1012, it was held that a petitioner standing in precisely the same relation to the city of Laurens and its city council as Milster and Abbott stood to the city of Spartanburg and its council could not be regarded the representative of the municipality, so as to make his contracts for reasonable counsel fees binding on the city as its representative. This motion would therefore have to be refused on that ground.

We think the other position taken by the city of Spartanburg is at least as strong. Mandamus is thus defined in High on Extraordinary Legal Remedies, 4: "The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." It is manifest, therefore, that in a mandamus proceeding the petitioner does not bring into the care or custody of the court property for administration or distribution. The proceeding relates entirely to the performance of a specifically alleged legal duty by persons charged therewith, and the court, through the writ, orders those persons to perform such specific legal duty. Such an order may direct the payment of money, as in this instance, but the court never has the money in its charge, and can make no disposition of it, further than to enforce obedience to the writ of mandamus. Upon payment and receipt of the money as required by the writ, the power of the court is exhausted. If the city of Spartanburg, through its council, had contracted with attorneys to institute mandamus proceedings to require the Spartan Mills to pay its taxes, and had expressly agreed to pay a fee in event of success, and all this had been set out in the petition, the court could not enforce the contract in the mandamus proceeding. Even in that case the contract would have been enforceable like any other by a suit between the contracting parties.

The only possible ground on which this claim could be placed is that Abbott and Milster, as citizens and taxpayers, should be regarded as representing the city in a matter of public concern, in which the city council refused to act for the city. Even if their contract for attorneys' fees could be regarded as a contract of the city, and standing on as high ground as if it had been made directly with the city council, payment of the fees could not be adjudged in a mandamus proceeding. In such a pro-

ceeding the court has no control of the funds after they are paid to the city council. If there is any contract, express or implied, with either the petitioners or their attorneys, it can only be enforced by a direct suit against the city.

The proceeding has resulted in a large accretion to the city treasury, but we cannot violate the settled rules of law to provide for the payment of the fees of the attorneys who conducted it to a successful issue. The motion is therefore refused.

(55 W. Va. 388)

STATE v. BANKS.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

1. Upon the trial of an indictment for unlawful and malicious shooting with intent to maim, disfigure, disable, and kill, it is error to instruct the jury that if they believe there was a quarrel between the accused and F., and that both were in fault, and that a combat, as the result of the quarrel, took place, and the accused shot and wounded F., "in order to reduce the offense from malicious to unlawful shooting, two things must appear from the evidence and circumstances of the case: First, that, before the shot was fired and the wound inflicted, the accused declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily shot F. in order to preserve his own life or to protect himself from great bodily harm."

(Syllabus by the Court.)

Error to Circuit Court, Logan County; E. S. Doolittle, Judge.

Levi Banks was convicted of malicious shooting, and brings error. Reversed.

John S. Marcum and Ragland & England, for plaintiff in error. The Attorney General, for the State.

McWHORTER, J. Levi Banks was indicted in the circuit court of Logan county for unlawful and malicious shooting with intent to maim, disfigure, disable, and kill Jonah Ferguson, on the 3d day of May, 1903. He pleaded "Not guilty." A jury was impaneled, and, after hearing the evidence and instructions of the court, rendered a verdict of not guilty of the malicious shooting, but guilty of unlawful shooting and wounding. The prisoner moved the court to set aside the verdict and grant him a new trial on the ground that the same was contrary to the law and the evidence. The court overruled the motion, and refused to set aside the verdict and grant a new trial, and ascertained the term of prisoner's confinement in the penitentiary at three years, and rendered judgment accordingly, to all of which rulings the defendant excepted. The defendant, in the course of the trial, took four several bills of exceptions to the rulings of the court, which were signed, sealed, and made a part of the record. A writ of error and supersedeas were awarded him.

The first and second bills of exceptions go to the rulings of the court in refusing to quash the panel of 20 jurors, on the motion of the defendant, because of irregularity in the summoning of the jurors. While the record shows some irregularity, it shows that the persons who were regularly drawn were summoned, and the same persons served as jurors, and there was no such irregularity as could possibly have prejudiced the defendant's case.

Bill of exceptions No. 2 is to the ruling of the court in granting instructions on behalf of the state, Nos. 1, 2, and 3. The first instruction on the question of self-defense is sufficient and proper. The second and third instructions are as follows: "(2) The court instructs the jury that if they believe there was a quarrel between the prisoner and Jonah Ferguson, and that both were in fault, and that a combat, as a result of such quarrel, took place, and that the prisoner shot and wounded Jonah Ferguson, in order to reduce the offense from malicious to unlawful shooting, two things must appear from the evidence and circumstances of the case: First, that, before the shot was fired and the wound inflicted, the prisoner, Levi Banks, declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily shot the said Jonah Ferguson in order to preserve his own life or to protect himself from great bodily harm. (3) The court instructs the jury that, on the trial of this case, if the prisoner, Levi Banks, relies upon self-defense to excuse him in shooting and wounding Jonah Ferguson, the person named in the indictment, in order that such defense may avail the prisoner the jury should believe from all the evidence in the case that the necessity relied on to justify the shooting and wounding did not arise out of the prisoner's own misconduct." As to instruction No. 2, it is evidently an abortive attempt to revamp the instruction set out in point 6 of syllabus, *State v. Cain*, 20 W. Va. 679, and apply it to this case. It will be seen, by reference to the instruction as here given, that the jury are told that, to reduce the offense from malicious to unlawful shooting, two things must appear from the evidence and circumstances of the case: First, that, before the shot was fired and the wound inflicted, the prisoner, Levi Banks, declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily shot the said Jonah Ferguson in order to preserve his own life or to protect himself from great bodily harm—thus telling the jury that, if both propositions were true, the defendant was still guilty of unlawful shooting, when, as a matter of fact, if they were true, the defendant, in firing the shot, was acting wholly in self-defense, and was entitled to a verdict of acquittal. If he had retreated as far as he could with safety, and then necessarily had to shoot in order to preserve his own life or to protect himself

from great bodily harm, he would have been justified in firing the shot, and it could not have amounted to unlawful shooting. The verdict of the jury clearly shows that they were influenced by this instruction, as the language of the verdict shows that they had it in mind when they wrote their verdict. The third instruction, while it may be good as an abstract proposition of law, yet it should not have been given in connection with No. 2. In *State v. Douglass*, 28 W. Va. 298 (Syl., point 6), it is held: "Where an erroneous instruction has been given to the jury, the presumption is that the exceptor has been prejudiced thereby, and the judgment will be reversed for such cause, unless it clearly appears from the record that the exceptor could not have been so prejudiced." Instruction No. 2 is clearly bad, and it is not only presumable, but quite certain, that the jury were influenced by it in arriving at their conclusion and verdict.

Bill of exceptions No. 4 relates to the evidence only, and the defendant does not seem to rely upon it; and, as the case will have to be retried, I deem it unnecessary to take up the matter of the evidence.

For the reasons given, the judgment is reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein.

(55 W. Va. 373)

BRYAN v. McCANN et al.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

TRUST—BILL TO ENFORCE—PARTIES.

1. A trustee filed his bill and amended bill to remove an alleged cloud upon the title to trust property; to ascertain and fix the amount of the trust debt, which is controverted by the debtors; and to obtain a decree to sell the property for the amount of the debt, when so ascertained and fixed. The court decreed a cancellation of the tax deed, alleged to be a cloud upon the title, ascertained and fixed the amount of the trust debt, and decreed that the trustee shall recover of the debtors the amount so ascertained and fixed by the court, and that, in default of payment within the time prescribed, the trustee, as special commissioner, shall sell the trust property. The administrator of the deceased trust creditor is not a party to the suit, although it appears therein that the trust creditor had died intestate, and that her administrator had been appointed and qualified as such before the institution of the suit.

Held, that the decree is erroneous, because the same was made and entered in the absence of a necessary party, and because the recovery in the name of the trustee is unwarranted.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County; E. S. Doolittle, Judge.

Bill by T. J. Bryan against J. L. McCann and others. Decree for plaintiff, and defendants appeal. Reversed.

Simms & Enslow, for appellants. Vinson & Thompson and T. J. Bryan, for appellee.

MILLER, J. By deed of trust executed by C. A. McCann and S. C. McCann his wife,

bearing date on the 30th day of April, 1891, they conveyed to the plaintiff, T. J. Bryan, trustee, a certain house and lot then owned by said C. A. McCann, situate in Central City, in the county of Cabell, to secure to Elizabeth A. Foster the payment of the note of said C. A. McCann for \$500, payable one year after its date at the Huntington National Bank, with interest thereon at the rate of 6 per centum per annum. The note was not paid at its maturity, but Mrs. Foster then took no steps to collect the same. Various payments thereon were made to her from time to time. After the execution of the deed of trust, the property was returned delinquent for the nonpayment of the taxes thereon for the year 1898; and on the 11th day of January, 1900, the same was sold by the sheriff, for said delinquent taxes, and was bought by J. L. McCann, a son of the grantors in the deed of trust, who was then about 23 years of age, and in business for himself, although living with his parents. In the year 1900 Mrs. Foster died intestate, leaving surviving her two brothers, W. H. Howe and F. C. Howe. In December, 1900, W. H. Howe was appointed and qualified as her administrator, and afterwards the administrator, W. H. Howe, requested the trustee, T. J. Bryan, to sell the property under the deed of trust for said indebtedness, when it was discovered that the property had been returned delinquent for the nonpayment of the taxes thereon and sold as aforesaid. Thereupon, at the January rules, 1901, for the circuit court of said county, the trustee filed his bill against said C. A. McCann, S. C. McCann, and J. L. McCann; alleging that the principal of said note, with about \$150 of the interest thereon, was still due and unpaid, and praying that said tax deed be set aside and annulled; stating as a reason therefor that the same had been irregularly and fraudulently procured and executed, and that it was a cloud upon the title of said property. The defendant J. L. McCann demurred to the bill, which demurrer being overruled, he filed his answer, in which he avers that he purchased said property at the tax sale for the sum of \$40.06; that after his said purchase he paid the taxes charged and due upon said property for the years 1899 and 1900; and that the amount of said taxes so paid by him, with the interest thereon, then amounted to about \$100, which sum said trustee should pay before he would be entitled to redeem said property. Respondent further says that said trustee did not pay or tender to him the said taxes paid by him as aforesaid before the execution and delivery to him of said deed by the clerk of the county court, but that the trustee did pay to the clerk said \$40.06, with interest thereon. Defendants C. A. McCann and S. C. McCann also filed their demurrer and answer to the bill, in which answer they deny that they are indebted to said Elizabeth Foster in the sum of \$500, and interest thereon, as afore-

said. Upon the contrary, they allege and charge that, upon a true statement of the account between the parties, the said loan will be found to be fully paid off and satisfied, provided the interest thereon be charged only at the rate of 6 per centum per annum. They also deny all of the other allegations of the bill. Depositions for both plaintiff and defendants were afterwards taken and filed in the cause, relating to the trust debt, the amount thereof, and to the tax deed to defendant, J. L. McCann. After the depositions were all taken and filed as aforesaid, to wit, on the 21st day of July, 1902, the plaintiff filed his amended bill in the cause against said C. A. McCann, S. C. McCann, and J. L. McCann, but did not make the administrator of Mrs. Foster a party thereto. In the amended bill the plaintiff amplifies his averments in the original bill as to the \$500 trust debt, and says that said C. A. McCann made default in the payment of the note when it became due, but that Mrs. Foster took no steps to collect the same; that C. A. McCann paid the interest on it for several years, and that on the 30th day of October, 1899, C. A. McCann still being in default in the payment of the interest, a settlement was made between him and Mrs. Foster concerning the interest due upon the said note, the principal never having been paid, when it was found that there was then due \$133.70 of interest upon the debt, whereupon said C. A. McCann and S. A. McCann executed to Mrs. Foster their joint note for said \$133.70, payable one year after its date, with interest, which note was not paid at maturity, but remains unpaid; and that said \$500 note, with its accrued interest, is also unpaid. The death of Mrs. Foster, the appointment and qualification of said W. H. Howe as her administrator, the sale and purchase of said property for the delinquent taxes thereon, and the conveyance thereof to J. L. McCann, are all reiterated in the amended bill, with a prayer that the tax deed be canceled, and that the property be sold to satisfy the plaintiff's demand as therein stated. The said J. L. McCann demurred to and also answered the amended bill, denying the several material allegations thereof. The defendants C. A. McCann and S. C. McCann, not waiving their demurrer thereto, but insisting on the same, also filed their answer to said amended bill, in which they rely upon the allegations of their original answer, and also deny the averments of the amended bill. On the 2d day of August, 1902, Annie B. Thompson and the Huntington National Bank filed their petition in said cause setting up a lien on the property of said C. A. McCann and S. C. McCann described in the bill, and praying that they be made parties to the cause, and that their lien be protected. Thereupon they were made parties to the suit. On the same day, to wit, on the 2d day of August, 1902, the cause came on to be heard, and was heard by the court, upon the process execut-

ed upon the defendants, the bill and exhibits therewith filed, the said amended bill, the said answers of each of the defendants to the bill and amended bill, with general replication to said answers, and upon the depositions taken and filed in the cause as aforesaid. Upon consideration thereof, it was adjudged, ordered, and decreed that said tax deed was and is fraudulent and void, and was and is a cloud upon the plaintiff's title to said property, and the said tax deed was then set aside and held for naught; and the court having ascertained that there was then due from the defendants C. A. McCann and S. C. McCann, upon the debts in the plaintiff's bill set up, the sum of \$737.71, it was further adjudged, ordered, and decreed that the plaintiff should recover against said C. A. McCann and S. C. McCann said sum of \$737.71, with interest thereon from that date until paid, and that he also recover from said C. A. McCann, S. C. McCann, and J. L. McCann the costs of said suit by him expended. It was further decreed that unless the defendants, or some of them, should, within twenty days thereafter, pay the said sums decreed against them as aforesaid, then the plaintiff, T. J. Bryan, trustee, who was by said decree appointed special commissioner for the purpose, should sell said property for cash. From this decree the defendants, C. A. McCann, S. C. McCann, and J. L. McCann, were allowed an appeal, and assign as grounds of error that the administrator of said Elizabeth A. Foster is not a party to said cause, and that the court erred in decreeing that said T. J. Bryan, trustee, was entitled, as plaintiff, to recover said debt from defendants.

A trustee may apply to a court of equity to remove impediments to a fair execution of his trust, to remove a cloud hanging over the title to the property conveyed to him in trust to secure the payment of a debt or debts, and to adjust accounts, if necessary, in order to ascertain the actual debts which ought to be raised by the sale, or the amount of prior incumbrances. *Machir v. Schon*, 14 W. Va. 777, 783; *Ambler, Trustee, v. Leach et al.*, 15 W. Va. 677; *Johnson v. Johnson*, 30 Ill. 215; *Rossett v. Fisher*, 11 Grat. 492. A trustee may, under circumstances, in order to remove a cloud upon the title to the realty conveyed to him in trust, file a bill in equity to set aside and have declared void a tax deed made under the provisions of the statute. *Burlew, Trustee, v. Quarrier*, 16 W. Va. 108. Having taken jurisdiction to remove the alleged cloud upon the title of the property, the court in this cause should go on and ascertain the liens thereon, with the amounts thereof, provided the proper parties are before the court upon sufficient pleadings for that purpose. When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved, to avoid a multiplicity of suits. *Watson v. Watson*, 45 W. Va. 290, 81 S. E. 939;

Robinson v. Braidon, 44 W. Va. 183, 28 S. E. 798; Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536.

The notes of defendants C. A. and S. C. McCann to Mrs. Foster, and the money due thereon, if any, belonged to the administrator, W. H. Howe, for the purposes of administration. The title of that and the other personal property of the intestate vested in him upon his appointment and qualification as her administrator as aforesaid, and related back, after his qualification, to the instant of the death of his intestate. Schouler's Ex'rs & Adm'rs, § 190; Woerner on Amer. Adml. pp. 385, 409, 411. Before and at the time of the institution of the suit, W. H. Howe was, in law, the creditor as to the two notes executed by the McCanns to Mrs. Foster. No principle of equity is more familiar or better settled than this: That all persons materially interested in the subject in controversy ought to be made parties in equity, and, if they are not, the defect may be taken advantage of either by demurrer or by the court at the hearing. Armentrout's Ex'rs v. Gibbons, 25 Grat. 371. Burlew, Trustee, v. Quarrier et al., 16 W. Va. 108; Howard v. Stephenson, 33 W. Va. 116, 10 S. E. 66; Rexroad v. McQuain, 24 W. Va. 32; Hill v. Proctor, 10 W. Va. 59.

One of the material questions raised and controverted by the pleadings, and upon which proof was taken and filed is the amount, if any, which is due the estate of Mrs. Foster from C. A. and S. C. McCann upon their notes to her, constituting a part of the assets of decedent's estate. Bryan, trustee, the plaintiff, has no pecuniary or personal interest in the debt. He merely holds the legal title to the property conveyed to him in trust by the trust deed as security for the debt. As a general rule, a trustee's authority over the trust property is defined and limited by the instrument creating the trust, and he should be guided strictly by its provisions. Atkinson v. Beckett, 34 W. Va. 584, 12 S. E. 717. He is the agent for both the creditor and debtor in the debt for which the trust is given. It is the duty of the trustee to look to the rights and interests of the trust debtor, as well as to those of the trust creditor. He is bound to act impartially between them. Rossett v. Fisher, 11 Grat. 492; Livey v. Winton, 30 W. Va. 554, 4 S. E. 451; Hartman v. Evans, 38 W. Va. C69, 18 S. E. 810. Unless the trustee is authorized to do so by the instrument conferring his authority, under which he acts, he cannot collect the trust funds, and give acquittances or releases therefor. As trustee, he should not be a contesting litigant in the matter of which he is trustee, to contest with the creditor or debtor the amount or validity of the trust debt; but, in equity, he should always be a party as trustee. Turk v. Skiles, 38 W. Va. 404, 18 S. E. 561. There must be an administrator to represent it, before an adjudication can

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be had in court concerning the personal property of an intestate decedent. 15 L. R. A. 491, note; Smith v. Denny, 37 Mo. 20; Hays' Ex'r v. Hays, 5 Munf. 418; Weeks v. Jewett, 45 N. H. 540.

The attempted adjudication of the amount due on the trust debt was between the trustee, on the one side, and the makers of the notes, C. A. and S. C. McCann, on the other side. The ascertainment and decree of the court thereon do not bind either the estate of Mrs. Foster, because her administrator was not a party thereto, or the debtors, because there was no issue between the administrator and themselves concerning said debt, which is controverted by them in their answer. A sale under the decree complained of would not discharge the lien of the deed of trust on the property, because the creditor, the administrator of Mrs. Foster, was not a party to the suit, and not bound by the decree. The debtors and the owners of the property are entitled, on the payment of the debt, under the decree or otherwise, to have the lien of the deed of trust released. The purchaser is likewise entitled to take it free from the incumbrance. The trustee cannot legally release the trust deed.

From what has been said, it follows that the court should have sustained the demurrers to both the original and amended bills for want of proper parties, and, not having done so, it should have directed the necessary parties to be made at the hearing. It is immaterial in what manner it is brought to the attention of this court that the decree complained of was rendered in the absence of proper parties; the decree will be reversed and the cause remanded in order that proper parties may be made. Gallatin L. C. & O. Co. v. Davis et al., 44 W. Va. 109, 28 S. E. 747; Reger v. Gall, 54 W. Va. —, 46 S. E. 147.

For the reasons stated, the decree complained of must be reversed, and the cause remanded to the circuit court of Cabell county for further proceedings to be had therein according to the views herein expressed, and further according to the rules and principles governing courts of equity.

(53 W. Va. 142)

CORLEY v. CORLEY.

(Supreme Court of Appeals of West Virginia.
April 11, 1903.)

Petition for rehearing. Denied.

For former opinion, see 44 S. E. 182.

POFFENBARGER, J. It is insisted, upon the authority of *Tompkins' Ex'r v. Stephens*, 10 W. Va. 156, and certain Virginia cases, that the order in question is appealable. In *Tompkins' Ex'r v. Stephens*, an order setting aside a verdict rendered on the trial of an issue out of chancery was held to be appealable, and reversed. Point 1 of the syllabus holds that a decree granting or refusing a

new trial on an issue out of chancery is reviewable, without saying whether a final decree is necessary to the entertainment of the appeal, and the opinion is silent on that question; but the court did entertain it, and hence the case establishes a precedent where a new trial has been granted, but not where it has been refused, and no final decree entered. The authorities cited by Judge Green for the doctrine announced in the syllabus are all actions at law. One was on a demurrer to evidence, making it the duty of the court to render a judgment one way or the other, and in the other two there were final judgments following the orders relating to the verdicts. After merely referring to these cases: *Knox v. Garland*, 2 Call. 241, *Briscoe v. Clarke*, 1 Rand. 213, and *Pleasants v. Clements*, 2 Leigh, 474, he says: "And I see no good reason why the same practice should not prevail in reference to granting or refusing new trials on issue out of chancery." Neither any of these cases nor *Tompkins' Ex'r v. Stephens* sets a precedent for entertaining an appeal from a mere order refusing a new trial, and we cannot go beyond them in view of the well-nigh universal rule that appeals cannot be taken except from decrees that are final in some sense, either absolutely or as settling the principles of the cause.

As shown in the opinion, the orders from which this appeal is sought to be taken settle nothing in the cause. An order granting a new trial might be different. Clause 9, § 1, c. 135, Code 1899, allows an appeal in such case, but not from an order refusing a new trial, and in the latter case a writ of error is never allowed except from the judgment entered on the verdict. *Reed v. Cline's Heirs*, 9 Grat. 136, is relied upon as holding that an order directing an issue out of chancery is appealable. But that case lays an important restriction on this assertion. It says: "There may be an appeal from a decree directing an issue where the decree impliedly involves a settlement of the principles of the cause," and no authority is cited in the opinion for the principle, even under that restriction. In that case the appeal was entertained because in directing the issue the court impliedly held "that the statute of limitations and the staleness of the demand" were not "sufficient defenses against the complainant's demand." Even if this reasoning is sound, and would be followed now, this case is not within its scope, for it presents but a single question of liability upon an alleged contract, which was in no sense prejudiced by the order directing the issue. *Reed v. Cline's Heirs* was followed by *Wise v. Lamb*, 9 Grat. 309, but in that case there was a final decree in accordance with the verdict. Although *Wise v. Lamb* approves the doctrine of *Reed v. Cline's Heirs*, it does not decide the same question, and cannot be said to be another precedent. In *Beverly v. Walden*, 20 Grat. 147, in which there had been no final decree when the appeal was taken, the evidence had

all been taken, and clearly showed that the plaintiff was not entitled to relief, and that a decree dismissing the bill should have been pronounced when the issue was directed, and it was dismissed in the appellate court. We have no such condition here.

As the case cannot be brought within the reasoning of any of the cases referred to, a rehearing would only result in delay and final dismissal of the appeal; hence it is refused.

(55 W. Va. 384)

STATE v. BRUCE.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

CONSTITUTIONAL LAW—SALES OF OLEOMARGARINE.

1. *State v. Myers*, 26 S. E. 539, 42 W. Va. 822, 35 L. R. A. 844, 57 Am. St. Rep. 887, overruled.

2. Chapter 8, p. 12, Acts 1891, Code 1899, p. 1115, being in contravention of the Constitution and laws of the United States, is invalid.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County; J. M. Sanders, Judge.

J. A. B. Bruce was indicted for selling oleomargarine, and from conviction appealed to the circuit court for writ of error, and from a denial of the same he brings error. Reversed.

A. W. Reynolds, for plaintiff in error.
The Attorney General, for the State.

McWHORTER, J. Under chapter 8, p. 12, Acts 1891, of the Legislature, found at page 1115 of the Code of 1899, J. A. B. Bruce was indicted and convicted in the criminal court of Mercer county, and fined \$20, for the violation of said statute as a vender of oleomargarine, adulterated or artificial butter, and unlawfully exposing the same for sale, without the same being then and there colored pink. The defendant demurred to the indictment, which demurrer was overruled by the court. The defendant then entered a plea of not guilty. A jury was impaneled, and the following statement of facts: "It is admitted by the parties in this case that the defendant, J. A. B. Bruce, is a retail dealer in oleomargarine at his place of business in the city of Bluefield, Mercer county, West Virginia, and, as such retail dealer, sold to a customer, on or about the 10th day of February, 1902, at his said place of business in the said city of Bluefield, Mercer county, West Virginia, one package of oleomargarine, less in quantity than ten pounds, which was properly stamped in accordance with the laws of the United States, and the said sale was in all particulars strictly in accordance with the laws of the United States, the said defendant being then a duly licensed retail dealer in oleomargarine, by authority of and pursuant to the laws of the United States, at his said place of business; that the said oleomargarine was part of a shipment of

oleomargarine which had been purchased at wholesale, strictly in accordance with and pursuant to the laws of the United States, from the Capital City Dairy Company, at the city of Columbus, in the state of Ohio, and was shipped to him from the place of business of the said Capital City Dairy Company, in the state of Ohio, to Bluefield, Mercer county, West Virginia aforesaid, the said Capital City Dairy Company being a duly licensed wholesale dealer in oleomargarine, under and pursuant to the laws of the United States; that the said oleomargarine was a pure, standard article of oleomargarine, such as is recognized by the laws of the United States as a proper and lawful article of interstate commerce, and the same article of food, by the name of 'oleomargarine,' referred to in the laws of the United States in force at the time of the said sale by the defendant to his customer, and at the time of his purchase thereof in the original package from the said Capital City Dairy Company, regulating the sales thereof, and the said oleomargarine was not colored pink"—was by agreement introduced as evidence at the trial, subject to the instructions of the court to the jury thereon; with which statement of facts the state rested its case. The jury returned a verdict of guilty. The defendant moved to set aside the verdict of the jury, and grant him a new trial, upon grounds set out in his bill of exceptions, which motion was overruled by the court, and judgment entered for a fine of \$20, to which ruling of the court the defendant excepted. The defendant presented its petition, accompanied by a copy of the record, to the circuit court of Mercer county, praying for a writ of error to the judgment of the criminal court, which writ was refused by the said circuit court. He then obtained, upon petition to this court, from one of the judges thereof, a writ of error to the said judgment of the circuit court in refusing said writ and a writ of error and supersedeas to the judgment of the criminal court. Upon the trial of the case the defendant asked the court to give the following instruction to the jury: "The court instructs the jury that chapter 8 of the Acts of the Legislature of West Virginia, 1891, adopted in the Code of West Virginia, 1899, is in conflict with the Constitution and laws of the United States, and is therefore unconstitutional and void, and upon the evidence and facts proved in this case the jury shall find for the defendant;" which the court refused to give and the attorney for the state asked the court to instruct the jury "that under the evidence in this case they should find the defendant guilty as charged in the indictment," which instruction the court gave, over the objection and exception of the said defendant.

Among the grounds upon which the defendant moved the court to set aside the verdict and grant him a new trial, as set

out in the bill of exceptions taken by the defendant, are the following: "(1) Chapter 8 of the Acts of the Legislature of West Virginia, 1891, which was adopted into the Code of West Virginia, 1899, is unconstitutional and void. This statute is in contravention of section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have the power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' in that it burdens and prohibits interstate commerce in an article of commerce which is recognized by the acts of Congress and the laws of the United States as a proper subject or article of interstate commerce. (2) That said statute is in contravention of that portion of article 6 of the Constitution of the United States which declares that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding,' in that it nullifies pro tanto a regulation of interstate commerce by Congress. (3) Congress passed laws fully regulating the sale of oleomargarine at retail, which laws were in full force at the time of the sale made by the defendant in this case. The sale made by the defendant was authorized by the acts of Congress so regulating such sales, and the defendant had fully complied therewith, and the sale was made strictly pursuant thereto, and said act of the Legislature of West Virginia under which this indictment was made is in contravention of the laws of the United States, in that it imposes an unreasonable burden, restriction, and prohibition upon and against such sales so authorized by the laws of the United States, the result of which is to restrict and prohibit interstate commerce in this recognized article of commerce." Also the overruling of the demurrer to the indictment, and in refusing to give the instruction to the jury asked by the defendant, and giving the instruction asked by the state.

In *State v. Myers*, 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. St. Rep. 887, decided December 16, 1896, the act of 1891 under which this indictment was found was held to be "not unconstitutional." Since the decision in that case the United States Supreme Court, in case of *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60, decided May 23, 1898, passed upon a statute of New Hampshire similar to our statute, the syllabus of which decision is as follows: "Following the decision in *Schollenberger v. Pennsylvania* [171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49], the court holds that the statute of New Hampshire prohibiting the sale of oleomargarine as a substitute for butter, unless it is of a pink color, is invalid, as being, in necessary effect,

prohibitory." The case of Schollenberger v. Pennsylvania, referred to in said syllabus, was decided by the Supreme Court on the same date, and is reported in the same volume, immediately preceding the Collins Case. These cases conclusively settle the question involved in the case at bar, and it is deemed unnecessary to reiterate here the reasons set forth in those cases for the decision. It follows that the court erred in overruling the demurrer to the indictment, and, further, in giving the instruction asked by the state, and refusing to give the instruction asked for the defendant as set out in the bill of exceptions. The decision in the case of State v. Myers, 42 W. Va. 822, 26 S. E. 530, 35 L. R. A. 844, 57 Am. St. Rep. 897, is overruled.

The judgment of the circuit court in refusing to grant a writ of error, and the judgment of the criminal court, and the verdict of the jury, are set aside, and the indictment dismissed.

(35 W. Va. 379)

STATE v. BALLARD.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

ASSAULT WITH INTENT TO KILL—VERDICT.

I. B. is indicted for the unlawful and felonious attempt to feloniously, willfully, maliciously, deliberately, and unlawfully slay, kill, and murder K. The jury found B. guilty of an attempt to commit murder in the second degree, as charged in the indictment. The facts and circumstances prove that, if the pistol shot, alleged in the indictment, and fired by B. at K., but which did not strike him, had resulted fatally to K., B. would not have been guilty of either murder of the first degree, murder of the second degree, or voluntary manslaughter.

Held, that the verdict of the jury and judgment of the court thereon, fixing the fine of defendant at \$50, and imposing upon him imprisonment in the county jail for the period of six months, are erroneous.

(Syllabus by the Court.)

Error to Circuit Court, Boone County; J. M. Sanders, Judge.

O. M. Ballard was convicted of assault with intent to kill, and brings error. Reversed.

W. L. Ashby, for plaintiff in error. L. Fuller, Atty. Gen., for the State.

MILLER, J. At the October term, 1902, of the circuit court of Boone county, O. M. Ballard, the plaintiff in error, was indicted for the unlawful and felonious attempt to feloniously, willfully, maliciously, deliberately, and unlawfully slay, kill, and murder one H. H. Kessinger. At the same term he entered his plea of not guilty to the indictment and was put upon his trial before a jury, which returned the following verdict: "We, the jury, find the prisoner, O. M. Ballard, guilty of an attempt to commit murder in the second degree, as charged in the within indictment." Thereupon the prisoner, by his attorney, moved the court in arrest of

judgment, and also to set aside the verdict of the jury, and to grant him a new trial upon the indictment; but the court overruled said motions, and the prisoner excepted; whereupon the court fixed his fine at \$50, imposed imprisonment upon him for a period of six months in the county jail, and entered judgment upon said verdict accordingly. To this judgment the plaintiff in error was granted a writ of error, and says that the evidence in the case wholly fails to sustain the verdict of the jury and the judgment thereon, and prays the reversal of said judgment.

The evidence adduced on the trial is certified and made part of the record, and proves the following facts: On the 15th day of August, 1902, at a church in said county, between four and five miles from the home of said Kessinger, and a greater distance from the residence of Ballard, the two had some hot and disrespectful words, and a threat on the part of Ballard to fight Kessinger is shown. Some time afterwards the parties, with others, but not together, started homeward, both traveling in the same direction and over the same road. It appears that Kessinger and some others were at first in the advance, but that Ballard and another young man passed them on the road. Shortly after this, Kessinger quickened the pace of the mule upon which he was riding, and overtook Ballard, who was on horseback. Kessinger testifies that he then told Ballard "to get off his horse, and let us have a fair fight with our fists, and have it out there. * * * I called him a few names." He admits that, in order to overtake Ballard, he racked and trotted his mule, and might have loped him some. He also says that he cursed and abused Ballard, and told him to get down and fight, and says that he might have called him "a s— of a b—, or something like that;" and further admits that, when he started his mule in a rack, he meant to overtake Ballard, and "allowed that we might have a little fair fight, and there would be no more of it. I told him that's the way I wanted to fight." It is also shown that, just before Ballard and Kessinger reached the place of the shooting on the public road, Kessinger dismounted, and said to Ballard that he intended to whip him; but Ballard told him that he was not going to get off; that very soon thereafter Kessinger threw a rock, which struck Ballard on the side of the head, knocking off his hat and hurting Ballard, as he says, a great deal; and a little later Kessinger threw a second rock, which struck Ballard in the back. Kessinger then advanced toward Ballard a few steps, when Ballard turned in his saddle, without stopping his horse, which he says was in a little trot, and fired his pistol in the direction of Kessinger. There is no dispute about the throwing of the rocks by Kessinger, or of their striking Ballard as stated. Kessinger admits that he threw the

rocks before the shooting, and that it all occurred in a few seconds. Ballard swears that when he fired he neither stopped his horse nor slowed him up; that he shot in the direction of Kessinger after he received the stroke from the second rock; that he shot because he was afraid Kessinger would follow him up and throw more rocks at him; that he shot to the left of Kessinger; and that, if he had stopped his horse and taken aim, he could have hit Kessinger. It is shown that at the time they were not more than 10 or 15 feet apart. Ballard further testifies that he had put his pistol in his pocket the night before, when he had no thought of Kessinger; that he did not have his pistol for the purpose of shooting, and that he did not at the time intend to shoot Kessinger. The facts and circumstances seem to corroborate Ballard in this statement. If he had intended beforehand to shoot Kessinger, he could have done so when Kessinger first came up and challenged him for a fight, or while Kessinger was riding along with him before the shooting occurred. The shot was fired in front of the house of Kessinger's father in the public road. Ballard had gone beyond the front gate at Kessinger's home, in the direction of his own home. He was in a place where he had a legal right to be when attacked by Kessinger. It was shown that the father, mother, cousin, and other relatives of Kessinger were present, or very near, when the difficulty occurred. Ballard says that Kessinger could have whipped him in a fight, but admits that he wanted to fight Kessinger in the morning, when the first difficulty occurred; and says that he was then drinking, but had sobered up when Kessinger came up with him on the road; and that he then told Kessinger that he wanted no trouble with him. He says he was "not scared very much, but was hurt a right smart," by the rocks which struck him.

Section 9 of chapter 152 of the Code of 1899 provides that: "Every person who attempts to commit an offence, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows: If the offence attempted, be punishable with death, the person making such attempt shall be confined in the penitentiary not less than one nor more than five years. If it be punishable by confinement in the penitentiary, he shall be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars. If it be punishable by confinement in jail, or fine, he shall be confined in jail not more than six months, or fined not exceeding one hundred dollars." This leads to a consideration of the question of the grade of the offense, if any, as shown by the evidence, had the shooting proved fatal to Kessinger, the shot not having touched Kessinger, and it not appearing how near to him it came. If the shot fired by Ballard had killed Kessinger, the offense, if any, would not have

been murder of the first degree, because all the facts and circumstances show that Ballard did not have, at the time of the shooting, the specific intent to take life, which is always an essential element in the crime of murder of the first degree, and without which that degree of murder cannot be established. It is urged that Ballard, being on horseback, and some distance from Kessinger, could have retreated, and should have done so, without firing the shot. In the language of this court, hereinafter quoted, this very attempt to retreat, under the circumstances shown, might have forfeited his life. He had been twice struck with the rocks thrown by Kessinger, who was still advancing upon him within distance, and with ability, to strike him again.

In *State v. Cain*, 20 W. Va. 679, 708, the court says: "The distinction between the circumstances under which a defendant is compelled by law to retreat before killing his assailant to preserve his own life, or to prevent the infliction of great bodily harm upon him, and those under which, without retreating, he may kill his assailant in self-defense, is well and sharply drawn. It is absurd to say that, when in the dead of night on the public road or street one is violently assaulted without fault on his part, he is bound to retreat before he uses a deadly weapon in defense of his person. His very attempt to retreat under these circumstances might forfeit his life. This is a very different case from the one, where a man, being himself in fault, enters into a combat with another. He must cease the combat and retreat, as far as safety will permit, before he is justified under any circumstances in taking life on the ground of self-defense."

In the *Cain* Case, *supra*, it is held: "When one, without fault himself, is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do some great bodily harm, and there is reasonable grounds for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearance, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, or danger, that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case." It is also held in that case that: "The bare fear that a man intends to commit murder or other atrocious felony, however well-grounded, unaccompanied by any overt act indicative of such intention, will not warrant kill-

ing the party by way of prevention. To warrant said killing, there must be some overt act indicative of imminent danger at the time; and the acts of the assailant must be such, as, under all the evidence and circumstances of the case, convince the jury that the prisoner had reasonable grounds to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm."

So far as the record discloses, Ballard was without fault at the time he was assaulted by Kessinger with rocks. The difficulty between them in the morning was no legal excuse for the attack by Kessinger at the time of the shooting. The threats and overt acts of Kessinger, and the presence of his father and other relatives at the time, were sufficient to put Ballard in fear of great bodily harm at the hands of Kessinger. Had the shot fired by Ballard proved fatal to Kessinger, Ballard would not have been guilty, under the facts and circumstances, of either murder in the second degree or voluntary manslaughter, and therefore could not have been guilty of an attempt to commit either of them.

The verdict finds him guilty of an attempt to commit murder in the second degree. The law affixes the same punishment to a conviction for an attempt to commit either murder in the second degree or voluntary manslaughter, such conviction being punishable by confinement in the penitentiary. The verdict and judgment thereon are erroneous. Therefore the said verdict is set aside, the judgment reversed and held for naught, a new trial upon the indictment is granted to the defendant, and the case is remanded to the circuit court.

(55 W. Va. 436)

RUNYON v. RUTHERFORD et al.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

ARBITRATION — SUBMISSION — PROCEDURE — AWARD—PARTIES.

1. An award of arbitrators, made under a submission entered into between the sole defendant and one of two coplaintiffs in an action of assumpsit, brought for the recovery of a debt due to the plaintiffs jointly, for the determination of the matter in controversy in the action, whereby it was further agreed that the award should be entered as the judgment of the court, is neither void nor voidable merely because of the failure of the other party to unite in the submission, nor because the umpire failed to append the word "umpire" to his signature, and affixed in lieu thereof the word "arbitrator."

2. An award so made is binding upon the parties to the submission, though it does not bind those who are not parties to it.

(Syllabus by the Court.)

Error to Circuit Court, Mingo County; E. S. Doolittle, Judge.

Action by Lewis Runyon against Lewis Rutherford and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. S. Marcum and J. B. Wilkinson, for plaintiffs in error. Sheppard & Goodykoontz, for defendant in error.

POFFENBARGER, P. The entry of an award of arbitrators as the judgment of the court in an action of assumpsit in the circuit court of Mingo county is the subject of complaint here, and the principal assignments of error rest upon two grounds, namely, that the award is not final, for want of a necessary party to the submission, and that the umpire signed it as "arbitrator," instead of "umpire." To show the propriety of the application of certain legal principles, under which the first objection to the award is deemed to be untenable, it is necessary to state the nature and origin of the claim sued on and the proceedings which resulted in the arbitration and judgment complained of. On or about the 20th day of November, 1896, Elliott Rutherford, Sr., and Louis Rutherford caused to be printed, posted, and circulated a handbill or advertisement, whereby they accused Anderson alias "Cap" Hatfield of the murder of John and Elliott Rutherford at Matewan, Mingo county, November 8, 1896, and offered to pay a reward of \$500 for his arrest and delivery to the jailer of said county. On the 20th day of the same month J. H. Clark and Daniel Christian made the arrest, and had the prisoner committed as aforesaid. Clark assigned his interest in the amount claimed under the offer of reward to Louis Runyon, who, as assignee, together with Christian, brought this action January 25, 1897, against said Elliott and John Rutherford to recover said sum of \$500. The date of the alleged assignment is not made clear by the record, but prior to the commencement of the action, December 10, 1896, the following receipt was executed: "Received of E. Rutherford and Louis Rutherford in full the reward offered by them for the arrest of Cap Hatfield for the murder of John and Elliott Rutherford at Matewan, November the 8th, 1896. Louis Runyon per W. S. B. agent of J. H. Clark." It appears that on or about the date of this receipt Clark was under a criminal charge of some kind which necessitated his giving a recognizance or bond, and he executed this release in consideration of \$50 cash paid to him by the Rutherfords and their giving or furnishing such bond for him. Clark swears he agreed to and did release only his interest, but Elliott Rutherford testified that Clark agreed to release the whole of the claim, according to the tenor and purport of the receipt. How this testimony got into the record does not appear, but it seems to have been given at a trial had at the May term, 1898, which must have been abortive for some reason not disclosed by the printed record. After the issue was made up, the case was continued from term to term until January 10, 1900, when, upon the suggestion of the death of Elliott Rutherford, the

action was abated as to him, and again continued. On the 27th day of August, 1900, Daniel Christian and Louis Rutherford made an agreement in writing under seal, submitting "the matters in controversy in said suit" to the arbitrament and final award and determination of John A. Sheppard and H. K. Shumate, and, upon their failure to agree, or disagreement within a specified time, to the determination and umpirage of such third person as the said arbitrators should select, and agreeing that the award should be entered as the judgment in the case. Failing to reach an agreement, the arbitrators selected Paul W. Scott as umpire, who, on the 25th day of September, 1900, after having heard the evidence and argument of counsel, sitting with the arbitrators, made an award in writing, signed by himself and John A. Sheppard, styling themselves "arbitrators," whereby it was ascertained that there was due from Rutherford to Christian the sum of \$307.50, with interest thereon from the date of the award, and costs amounting to \$42.60. Subsequently, the award was entered as the judgment of the court over the objection of the defendants.

Counsel for plaintiff in error say the award is utterly void as to all parties and for all purposes for want of finality and mutuality, because of the failure of Runyon to join in the submission, and in support of this contention they cite *Gregory v. Deposit & Trust Co. (C. C.)* 38 Fed. 408, *McCarthy v. Swann*, 145 Mass. 471, 14 N. E. 635, and *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924. The first of these cases seems to have been a complicated suit in equity, involving many issues. The second one is a case in which, after a reference, the parties, together with another person, who was no party to the suit, but who had a separate and distinct interest connected with the matters in controversy between the parties, entered into an agreement that the determination of the referee should be final, and entered as the judgment of the court. It was held that the claim of this third party was not thereby brought into the suit, and the court refused to enter the award. *Turner v. Stewart* only holds that an award is not binding upon a party who did not unite in the submission. It does not decide that an award made under a submission entered into by some of the parties to a pending suit is void as to those who do submit their matters in difference to arbitrators. Whatever may be said of the other two authorities, relied upon, the rule is well settled in the law of this state that an award made under such a submission is binding upon the parties to it, although they be parties to a pending cause, and other parties to it do not join. In *Fletcher v. Pollard*, 2 Hen. & M. 544, the court held: "If, pending a suit in chancery, brought by one of three mercantile partners against the other two for a settlement of the accounts of the copartnership, the plaintiff and

one of the defendants agree to refer all matters in difference between them relative to the subject in controversy to arbitrators (whose award is to be the decree of the court), according to which agreement an order of reference is made, and the arbitrators make a report that they had examined and stated the books of the copartnership, and award the payment of certain sums by the other defendant as the only debtor to the plaintiff and to the defendant, who agreed to the reference, and state that the payments already made by that defendant discharge him from any further claim of the plaintiff on account of the copartnership, such report ought to be considered as an award, and sufficiently final and good between the parties who agreed to the reference." *Fleming, J.*, said: "The award appears to be perspicuous and just, and ought, in my opinion, to be conclusive, at least between the parties who agreed to the special reference." *Wood v. Shepherd*, 2 Pat. & H. 442, holds that: "One partner has no authority, by virtue of the partnership relation, to bind his copartners by an agreement to submit claims or transactions growing out of the partnership business to arbitrators. But the partner who makes such agreement is bound thereby, and the agreement is valid and binding between the parties thereto." Though not under a submission made by the parties to a pending suit, the award in *Wood v. Shepherd* was in all substantial respects like the one now under consideration. It was a voluntary submission by agreement, and the court very properly held that the parties to it, although without authority to bind others, could, upon obvious principles of law, bind themselves. To deny this right would be to limit the natural right of the individual to make and claim the benefit of contracts. *Thompson, J.*, said, in the above case: "It is certainly not a very obvious consequence that, because those who do not submit are not bound by the award, those who do should not be. On the contrary, the very reverse of this proposition would, at the very first blush, seem to be the most reasonable. *Wood* and *Shepherd* had the perfect right and the full power to bind themselves, whilst they could not bind outstanding copartners. *Shepherd* was beyond question irrevocably bound. There is nothing wrong or unusual for one man to submit for himself and another, taking upon himself the peril of his dissent or nonacquiescence." To the same effect, see *Boyd's Heirs v. Magruder's Heirs*, 2 Rob. (Va.) 761, differing somewhat in its facts from the case last above cited, but not in principle. *Forrer v. Coffman*, 23 Grat. 871, though not binding authority upon this court, reaffirms the principles formerly announced by the Virginia court, holding that where, in a pending suit by a plaintiff against copartners, the plaintiff and one of the defendants made a submission of the matters in contro-

veray, agreeing that the award shall be entered as the judgment, the award is binding upon the parties to the submission, and should be entered up as the judgment in the action. Staples, J., said: "The second objection is that Clippenger is not noticed in the award, although he is a party to the action, and one of the lessees of the property involved in the decision of the arbitrators. The answer is that Clippenger was in no way concerned in the submission, and cannot, therefore, be bound by the award. The defendant Forrer agreed to surrender the lease, to assume any liability which might attach to the firm, and to pay the plaintiff for the rent of the property such sum as should be ascertained by the arbitrators. The award may not be binding upon Clippenger, who was no party to the submission; but it is none the less valid as to Forrer, who did assent to it. As to him, the award is within the terms of the submission." By becoming litigants parties do not lose or surrender the right or power to make contracts and bind themselves in respect to the matters in controversy. Consent decrees and judgments by confession are not unusual in the courts, and, when made, parties are more firmly bound by them than by decrees and judgments obtained in the regular course of procedure, for they cannot be disturbed for anything except fraud, or perhaps mistake. In such cases all errors and irregularities are released and waived. Without his consent, Rutherford could not be subjected to two suits upon this demand, one by Christian and the other by Runyon; but no principle of law is recalled which precludes him from agreeing to a severance of this demand, and making himself liable for two actions on account thereof, if such a thing could result from holding this award valid. It cannot be said that he was ignorant of any interest Runyon may have in the controversy, for he was a party to the action, the declaration in which apprised the defendant of his alleged interest. Neither surprise, mistake, nor other adventitious circumstance calling for relief or working injustice appears, and the ancient jealousy of the courts on the subject of their jurisdiction, which led them to discourage arbitrations, and which seems to have governed the action of the court in *McCarthy v. Swann*, 145 Mass. 471, 14 N. E. 635, has long since yielded to the modern view of the speedy and economical adjustment of controversies by means of them.

A question somewhat discussed, but not important, is whether the receipt given by Clark is conclusive upon Runyon. However that may be, it does not conclude Christian, because it is admitted that the debt due to him and Clark jointly was not paid to the latter. Ordinarily, a joint creditor may collect the whole debt, and payment to him is binding upon his co-creditor; but he cannot release without payment, so as to prejudice

the other party. *Parsons, Cont. 730*. Part payment made to one would operate to reduce the amount of the recovery, but both creditors would still have to sue for the balance due, because the promise or obligation is to them jointly, and not made to either separately. It does not preclude him from suing, but may prevent recovery of more than one-half of the debt, as to which matter no question arises here.

The only remaining contention is that the failure of the umpire to affix the word "umpire" to his signature, and his signing the award with one of the arbitrators, and describing himself as "arbitrator," invalidates the award. To so hold would set it aside on purely technical and extremely narrow grounds. From the award itself it appears that he was the umpire, and not an arbitrator, and therefore that the misdescription is nothing more than a clerical error. Taking the instrument, and construing it as a whole, the court is bound to say he makes an award as umpire, and not as an original arbitrator, and this is the rule of construction universally applied.

These conclusions result in an affirmance of the judgment.

(55 W. Va. 391)

PRESTON v. WEST et al.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

BILL IN EQUITY—PARTIES—DEMURRES—DECREE—APPEAL.

1. A person cannot be made a party to a bill by merely inserting his name in the caption thereof, but the bill must contain some allegation showing such person's interest or claim to interest in the subject-matter in controversy.

2. A bill which makes a person a party in the caption thereof, but contains no allegation showing such person's interest or claim to interest in the subject-matter in controversy, is demurrable.

3. If the circuit court overrules such demurrer, and grants the relief asked in such bill as to the subject-matter in controversy without having such nominal party properly impleaded as to such subject-matter, although other pleadings in the cause show that such nominal party is claiming the whole of such property, such nominal party may appeal from such decree, and have the same reversed.

(Syllabus by the Court.)

Appeal from Circuit Court, Raleigh County; J. M. Sanders, Judge.

Bill by A. D. Preston against A. H. West and others. Decree for plaintiff, and defendants appeal. Reversed.

W. H. McGinnis and J. W. McCreery, for appellants. A. D. Preston, for appellee.

DENT, J. A. H. West and Jane West, his wife, complain of a decree of the circuit court of Raleigh county, rendered on the 27th day of January, 1903, in favor of A. D. Preston, on a bill in chancery filed by said Preston against appellants and others. Am.

inspection of the record shows the following proceedings in the case: At February rules, 1902, plaintiff filed his bill against A. H. West and others, claiming an individual interest in a certain tract of land, and alleging that the whole of the land was claimed in some manner by A. H. West, and praying a partition thereof. At April rules A. H. West filed his answer, alleging that he had no interest in the land, but that it belonged to his wife, Jane West, who had purchased and paid for the land in 1893, and had ever since been in peaceable possession thereof, denied the right of plaintiff to partition, and asked that Jane West be made a party to the suit. A general replication was put in the answer, and both plaintiff and defendant A. H. West took depositions. These depositions appear to fully sustain the allegations of the answer as to the ownership of the property being in Jane West. Plaintiff excepted to the reading of these depositions, because, among other things, the defendant A. H. West disclaims any interest in the subject-matter in controversy. On the 5th day of May, 1902, the court permitted the plaintiff to amend his bill by inserting in the caption thereof the name of Jane West, and thereupon she appeared by her attorney, waived service of process, and leave was given her to file her answer to the bill at rules. At a special term of the court held on the 27th day of January, 1903, the cause was heard on the bill and exhibits upon the demurrer to the bill, on the answer of A. H. West and general replication thereto, upon the depositions and exceptions thereto, and was submitted to the court on argument of counsel. The court thereupon overruled the demurrer to the bill, and decided that plaintiff was entitled to the relief prayed, and that he is the legal owner of the one-half undivided interest in the land; allowed the defendant Jane West to file her answer, to which the plaintiff replied generally; and then appointed commissioners to partition the land, if susceptible of partition. From this decree this appeal is taken.

It is plainly apparent from these proceedings that Jane West has never had her day in court, nor any opportunity to be properly heard. The court entirely ignored the answer of A. H. West, the depositions taken in behalf thereof, and the exceptions thereto. This answer, sustained by the depositions in support thereof, shows that Jane West claims the subject-matter of controversy, and is a necessary party to the suit. In an irregular manner her name was added to the caption of the bill, and she waived process, and was granted leave to answer. This conferred upon her the right to appear, and object to the decree, and, if erroneously entered, to appeal therefrom; otherwise she would be bound thereby, as she must be deemed to have been present in court. There is some doubt as to the appealable character of the decree. This should be resolved in her favor, to prevent future complications. Certainly the

court intended the decree to be a final adjudication, even as to her rights, or it would not have been entered at the time of or after she tendered her answer. On an inspection of the whole record, it is plain that she is a necessary party to the suit, as she claims the whole subject-matter thereof. The irregular way in which she was named as a party has denied her a hearing in the cause. The court appears to have disregarded the answer of A. H. West and the depositions in support thereof, because he was not interested in the subject-matter of controversy, and to have refused to consider the answer of Jane West, either because not filed in time, or because not responsive to the allegations of the bill. The reason, however, is anything but plainly apparent.

The first cardinal question of ascertainment in every chancery suit before a final decree, or a decree settling the principles of the cause, is as to whether all persons interested in such decree are properly before the court, and have had a hearing as to their rights. *Rexroad v. McQuain*, 24 W. Va. 32. This is peculiarly a question for the court for the promotion of the ends of justice, whether on demurrer at the hearing or on appeal. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468. Not only must a person in interest be made a party, but he must be properly impleaded. *Crickard v. Crouch's Adm'rs*, 41 W. Va. 503, 23 S. E. 727. In the case of *Shinn v. Board of Education*, 39 W. Va. 498, 20 S. E. 604, it was held that: "Where a person files his petition asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and no relief is prayed against him, and he is admitted to become such party defendant, he does not become a party in the cause until he is made a party by some allegation in the bill as amended." A person is not properly a defendant to a bill unless such bill contain some allegation touching such person's rights, and prays relief because thereof. *McCoy v. Allen et al.*, 16 W. Va. 724. In the present case the court permitted the amendment of the bill by the insertion of the name of Jane West in the caption thereof. She waived process and appeared. The demurrer to the bill was considered and passed on by the court, with all the papers before it, after the name of Jane West was inserted in the caption thereof. On an examination of the bill there appears not a single allegation therein touching the rights or the property of Jane West, nor is it apparent therefrom why she is made a party thereto. Hence there is no allegation therein contained that calls upon her for an answer, or shows why she is made a party thereto. The bill is therefore defective and demurrable as to her, and the court should have required the plaintiff to have amended the same so as to show cause for bringing her before the court. Until it was so amended she could not and would not

be bound to answer the same. The court should have sustained the demurrer to the bill, and required the plaintiff to have amended the same, not alone by naming Jane West as a party defendant therein, but also by making such proper allegations as to her rights in the premises concerning the subject-matter of the suit and the prayer for relief as would enable her to properly present her rights by answer, and have the same properly adjudicated.

It is proper to say here that when exceptions are filed to depositions because taken before issue made up on answer filed the court should first determine such exception before hearing the cause, so as to afford opportunity to retake such depositions, if necessary. While due diligence is required, snap judgment should not be permitted in any case in chancery, but all proceedings should be carried on and molded to meet the ends of justice, the primary object of all litigation, which it is the duty of the court to attain, if possible.

The decree complained of is reversed, the demurrer to the bill sustained, with leave to plaintiff to file an amended bill making the appellant Jane West a party thereto by suitable allegations as to her interests and rights therein contained, and for further proceedings according to the rules of equity.

(55 W. Va. 395)

BARRETT v. RALEIGH COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

DEMURRER TO EVIDENCE—JUDGMENT—APPEAL— —REVIEW—BREACH OF CONTRACT— DAMAGES.

1. In treating a demurrer to evidence as on a verdict of a jury in favor of the demurree, the court should be governed by the rules and principles established in the case of *Johnson v. Burns*, 20 S. E. 686, 39 W. Va. 658, and not the old rules and principles thereby superseded and rendered obsolete.

2. On demurrer to evidence, if it be conflicting, judgment in favor of the demurree should be given, unless the evidence plainly and decidedly preponderates in favor of demurrant on some decisive point.

3. On demurrer to evidence, if the evidence, though conflicting, plainly and decidedly preponderates in favor of the demurrant on some decisive point, the demurrer should be sustained, and judgment should be given for the demurrant.

4. On a demurrer to evidence, although the evidence in favor of the demurree may be weak, doubtful, or questionable, the demurrer will be overruled, unless on some decisive point at issue the evidence in favor of the demurrant plainly and decisively preponderates over the evidence as to the same point in favor of the demurree.

5. When the circuit court has found for the plaintiff on a demurrer to evidence by the defendant, this court will not disturb such finding, unless it is against the plain and decided preponderance of the evidence, or is wholly without evidence to support it.

6. A plaintiff contractor who sues for the profits on his contract, which he was prevented from fulfilling by his employer, without fault on his

part, is entitled to recover the full consideration for such contract, less the expense of fulfilling the same.

7. Plaintiff in such a case is not bound to prove what his profits would have been with absolute certainty, but only with such reasonable certainty as will satisfy a jury as to the reasonableness of his demand or estimate. Remote or doubtful contingencies are insufficient to destroy the reasonable certainty of such demand.

8. A judgment in favor of demurree on conflicting evidence will not be disturbed, unless upon a plain legal ground, sufficient to preclude any recovery on the part of the demurree.

(Syllabus by the Court.)

Error to Circuit Court, Raleigh County; J. M. Sanders, Judge.

Action by Leon Barrett against the Raleigh Coal & Coke Company. Judgment for plaintiff. Defendant brings error. Affirmed.

See 41 S. E. 220.

John H. Hatcher and W. A. French, for plaintiff in error. Broun & Ball, W. L. Ashby, and A. A. Lilly, for defendant in error.

DENT, J. The Raleigh Coal & Coke Company complain of a judgment of the circuit court of Raleigh county, rendered against it on the 28th day of July, 1903, for the sum of \$930, at the suit of Leon Barrett. The plaintiff obtained a judgment on a former trial, which was brought here by the defendant, and reversed. *Barrett v. Coal Co.*, 51 W. Va. 410, 41 S. E. 220, 90 Am. St. Rep. 802. On a second trial, the jury rendered a second verdict in favor of the plaintiff, which, on motion of the defendant, was set aside by the circuit court. On the third trial the defendant, probably fearing an adverse verdict against it which might not be set aside, demurred to the evidence, so as to cast on the court the duty of deciding the law of the case applicable to the evidence. The circuit court overruled the demurrer, and entered judgment for the defendant; hence this writ of error.

The first question that presents itself is as to what rule should govern in cases of demurrer to evidence, the new rule of *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839; supported by *Talbott v. Railroad Co.*, 42 W. Va. 500, 28 S. E. 311, and *Teel v. Ohio R. R. Co.*, 49 W. Va. 85, 38 S. E. 518, or the old rule as held in *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664, sustained by *Hogg's Readings & Forms*, 537. Or can and should these rules be reconciled to mean virtually the same thing, except that the old rule is modified by the holding of this court in the case of *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686. In the case of *Shaver v. Edgell*, 48 W. Va. 512, 37 S. E. 668, Judge Brannon says: "I hesitate not to say that if this case had been wholly left to the jury, and it had found a verdict for the defendant, the court must have set it aside as unwarranted by the evidence, and, this being so, the circuit court in this case was warranted in giving judgment for the plaintiff upon the demurrer." *Gunn v. Ohio*

River R. R. Co., 42 W. Va. 681 [26 S. E. 548, 36 L. R. A. 575].” In the latter case it is said: “If the evidence is such that, if there were a verdict in favor of the demurree, the court ought not to set it aside then on demurrer to the evidence, the court ought to give judgment against the demurrant.” Both these cases were decided since the case of *Johnson v. Burns*, cited. Hence, when they use the word “verdict,” they mean a verdict determined according to the rule laid down in the latter case, and not the rule existing prior to that time. The old rule regarding the review of a verdict of a jury was modified, by the holding in the case of *Johnson v. Burns*, to suit the statutory requirement that the court should consider the whole of the evidence certified, and thereby incidentally modified the rule relating to the consideration of the evidence on demurrer, and this is the new rule established in the case of *Mapel v. John*. To hold otherwise we must say, in cases of demurrer to evidence, that when the word “verdict” is used it is according to its ancient effect prior to the decision of *Johnson v. Burns*. This would make unnecessary confusion between the present rule relating to motions to set aside the verdicts of juries, the motion to exclude the evidence, the motion to direct a verdict and a demurrer to the evidence, all of which motions should be governed by the same principles of law, and this is, that, where the evidence plainly preponderates in favor of a litigant, he is entitled to judgment. If the evidence so plainly preponderates in favor of the demurrant that a verdict of a jury in favor of the demurree would be set aside, then the court will sustain the demurrer and give judgment for the demurrant, otherwise the judgment must be for the demurree. This verdict must be governed by the new standard established by the case of *Johnson v. Burns*, and not the old standard that was thereby modified. On the subject of the conflict of evidence, the rule then would be that all the evidence of the demurrant in conflict with the evidence of the demurree should be rejected, unless the conflicting evidence of the demurrant so plainly preponderates over the evidence of the demurree that if there were a verdict in favor of the latter it would be set aside, and in such case the demurrer must be sustained. For if the evidence, although conflicting, plainly preponderates in favor of the demurrant, judgment should be entered accordingly. This makes judgments on demurrers to evidence harmonize with the later decisions founded on the verdicts of juries, following the case of *Johnson v. Burns*. *Miller v. White*, 48 W. Va. 68, 33 S. E. 332, 76 Am. St. Rep. 791; *Limer v. Traders’ Co.*, 44 W. Va. 175, 28 S. E. 730; *Davidson v. Railway Co.*, 41 W. Va. 407, 23 S. E. 593. Following this rule, the judgment in favor of the demurree in this case cannot be disturbed unless the evidence, though conflicting, plainly and decidedly preponderates in favor of the demurrant, or the evidence of the demurree is for

some reason legally insufficient to sustain the judgment.

The first question raised by the demurrant is that the writing introduced by the defendant is not a completed contract binding on the defendant, because not signed by its president and sealed with its corporate seal, but is only signed by its superintendent, William Lang. Nevertheless it was received and held by the company, and acted on between the parties, as a completed contract, and on the former appeal to this court no such objection was interposed, but the contract was admitted, so that the court cannot do otherwise than treat it as a binding contract between the parties thereto, and a jury would have the right to find that it was ratified and confirmed by the conduct of the parties in relation thereto, and such finding could not be disturbed.

The plaintiff’s case is that he was to make and burn 500,000 bricks for the defendant, at the price of \$5 per thousand, to the satisfaction of the superintendent, on the defendant’s land; the defendant to furnish the clay and the coal necessary to burn the bricks; that he proceeded to get ready to make and burn the whole amount of brick by preparing the yard and securing the necessary implements; that he made and burned sixty thousand (60,000) of such brick; that he was then notified by the then superintendent, Mr. Bunn, not to make any more brick, as the company had all the brick it needed, and more, too; that he then saw the president, who told him not to make any more brick, that when they needed any more they would make another contract, and that plaintiff’s contract was a mere memorandum, not binding on the defendant; that plaintiff answered that he would see whether it was not a binding contract, and refused to sign a receipt in full on payment of his hands for the labor performed by them, claiming that the defendant should pay him for the preparation made for making the 500,000 brick. This the defendant refused to do. The plaintiff then brought this suit, claiming as due him a prospective profit of \$2 per thousand on the whole 500,000 brick, deducting therefrom the amount already received by him, leaving a balance, with interest, as ascertained by the jury, amounting to \$920. The plaintiff’s proof undoubtedly sustains the plaintiff’s contentions, and the only question presented for the court is as to whether, as to any material and controverted point, the evidence of the defendant plainly and decidedly preponderates.

Defendant’s second position is that Mr. Bunn had no authority to stop Mr. Barrett from completing his contract, and that, in fact, neither what Mr. Bunn nor Mr. Lucado, the president of the company, said to him was a sufficient breach of the contract to authorize the plaintiff to stop work thereunder. On these propositions the feigned verdict is for the plaintiff, and the plain and decided preponderance of the evidence does not con-

trovert the same. On the contrary, it is fully sustained by the evidence, for it shows that the defendant had changed its superintendent, and with him its plans for future work, and therefore did not intend or need to carry out its contract with plaintiff.

Defendant's third position is that if the contract is held valid, and that the defendant has broken the same, such breach is warranted by the inability of the plaintiff to make such brick as are specified in the contract. This is an after consideration, and was not given to plaintiff, at the time it refused to permit him to proceed with his contract, as a reason for such refusal. Plaintiff's answer to this is that he made just as good brick as could be made with the clay and coal furnished him by the defendant, and that the defendant had accepted those already made, and did not interpose this objection until after suit was brought, and that the bricks could have been sold to other parties for \$6 per thousand, but the defendant refused to allow them to be sold. On this proposition the evidence is conflicting, and does not plainly and decidedly preponderate in favor of the defendant, so as to overthrow the feigned verdict in favor of the plaintiff.

The defendant's fourth position is that the plaintiff has not shown in his evidence that his profits would have amounted to \$2 per thousand, but that the evidence shows that, if he had been permitted to fulfill his contract, he would have suffered a loss instead of gaining a profit. On this question also the evidence is conflicting, and the plain and decided preponderance is not in favor of the defendant. The court is not able to say how a jury would have found on this question, but, the defendant having admitted that such finding would have been against it, the court cannot say that such finding was opposed to the plain and decided preponderance of the evidence.

It is sufficient to say that plaintiff's own evidence fully sustains his case, if there was no other evidence in the case. His evidence is contradicted to some extent by the witnesses for the defendant, but it is supported by his own witnesses. As to the credibility of witnesses, the jury is ordinarily the sole judge. *Smith v. N. & W. Ry. Co.*, 48 W. Va. 69, 35 S. E. 834; *Trump v. Coke Co.*, 46 W. Va. 238, 32 S. E. 1035; *Young v. Railroad Co.*, 44 W. Va. 218, 26 S. E. 932; *Sisler v. Shaffer*, 43 W. Va. 769, 23 S. E. 721; *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669. With the credibility of witnesses the court has nothing to do on a demurrer to evidence, as a general rule, for the demurrer admits the credibility of the demurree's witnesses as established. If the defendant had stopped the plaintiff from fulfilling his contract, for the reason that he was unable to make and burn brick to its satisfaction, and had given him such reason for so stopping him, the plaintiff might have had no cause of action, but it stops him because it does not need any more brick, because, apparently, of a change of superin-

tendent and plans, without giving him any other reason, and then, after it is sued on its contracts, it sets up the various after-considered pretexts that there was no binding contract, that its servants did not stop the execution of the contract, that plaintiff could not make good brick, and that plaintiff would have lost money if permitted to execute the contract. These are contradictory, evasive issues, instead of meeting plaintiff with a square issue; yet, if any of them were fully sustained by a clear and decided preponderance of the testimony, a jury would have been bound to have found in favor of the defendant. They were thence submitted to different juries. The first two found for the plaintiff, and the defendant virtually admits that the third would have done likewise. It may be that the juries were moved by the apparent lack of fairness on the part of the defendant in dealing with the plaintiff. But, however this may be, the evidence being decidedly conflicting, and the facts being determined by the demurrer in favor of the plaintiff, there is no question of law presented by the evidence that will enable this court to say that the circuit court erred in overruling the demurrer to the evidence and entering judgment for the plaintiff.

The damages appear to be excessive. This was a question for the jury, and not for the court, and the defendant made no motion to set aside the verdict because of excessive damages, if such motion was even proper, on the return of the third verdict.

Defendant claims that the damages are speculative, and not certain. *Beatty Lumber Co. v. W. U. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Douglass v. Railroad Co.*, 51 W. Va. 523, 41 S. E. 911; *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980; *Hare v. Parkersburg*, 24 W. Va. 554; *James v. Adams*, 8 W. Va. 563. In the case of *United States v. Behan*, 110 U. S. 339, 4 Sup. Ct. 81, 28 L. Ed. 168, the rule is stated to be, in case a contractor sues for the profits on a contract which he is prevented from fulfilling by breach of his employer, without fault on his part, the difference between the cost of doing the work and what he was to receive for it. 3 *Sunderland on Damages*, § 713; *B. & O. R. R. Co. v. Stewart & Co.*, 79 Md. 487, 29 Atl. 964. The plaintiff is not bound to prove such profits with absolute certainty, but with only reasonable certainty, and the fact that the employer might reject the work as not done to his satisfaction, when completed, would not render such profits uncertain, especially if the contractor might get a larger price for the brick when completed than his employer agreed to pay him for the same. There is evidence tending to show that the plaintiff could have received \$6 per thousand for the brick made and burned, if the defendant had rejected the same absolutely and permitted him to sell them. The defendant had no right to reject the brick as not according to the contract, and at the same time retain the same and refuse

the plaintiff the right to sell and make his expenditures therefrom. If the brick were rejected, plaintiff was entitled to a lien thereon for the money, time, and labor expended in producing them, although the defendant might be entitled to hold them for its advances. The probability that the defendant might have rejected all the brick when completed, and that the plaintiff would have thereby sustained the complete loss thereof is too uncertain a contingency to render plaintiff's estimate of his profits so uncertain as to prevent a recovery therefor. All that the plaintiff was required to prove was that the profits claimed were reasonably certain to have been realized but for the wrongful act of the defendant. *B. & O. R. R. Co. v. Stewart & Co.*, cited.

Defendant claims that the evidence shows that the plaintiff would have incurred a loss instead of realizing a profit out of his contract, and, impliedly, that defendant deserves a reward for stopping him, instead of being compelled to pay his estimated profits. This might have been urged before a jury, as the evidence is conflicting, but it is not a question for the court, unless it is clearly and decidedly plain that the plaintiff would have suffered loss instead of having made a profit on his contract. The court cannot so determine.

The various questions raised by the defendant are questions of fact, dependent on the evidence, which is highly contradictory and conflicting, and on most material points favorable to the plaintiff. For this court to overrule the circuit court and sustain the demurrer to the evidence, the court must hold that the evidence plainly does not justify a judgment in favor of the plaintiff for any sum whatever. The defendant has placed itself in the position of saying to the court, "If the plaintiff is entitled to any recovery, he is entitled to the full amount of the conditional verdict of the jury."

The character of the evidence in this case as to the binding force of the contract, the alleged breach thereof, the ability of the defendant to fulfill it, for the want of experience, lack of means, or character of material to be used, or the satisfactory character of the work already done, and as to whether there would result a profit or loss, and the amount thereof, demanded a submission to a jury as the proper triers of all such and similar questions of fact, and the jury's verdict, rendered on a fair hearing, should have ended the controversy. As to the questions of fact—and these are all that are left for consideration—on conflicting testimony of witnesses, the plaintiff was entitled to a trial by jury, and the defendant could not deprive him of such trial by demurring to the evidence, unless it could present a plain legal ground, not subject to disputed questions of fact, which would preclude any recovery on the part of the plaintiff. No such decisive legal ground appearing, this court must affirm the judgment of the circuit court.

(55 W. Va. 429)

ANDERSON v. DAVIS & OULD et al.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)PAYMENT — EVIDENCE — RECEIPT — IMPEACHMENT—MARRIED WOMAN—LIABILITIES—
FAMILY SUPPLIES.

1. Casual admissions alone, although in writing, are insufficient to show payment of an acknowledged debt, when payment is denied, and the debtor, being called upon to prove it, fails to testify or introduce other evidence.

2. A receipt purporting to be in full of rent of real estate to a specified date, or other account, is only prima facie proof of settlement, and may be overcome by contradictory evidence, and no rule of universal application as to the nature and sufficiency of such evidence can be formulated.

3. The husband being the head of the family, and under a legal duty to support it, the separate estate of the wife is not liable for an account for family necessities supplied by a merchant, when it is not shown that she has agreed to pay for them, or estopped herself from denying liability therefor.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Bill by J. M. Anderson, trustee, against Davis & Ould and others. From the decree, plaintiff and defendant Huff, Andrews & Thomas Company appeal. Affirmed.

R. C. & B. McLaugherty, Anderson & Easley, and Henson & Mason, for appellants. W. Walter McLaugherty, for appellees.

POFFENBARGER, P. Two appeals from the same decree of the circuit court of Mercer county have been taken in the chancery cause of J. M. Anderson, Trustee, v. Davis & Ould et al., one by the plaintiff, Anderson, trustee, and the other by Huff, Andrews & Thomas Company, both of which present the same question on the merits of the case. On the 7th day of May, 1900, Davis & Ould, partners doing a mercantile business in the city of Bluefield, made a general assignment for the benefit of their creditors by conveying all their property to J. M. Anderson, trustee. Later the trustee brought this suit to convene all the creditors, and determine the amounts and priorities, if any, of the debts due from the firm; making Mary O. Lusk a defendant, along with numerous other creditors. She answered the bill, setting up claims for rent of the room in which the firm carried on its business, amounting, in the aggregate, to \$768.50. Of this sum, \$240 was charged as the rent from May 15, 1896, to May 14, 1897, inclusive, and the residue, of \$528.50, as the rent from May 14, 1897, until May 8, 1900. In addition to this, she claimed \$22.50 as rent due from the trustee for the use of the room from May 8, 1900, until June 21, 1900. She averred that, of the amount so due to her, she had assigned about \$80 to W. Walter McLaugherty, out of which he was to pay a judgment in favor of E. Levering &

Co. for \$63.40, with interest and costs thereon; a judgment in favor of the American Thread Company for \$20.34, with interest and costs; whatever individual account or claim he might have against her; and the balance, if any, to her or her order. There was a reference to a commissioner, who refused to allow Mrs. Lusk anything, but, on exception to his report, the court disapproved his action in respect to said claim, sustained the exception, and allowed her the sum of \$550, and adjudged that \$196.20, part of said sum of \$550, being one year's rent of said room, was the first lien on the assets of the firm. From so much of the decree as allows this sum to Mrs. Lusk, and gives her the lien aforesaid, the trustee and Huff, Andrews & Thomas Company have appealed. Huff, Andrews & Thomas Company show that their claim was \$1,145.56, on which they would have received a dividend of 50½ per cent., equal to \$578.50, but for the allowance aforesaid to Mrs. Lusk, in consequence of which their dividend was reduced to 41.55 per cent., yielding them only \$476. Claiming a loss of \$102.50 to them by reason of said allowance, they appeal.

A dismissal of the appeal of Anderson, trustee, is urged upon the ground that he has not sufficient interest in the controversy between the creditors to enable him to sustain an appeal. The suggestion in this connection is that by resisting the allowance of a claim of a creditor, under the circumstances of the case, the debtors being insolvent, he intermeddles, without warrant or authority, in the controversy between creditors. This is a misapprehension of the duties and office of a trustee in such case. In the application of the assets conveyed to him, he is not only responsible to the creditors, but also represents the debtor, having full authority to sue for and collect such claims as constitute part of the assets, and to resist the payment of unjust or illegal demands asserted against them. His status is strikingly analogous to that of an administrator or an executor. In respect to such assets, he is the only person who can sue or be sued at law. While the claims of creditors conflict with one another, each prosecutes his action or claim directly against the trustee or the funds and property in his hands, and only incidentally against the demands of other creditors. The creditor unites with the trustee in the defense of the assets against other demands. It is well settled that an executor may prosecute an appeal. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488; *Shirley v. Healds*, 34 N. H. 407; *Smith v. Sherman*, 4 Cush. (Mass.) 411; *Bellow's Estate*, 60 Vt. 224, 14 Atl. 697; *Fairfax v. Fairfax*, 7 Gratt. 36. Executors, administrators, and trustees in deeds of trust executed for the benefit of creditors hold the legal title to the estate in their hands, and, at law, are the only persons who can sue and be sued in respect thereto. As the trustee is the only person who can be sued, he is a proper person to defend, and his resort to an appellate court is

but a continuation of the defense made in the lower court. Though, in equity, those who hold the beneficial interest must be made parties, the legal title of the fiduciary is nevertheless respected. He therefore clearly has the right to appeal, and, in doing so, represents the estate, for the benefit of all who are interested in it. *Saunders v. Waggoner*, 82 Va. 316. It is not intended here to intimate that the trustee represents his assignee personally. A decree or judgment against the trustee only would bind only the fund or property in his hands.

Said sum of \$240 arose under a written contract of rental for one year as aforesaid. On the 1st day of June, 1897, another contract in writing was made for one year at \$15 per month, and after the expiration of said year the lessees held over until the date of the assignment. The amount of rent claimed to have accrued to Mrs. Lusk is not controverted, but it is insisted that, by reason of payments and credits given on a store account, nothing remains due her. In her answer and deposition she fails to state the exact amount due, giving as a reason for her failure her ignorance of the exact state of the account. The management of the business was intrusted to her husband, W. I. Lusk, who insists in his deposition that there is a considerable balance due his wife, but that he does not know the amount. Nor does the trustee prove by his assignors or any witness the amount paid on account of the rent. On that subject they do not testify. Neither Davis nor Ould testified at all. The contract of June 1, 1897, provided for the payment of part of the rent thereunder upon a note held by the lessees, and the balance to W. O. Pollock, local agent of the Holston National Building & Loan Association. Whether anything was paid on the note does not appear. Pollock files a statement showing that he received from Mrs. Lusk, for the building association, in the years 1897, 1898, and 1899, \$287.72. A receipt for \$60 is produced, and an order payable to a third party for \$20 is mentioned; but whether it was paid out of the rent is uncertain, as W. I. Lusk testifies that he paid something on it, and the balance is not shown to have been paid. The appellant relies, however, upon certain facts, in the nature of admissions, tending to show that there was only about \$80 due and unpaid on account of the rent at the date of the assignment. One of these is the receipt for \$60, above mentioned, which reads as follows: "Received of Davis & Ould \$60.00, sixty dollars, in full for rent to May 1, 1899. Mary O. Lusk, per W. I. Lusk." Said W. I. Lusk says the words "in full for rent to May 1, 1899," were added to the receipt after he signed it as agent for his wife, and later he testified that only the words "in full" were so inserted. He testifies also that he had given several receipts, but does not remember how many, and has nothing to show just how much was paid to him on account of rent. A circumstance re-

lied upon as tending to prove that Mrs. Lusk only claimed about \$80 after the assignment is that she sued out a distress warrant for about that amount. Another is that she executed to W. Walter McClaugherty on the 20th day of September, 1900, the assignment for about \$80 hereinbefore described, purporting to be an assignment of all the rent due and owing to her by the trustee, including everything up to and including May 7, 1900, the date of the assignment. Another is that, on a day which does not seem to be fixed by the evidence, W. I. Lusk made an alleged settlement, as agent of his wife, with Davis and the trustee, in which, among other items credited on the account for merchandise, is the sum of \$80 as rent up to May 8, 1900, leaving a balance due Davis & Ould on the store account of \$236.87. But Lusk says he has no recollection of having made such statement, or signing the memorandum at the foot of the account. He says Davis, after having taken several drinks with him, took him to the office of the trustee, where the credits were made, but he was so much intoxicated that he does not remember what transpired after he went to the office. Anderson, the trustee, testifies that he procured the meeting of Lusk and Davis at his office, and says that, if Lusk was drunk, he did not observe it, and that, though he may have been drinking some, he was not so drunk he did not know what he was doing.

Are these circumstances sufficient to bar recovery? The amount of rent which accrued to Mrs. Lusk is undisputed. Davis & Ould owe her the amount she claims, if they have not paid it in some way. The burden was upon them to show payment. They were virtually called upon to do so in the account filed by Mrs. Lusk with her deposition April 30, 1902, prior to the making of the final report of the commissioner, in which she said her account was subject to any proper credits for money paid her by Davis & Ould to S. P. Cary, Pollock, and to themselves on a note held by them against her, amounting to about \$40. In it she further said the amount was unknown to her, but was left open for proof to be furnished by Davis & Ould. At most, the facts and circumstances relied upon constitute evidence in the nature of admissions. They do not show payments. They are not conclusive by any means, although written. The assignment is not a written agreement between Mrs. Lusk and Davis & Ould. It is a paper given to a third party, and is in no sense a contract between Mrs. Lusk and Davis & Ould. She may have been laboring under some false impression or defect of recollection at the time she executed it, and, if so, she could overthrow the inference of payment arising from its language. She may have assumed that Davis & Ould had paid more money to the building association and to other parties for her, on account of the rent, than they had actually paid. She says in her answer that she had endeavored

without avail to obtain a settlement with them; and, in her deposition, that she does not know how much has been paid; and, in her account filed before the commissioner, virtually calls upon them to disclose the amount, and they have failed to do so. As to the distress warrant sued out after the assignment, it could only have covered the rent for one year, and the making of the affidavit for it does not necessarily carry upon its face any implication of the payment of the rent for preceding years. The receipt relied upon as showing payment of rent up to May 1, 1899, is not conclusive, although it is evidence. *Ruby, Adm'r, v. Railroad Co.*, 8 W. Va. 269. In the case just cited the receipt was attached to a statement, and imported a settlement and payment of a balance due, but it was nevertheless said to be impeachable. Of a receipt in full, 23 Am. & Eng. Enc. Law, 988, says: "Like other receipts, it is subject to explanation or contradiction by extraneous evidence." The same work says at page 986: "No rule can be laid down as to the kind or quantity of evidence which ought to outweigh the receipt." Nor is the alleged settlement made by W. I. Lusk in which \$80 was credited on the store account as rent to May 8, 1900, conclusive. It is mere evidence. Although these admissions, by reason of their being written, are entitled to more weight, perhaps, than mere verbal admissions, they are still casual in their nature, and may have resulted from inadvertence. If, as is claimed, the rent has all been paid, it is remarkable that no receipts were taken for, nor book entries made of, the payments, and still more remarkable that, if receipts were taken, they have not been produced. Again, if none were taken, it is strange that the fact is not established, and the testimony of Lusk to the effect that he gave receipts is not denied. Neither Davis nor Ould attempt to testify to the payment of the rent. For some reason, they have seen fit to rely solely upon these admissions. If it were a case otherwise doubtful upon the evidence, these facts would be undoubtedly sufficient to turn the scale against Mrs. Lusk; but, as her debt is undisputed, and no effort is made to show payment of a large part of it, except by means of these admissions, an entirely different one is presented, and, under such circumstances, they are insufficient to establish the fact sought to be deduced from them. The large discrepancy between the acknowledged amount of the debt and the payments shown or indicated is a circumstance which, being wholly unexplained or accounted for, clearly overbalances the admissions relied upon. "It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse." 1 Jones, Ev. § 297. "It is hardly necessary to add that, unless admissions are contractual, or unless they constitute an estoppel, within

some of the rules already stated, they are not conclusive, but are open to rebuttal or explanation, or they may be controlled by higher evidence. This is true even though they are made under oath, although admissions thus solemnly made are evidence of great weight against the declarant, and they throw on him the burden of showing a mistake." *Id.* § 298.

Of the rents which accrued as aforesaid, \$175, in addition to the \$80 hereinbefore mentioned as having been credited at the time of the alleged settlement, was credited on a store account made with Davis & Ould. It commences in November, 1898, in the name of W. I. Lusk, and, after running to August 21, 1899, in his name, was transferred to a new book, and entered up in the names of W. I. and M. O. Lusk. Nothing in the record shows that Mrs. Lusk ever contracted any part of the account, agreed to pay it, asked credit for it, or knew that it was made in her name. The rents in question were part of her separate personal estate, which she was entitled to hold free from the debts of her husband, and, in the absence of any application of them by her to the payment of her husband's store account, or an extension of credit upon the faith of the same, induced by some act or declaration of hers, they could not be applied in payment of her husband's account. *Schouler's H. & W.* 235, 324. The law presumes that the husband supports the family, since he is under a legal duty to do so. *Id.* 66, 101, 199; *Min. Inst.* 310; *Bogges v. Richard's Adm'r*, 39 W. Va. 567, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938; *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. 688.

As the record fails to show in detail the findings and calculations made by the court, it is impossible to determine whether they are strictly accurate, but no more has been allowed than seems to be justly due, so far as can be ascertained from the evidence, under the principles above announced. By allowing interest on each item of unpaid rent from the date on which it became due until the date of the decree, there appears to be due Mrs. Lusk at least \$550.

The court did not err in adjudging a lien in favor of Mrs. Lusk for the rent for the year next preceding the date of the assignment. The statute gives it. Code 1899, c. 93, § 11; *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 993.

These conclusions result in an affirmance of the decree as to both appellants.

(55 W. Va. 423)

MUNSON v. GERMAN-AMERICAN FIRE INS. CO.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

BILL OF DISCOVERY—SUFFICIENCY—INSURANCE—NOTICE OF LOSS—RECEPTION.

1. It is necessary that a mixed bill for discovery and relief show that the plaintiff has a

good case for recovery or defense, in order to obtain discovery.

2. Notice of loss may be given to an insurance company through the mail, at the risk of the insured. Deposit of it in the mail is *prima facie*, but not conclusive, evidence of its reception by such company.

3. If the furnishing of proof of loss is made by an insurance policy a condition precedent to action upon it, performance, or waiver of it, must be shown before recovery can be had. Such is the case where the policy provides that no action shall be brought until its conditions are complied with and it requires such proof of loss.

4. A bill cannot be maintained against a corporation for discovery without making a proper officer of it a party.

5. If a fire insurance policy provide that proof of loss shall be furnished within a given time, and that no action shall be brought upon it until such proof is furnished, and provide for its forfeiture for certain causes, but not for failure to furnish such proof of loss, failure to furnish such proof of loss within the given time does not wholly destroy all right of recovery, but only delays right of action; but action upon it cannot be brought until such proof is furnished.

6. Loss of a policy of fire insurance will not excuse compliance with the imperative requirements of the policy as to notice and proof of loss.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by J. W. Munson against the German-American Fire Insurance Company. Decree for plaintiff, and defendant appeals. Reversed.

C. W. Dailey, for appellant. W. B. Maxwell, for appellee.

BRANNON, J. J. W. Munson filed a bill in equity in the circuit court of Randolph county against the German-American Fire Insurance Company of New York, stating that the company had issued to him a policy of insurance for \$1,000 upon his dwelling house; that the house was destroyed by fire, and that the policy was destroyed with it; that as soon as practicable after the fire he had informed the agent through whom he obtained the policy of the destruction of the house, he not knowing the company's address, and the agent informed him that he was no longer agent for the company, but gave him the address; that the plaintiff then wrote the company a letter informing it of the fire, but, receiving no reply, he placed the matter in the hands of an attorney, who wrote the company of the loss of the house and policy, and that the plaintiff did not know the demands of the policy as to what he should do, and asking what the company required of him in the way of proof of loss; that the company answered that this letter was the first information it had of the fire, and that the matter had been referred to its Baltimore agent; that the plaintiff asked this agent what was required of the plaintiff to secure a settlement of the claim,

¶ 2. See Insurance, vol. 23, Cent. Dig. §§ 1664, 1723.

but both had failed to give him information. The bill states that the plaintiff is entitled to recover the full amount of the policy; that he believed that it was provided in the policy that before he had right to recover it was necessary for him to furnish some sort of proof of loss, but that he did not remember the provisions of the policy, or what proof of loss was required; that he had so informed the company. The bill avers that the plaintiff had full proof to meet any requirement of the policy; that the company had an exact copy of the policy, and knew of its requirements. The bill asked that the company be required to make discovery as to requirements of the policy in order for the collection of the insurance money, that upon such discovery the plaintiff be allowed to furnish proof of his demand, and that the amount of the insurance be decreed to him. A decree was entered requiring the company to make such discovery, and afterwards a decree was rendered compelling the company to pay the full amount of the policy, and the company has appealed.

The first question arises upon a demurrer to the bill. The court overruled the demurrer. Counsel for the company suggests that it is indispensable that to call for discovery the bill show a good case, a right of recovery, and that this bill does not show a good case, because it shows that the plaintiff knew that he had to do certain things as conditions precedent to recovery, namely, to give the company notice of loss, and to furnish statement of the loss. It is plainly necessary that a bill show a recoverable case to call for discovery. It must state "a case which will constitute a just ground for a suit or defense, and its nature, * * * such a case as will enable the plaintiff to recover in the action." *Hogg's Eq. Proced.* § 163; 6 *Ency. Pl. & Prac.* 740; *Story, Eq. Pl.* § 319. This puts the question whether the bill does present a case for recovery. It is said that the bill admits, as it does, that Munson knew very well that he was called upon to give the company notice of the fire, and also proof of the loss, and its character and amount, and that the bill fails to state that he did so. The bill says that, after writing to the local agent, Munson wrote to the company of the fire at once. *Prima facie*, this was sufficient notice, as a letter deposited in the mail, properly addressed, is presumed to reach the person addressed. *Galloway v. Standard Co.*, 45 W. Va. 237, 31 S. E. 969; 1 *Joyce on Ins.* §§ 62, 3300. Thus, so far as concerns notice of loss, the bill is sufficient. Besides, the policy is not stated in the bill as to its provisions, and we cannot say what were its provisions. We do not know whether the failure to give notice of the fire was required within a particular time, or whether it forfeited the contract. True, the bill says that it was necessary to recovery. This may be said to make it a precedent condition, but we do not know whether the failure to give no-

tice of fire within a given time forfeited the policy. Therefore, as before suit notice of the fire was given, we cannot say that the demurrer was good so far as it concerns failure to give notice of loss in due time, because notice appears to have been given, and also because we do not see that its delay forfeited the policy.

But how as to proof of loss? The bill makes no pretense that it was given or attempted to be given. This makes the bill bad, because it admits that a duty to furnish proof of loss rested on Munson, and the law is settled that such proof is indispensable to a suit for recovery. If a pure bill of discovery could be maintained upon a bill not averring that proof of loss had been furnished, still a bill for discovery and relief cannot be sustained without such averment. "If the furnishing of proofs of loss is a condition precedent to the bringing of action, performance or waiver of it must be shown." *Kerr on Ins.* 767. This bill is one of discovery and relief, not a pure bill of discovery. There is jurisdiction in equity, regardless of discovery, since the bill states the loss of the policy; but that can be no relief upon a bill not stating that proof of loss was furnished or waived. It was error to overrule the demurrer and compel a discovery, as no proof of loss had been given before the suit. Proof of loss afterwards would not avail for this suit.

The bill is defective in another respect. When discovery from a corporation is asked, it is indispensable to make some proper officer of it a defendant, as a corporation cannot answer under oath, and therefore the practice is to make such officer a party. *Teter v. W. Va. Cent. & Pa. R. Co.*, 35 W. Va. 433, 14 S. E. 146; *Roanoke Street R. Co. v. Hicks (Va.)* 32 S. E. 295. In the latter case the Virginia court said: "A bill cannot be maintained against a corporation alone, as one for discovery, it being unable to answer under oath."

The company, in response to the command for discovery, produced a copy of the policy. It provides that: "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company * * * and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured stating" (giving the details of the proof of loss). The policy contained this provision: "No suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." It contained no clause of forfeiture for failure to comply with this provision; that is, as to notice of loss and proof of loss. It does contain provisions forfeiting the policy for keeping certain inflammable articles in the house, and other causes, but does not for-

felt for failure to give notice and proof of loss. As stated above, the bill states that prompt notice by letter was given of the fire, which is prima facie evidence of its reception by the company; but it is only prima facie evidence. The officers of the company swear that this letter did not reach the company. This repels the claim of early notice to the company. *Joyce on Ins.* § 8300. The earliest notice of the company was 8d January, 1902. The fire was 20th October, 1901. None of the authorities hold that this notice would comply with the provision of the policy demanding immediate notice of loss. *Joyce on Ins.* § 8291; *May on Ins.* § 462; *Elliott on Ins.* § 304; *Kerr on Ins.* p. 482. It would seem very reasonable that such a provision ought to be complied with within a reasonable time. How can a distant company, without such notice, know of the fire and take steps, while the matter is fresh, to investigate the facts for its own protection? But the policy does not forfeit for this cause, though it is particular to do so for other causes. "If no forfeiture is provided for in case of failure to furnish the proofs, forfeitures being stipulated in case of breach of other requirements, or furnishing the proofs in the specified time is not made a condition precedent to recovery, the great majority of recent decisions hold the effect of failure to furnish them is merely a postponement of the time of payment to the specified time after they are furnished." 13 Am. & Eng. Ency. L. (2d Ed.) 829; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670. *Elliott on Ins.* § 307, says: "Where no forfeiture is provided by the contract, and the service of the proof of loss is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until such proofs are furnished; but, unless otherwise provided, expressly or by fair implication, it is not important that proofs be not in fact served within the time stated in the policy." It is there stated that it is only when the policy forfeits the right that the liability ends. *Kerr on Ins.* 450, lays down the same law. But without regard to absolute forfeiture of the policy, it still can be said, under all the authorities, that, where a policy calls for proof of loss before suit, no suit can be maintained upon it without such proof. This is shown by authorities above given and by our own cases. *Peninsular L. T. Co. v. Franklin Ins. Co.*, 35 W. Va. 606, 14 S. E. 237; *Flanagan v. Phenix Ins. Co.*, 42 W. Va. 426, 26 S. E. 518; *Adkins v. Globe Ins. Co.*, 45 W. Va. 384, 32 S. E. 194. It is said that the *Rheims* Case does not hold that proof of loss is a condition precedent to suit, and that it differs from the three cases above mentioned. I do not think so. That case turned more on waiver. The *Rheims* Case holds that where proof of loss is to be made within a fixed time, but the

policy does not forfeit for failure therein, failure to make proof of loss within the time does not forfeit the policy, but postpones action until proof is made. There was proof in that case, but not within the time. It does not hold that suit can be brought without such proof. The *Peninsular* Case does not assert a forfeiture, but declares, with the *Rheims* Case, that proof before suit is necessary. The *Flanagan* and *Adkins* Cases say nothing as to forfeiture, but assert the prerequisite of proof before suit. All the cases are consistent with two propositions: One, that where proof is required by the policy within a fixed time, but no forfeiture is declared, mere failure to furnish proof within the time does not destroy all right of recovery; the other, that such proof must precede action. The failure of the plaintiff in this case to furnish proof of loss cannot be excused by the loss of the policy, even if *Munson* was unable to remember its provisions. Persons making an imperative contract cannot plead failure of memory of its contents. They are bound to remember. One cannot place upon the other damage from the former's loss of memory; he cannot make him carry the burden of an accident which is only the misfortune of the one, not the fault of the other. This policy makes no such exception. Only the act of God can intervene and release the letter of the contract. *Joyce on Ins.* § 8280; *May on Ins.* § 465; *Kerr on Ins.* p. 470.

For these reasons, we reverse the decree and dismiss bill.

(55 W. Va. 278)

CLARK et al. v. MERCER COUNTY COURT.*

(Supreme Court of Appeals of West Virginia.
March 15, 1904.)

TAXATION—EQUALIZATION—REVIEW BY COUNTY COURT—APPEAL.

1. C. and D. made application to the county court of the county of M. to have corrected certain valuations of their lands made by a commissioner to reassess the lands of that county under chapter 21, p. 82, Acts 1899, and also to have stricken off the valuation added thereto by the board of equalization; alleging that the acts of the commissioner and board were each illegal and void, and praying to be released from the taxes charged against their lands for 1900 upon the valuations ascertained and fixed as aforesaid. The county court refused their application and dismissed it. Applicants then appealed to the circuit court, making the county court a defendant. The circuit court, upon the appeal, reversed the order of the county court; ordered that said valuations and the landbooks for 1900 be corrected, as to applicants' lands, by taking therefrom the valuation added thereto by the board of equalization; and released and exonerated C. and D. from the payment of \$1,889.43 of the state, county, and district taxes and levies charged against said lands for 1900, \$1,049.70 of said sum being county and road levies. To the last-mentioned judgment, the county court was granted a writ of error.

Held, that the county court did not err in refusing the relief prayed for as aforesaid, because

*Rehearing denied.

it was without jurisdiction to grant the same; that the circuit court did err in reversing the judgment of the county court, in correcting said valuations, and in releasing C. and D. from the payment of said taxes and levies as aforesaid; and that this court has jurisdiction upon said writ of error to reverse the judgment of the circuit court.

(Syllabus by the Court.)

Error from Circuit Court, Mercer County; J. M. Sanders, Judge.

Action by E. W. Clark, trustee, and others, against the county court of Mercer county. Judgment for plaintiffs, and defendant brings error. Reversed.

J. M. Anderson, for plaintiff in error. A. W. Reynolds and J. S. Clark, for defendants in error.

MILLER, J. On the 20th day of February, 1899, the Legislature of this state passed an act entitled "An act to provide for the reassessment of the value of all the real estate in this state" (Acts 1899, p. 82, c. 21), which act took effect 90 days after its passage. The law provides for the appointment, qualification, and duties of a commissioner for each assessment district in the several counties of the state. Each commissioner appointed and qualified under the act was required on the 1st day of April, 1899, or as soon thereafter as practicable, after receiving the books and instructions to be furnished to him by the auditor, to proceed to examine, in person, all the tracts of land and town lots, with the buildings and improvements, if any, thereon, within his district; and, upon such examination, in accordance with his instructions and the provisions of the act, to assess the fair cash value thereof. As soon as the commissioner had completed the assessment in his district, he was required to make and verify, by oath or affirmation, three copies thereof, in the books furnished by the auditor for that purpose, two of which books he was directed by the statute to file with the clerk of the county court of his county on or before the 1st day of January in the year 1900, and the other he was required to transmit to the auditor on or before the 1st day of April of the same year. In the county of Mercer, from which this proceeding comes, J. W. Dunnagan, the commissioner to reassess the lands in that county, was not appointed until April 5, 1900, under said act of 1899. It appears that he did not then have sufficient time to go upon the lands in the county and make a personal examination thereof, but took for his guide the book showing the reassessment of said lands in 1890, and also the landbook of said county for 1899, and made up his assessments by adopting the lands and the values thereof as charged, and appearing upon said book for 1899; that he made no changes thereof, except to add thereto the value of any additional buildings placed on the lands of which he had information; and that the reassessment of the lands of defend-

ants in error, hereinafter referred to, was made in that way. It also appears that there was no reassessment of the lands in Mercer county under said act or otherwise, except that made by Dunnagan. Section 10 of that act provides for a state board of equalization, to consist of four members, whose duty it was to correct and equalize the assessments made as aforesaid between the several counties and assessment districts, if it should appear to them that the average value of the real estate in any county was either too high or too low. The said board had the right, under the law, to increase or reduce the average value of the real estate in the several counties and districts thereof according to the evidence adduced before them, or which might come to their knowledge. It is also shown that the board of equalization increased the valuation of the lands in Mercer county, as fixed by Dunnagan, including the lands of plaintiff, and added thereto 25 per cent. On the 11th day of December, 1900, said E. W. Clark and Joseph I. Doran, trustees of the Flat Top Coal Land Association, made application to the county court of said county of Mercer to have corrected the reassessment of the lands of said association in that county made under said act of 1899 as aforesaid, and to have corrected the landbook for 1900 in respect to said lands, which application was docketed, and the prosecuting attorney for the county waived notice thereof and appeared thereto; and again, on the 16th day of March, 1901, to which time the hearing had been continued, the said applicants, as well as the prosecuting attorney who attended to the interests of the state and county in the matter, appeared in the county court, whereupon said trustees moved the court to correct the landbook of Mercer county for the year 1900 in respect to all of the tracts of land charged thereon in their names, as trustees aforesaid, and to release and exonerate them, as trustees, from the payment of 25 per cent. of the taxes charged upon all of said tracts of land for the year 1900, upon the ground that said taxes were and are illegal, having been placed thereon pursuant to the action of the State Board of Equalization, appointed and acting under the provisions of the act of the Legislature of 1899, and because said taxes were and are based upon the reassessment of lands made in the year 1900 as aforesaid, and upon the ground that the action of the board of equalization, in placing an increase of 25 per cent. in value upon said lands was and is illegal and void. After hearing the evidence upon the motion, the county court overruled the same, refused to correct the said landbook, and declined to release the applicants from any of the taxes charged against them upon said lands as aforesaid for the year 1900. To the action and ruling of the court, said Clark and Doran, trustees, excepted, and upon their request the court signed a bill of exceptions in which is certified all of the evi-

dence heard and the rulings made by it upon the hearing of the application aforesaid. From this order of the county court said Clark and Doran obtained an appeal to the circuit court. The appeal was placed on the record of that court in the name of "E. W. Clark et al., Surviving Trustee, v. County Court of Mercer County." On the 15th day of August, 1901, it was heard by the circuit court; the plaintiffs, E. W. Clark and Joseph I. Doran, being present, as well as John M. Anderson, prosecuting attorney of Mercer county, who was attending to the interests of the state and county therein. The last-mentioned court was of opinion that there had been no reassessment of the lands in the proceedings mentioned, under the said act of 1890; that the action of the board of equalization in increasing the valuation of said lands 25 per cent. was and is illegal and void; that such illegally increased value resulted in the illegal increase of the taxes on the lands of said Clark and others, trustees, to the extent of 20 per cent.; and that 20 per cent. of the taxes charged against said lands on the landbook for 1900 were and are void. The order or judgment of the county court was therefore reversed and set aside, and the landbook of Mercer county for the year 1900 was ordered to be corrected as to all of the tracts of land charged thereon in the names of said E. W. Clark and others, trustees, to the extent of 20 per cent. of the taxes charged against said lands, and that said trustees should be, and were, released and exonerated from the payment of the illegal assessment against them as aforesaid, amounting to 20 per cent. of the taxes charged against said lands for the said year. The taxes, from the payment of which said Clark and others were so released and exonerated, were and are as follows: State tax, \$262.41; state school tax, \$105.08; county levy, \$524.85; road tax, \$524.85; teachers' fund, \$524.85; for purchase of schoolbooks, \$52.47; and building fund, \$419.82. Thereupon the prosecuting attorney moved the court to set aside its said finding and judgment, which it refused to do. The county court, by its prosecuting attorney, then applied for, and was granted, a writ of error and supersedeas by this court to the last-mentioned judgment.

Defendants in error contend that the reassessment by Dunnagan, commissioner as aforesaid, was and is illegal and void, because he was not appointed within the time prescribed by the act in which the assessment should have been made and completed; that his appointment was after the date on which he was required to begin his work of reassessment; that at the time of his appointment the life of the act had expired; that the reassessment so made by him for these and the further reason that he did not personally examine the lands, was and is illegal and void; and that therefore the action of the board of equalization in increasing and add-

ing 25 per cent. to the value of the lands as fixed by said Dunnagan was and is without jurisdiction, illegal, and void.

Const. art. 10, § 1, provides that "taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value. * * *" In order to carry out this mandate of the Constitution, the Legislature from time to time has enacted suitable laws providing for the revaluation and reassessment of the lands of the state. Such statutes, in their administrative requirements, are generally treated and held by the courts as directory. If, however, by the use of negative words, the statute requires a particular proceeding to be taken in a particular time or manner, and makes it void if not so done, or gives it effect provided it is so done, or declares that, unless it is so taken, subsequent proceedings shall not be had, or prohibits its being done except at the time the statute prescribes, or if any terms plainly imperative are employed, the intent is clear, and no discretion can be permitted in construction. It is not often, however, that these or similar words are met with in the statutes which define official duties under the revenue laws, and the construction of particular provisions must be left for determination in such light as the obvious purpose they were intended to accomplish may afford. No one should be at liberty to plant himself upon the nonfeasance or misfeasance of officers under the revenue laws which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty. Cooley on Tax. 479.

While it is not necessary to decide the question in order to dispose of the present case, yet we are of opinion that the administrative features of the act under consideration are directory, and that the revaluation and reassessment of the taxes charged against the lands of plaintiffs thereunder as aforesaid were not and are not void, but were and are irregular. Section 7 (page 86) of the act provides that "any person feeling himself aggrieved by the assessment of his real estate or other property, as herein provided for, made under the provisions of this act, may, within one year after the filing of a copy of such assessment with the clerk of the county court, apply, by himself or his agent, to the said court for redress, first giving reasonable notice in writing of his intentions to the prosecuting attorney, and stating in said notice the character of the correction he desires. It shall be the duty of the prosecuting attorney, upon being notified, to attend to the interest of the state at the trial of such application. If upon hearing the evidence offered, the county court shall be of opinion that there is

error in the assessment complained of, or that the valuation fixed by the commissioner is too high or too low, the court shall make such order correcting the assessment as is just and proper. The right of appeal, from any such order made by the county court, shall lie to the circuit court, and may be taken either by the applicant or the state; and in case the applicant, or the state by its prosecuting attorney or agent, desires to take an appeal from such order, the party desiring to take such appeal shall have the evidence taken at the hearing of such application certified by the county court, and such appeal when allowed, by the court or judge in vacation, shall have precedence over all other cases pending in said court." This provision refers to the assessments made by the commissioners and not to the acts of the board of equalization, "whose duty it shall be to correct and equalize the assessments so made, between the counties and assessment districts." That statute nowhere confers jurisdiction on the county court to review or alter the work of said board. Under section 94 of chapter 29 of the Code of 1890, the county court had no authority to make the change or grant the relief prayed for by Clark and others upon the grounds urged by them. Therefore the county court, having no jurisdiction, did not err in dismissing said application. The circuit court, acting as an appellate tribunal under the same law, had no jurisdiction to reverse the action of the county court, and release the applicants from the payment of said taxes, as hereinbefore stated. The circuit court therefore should have refused the appeal, and declined to act in the matter.

Can this court entertain this writ of error? In the case of *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. 632, the court held that "a county court is not a party to an appeal taken under section 7, c. 36, p. 63, Acts 1891, for reassessment of lands by a landowner, from the decision of a county court refusing to reduce the valuation of his land made by a commissioner under said act, and cannot maintain a writ of error from this court to the decision of a circuit court upon such appeal." The section of the act of 1891 referred to provides that the right of appeal from any such order made by the county court shall lie to the circuit court, and may be taken either by the applicant or the state. In that case the applicant, *Mackin*, appealed to the circuit court; and from the judgment of that court, which was adverse to her, she obtained a writ of error to this court, which was dismissed for want of jurisdiction. The court, by *Brannon, J.*, in part, says: "Thus I have shown that there is no act expressly giving a writ of error to this court on the decision by a circuit court of an appeal from a county court in a matter of correction of an assessment for taxes, and also that no writ of er-

ror lies under the general statute providing for appeals and writs of error." But that case does not govern this writ of error. The Constitution (article 8, § 3) confers appellate jurisdiction on this court in civil cases "where the matter in controversy exclusive of costs, is of greater value or amount than one hundred dollars; * * * and in cases relating to the public revenue, the right of appeal shall belong to the state as well as the defendant." Counties are parcels and subdivisions of the state. The county courts are the legal representatives of the respective counties for the exercise and discharge of certain delegated governmental functions, among which are the superintendence and administration of the internal police and fiscal affairs of their counties, under such regulations as may be prescribed by law. Const. art. 8, § 24. Upon proper application and proof, the county court may increase or reduce the valuation of any property charged with taxes within its jurisdiction, and release the taxes erroneously assessed thereon. It is thus clothed with authority to deal with the state and district as well as the county taxes and levies. The county court of every county shall be a corporation by the name of "The County Court of — County," by which name it may sue and be sued, plead and be impleaded, and contract and be contracted with. Code 1890, c. 39, § 1. It would be a solecism to say that the Constitution creates the county court, and imposes upon it certain duties, of which the superintendence and administration of the fiscal affairs of its county is one, and that the statute gives it the right to sue and be sued, plead and be impleaded, in the courts, but that it cannot be a party to a tax proceeding which directly affects and takes from it the revenues of its county. In this case, by the order or judgment of the circuit court, which we must say was and is wholly without jurisdiction, and therefore void, the state, county, and districts in said county of Mercer were and are deprived of \$1,889.48 of taxes for 1900, not because the lands upon which the taxes were charged were not liable for taxes for that year, not because said lands were valued too high, but for the reason, as it is stated, that the commissioner and board of equalization were without authority to fix the valuations. The county court, representing directly the said county and road levies, amounting in the aggregate to \$1,049.70, was thus deprived, to that extent, of the means with which to pay the creditors of the county, to open and maintain public roads, and to discharge other public obligations. If we were disposed to adopt a narrow meaning of the Constitution and statute, we can nevertheless entertain this writ of error for the purpose of reversing said judgment. The county court was made a party defendant to the "case" (which is a civil case) in the circuit court. The judg-

ment of that court was and is, in legal effect, in favor of the plaintiffs, Clark and others, against the county court, for \$1,049.70, to be taken from its county and road levies. That judgment was and is void. Where the subject-matter in controversy is sufficient, and the bar of the statute has not intervened, the right of a party to a void judgment or decree to have the same reviewed and reversed, if prejudiced thereby, is unquestioned. *Moseley v. Cocke*, 7 Leigh, 224; *McCoy v. Allen*, 16 W. Va. 724; *Railroad Co. v. Ryan*, 81 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865; *Cook v. Dorsey*, 38 W. Va. 196-199, 18 S. E. 468.

The judgment complained of, being prejudicial to the plaintiff in error and void, is reversed and set aside, and the said proceeding is dismissed.

(56 W. Va. 690)

STATE v. KELLISON.*

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

CRIMINAL LAW—DELAY IN TRIAL—DISCHARGE OF ACCUSED—PRIVILEGE OF COUNSEL—RECORD—IMPANELING JURY—INSTRUCTIONS.

1. The fact that the record in a felony case shows that more than three terms of the court have passed without a trial, after the finding of the indictments, affords no ground for the discharge of the accused, under section 25 of chapter 159 of the Code of 1899, from prosecution for the offense with which he is charged. It must further appear that he has been held for trial, as well as charged with the crime, for such period, without a trial.

2. Failure of the record in a felony case to show that the accused had the assistance of counsel therein is not ground for setting aside the verdict and granting a new trial, if it does not affirmatively appear that the accused was denied the privilege of counsel guaranteed to him by section 14 of article 3 of the Constitution.

3. It is not necessary to a legal conviction on a charge of felony that the order showing the impaneling of the jury recite that the jurors so impaneled were good and lawful men.

4. If, in such case, the order recite that the jury were "sworn the truth to speak upon the issue joined," without more respecting the oath, and it does not appear that any objection was made to the form of the oath administered, it is presumed that the jury were properly sworn.

5. Failure of the record in a felony case to show that, upon an adjournment, the court instructed the officer into whose charge the jury were given to keep them together, and not to converse with them, or permit any one else to do so, is not ground for setting aside the verdict. Although it is usual and proper to give such instruction, the law does not require it, for the statute makes it the duty of the officer to do the things above mentioned without any instruction.

6. When, in a trial of a felony case, the court instructs the jury, at the instance of the defendant, that, in order to convict, they must believe from the evidence beyond all reasonable doubt that the accused is guilty, it is not error to give, at the instance of the state, another instruction to the effect that such reasonable doubt is not a vague or uncertain doubt, and that what

the jury believe from the evidence as men they should believe as jurors.

7. The giving, in such case, of the following instruction, though not as periphrastic as it ought to be, is not error: "The court instructs the jury that, to convict a person of murder, it is not necessary that malice should have existed in the heart of the accused against the deceased, and if they believe from the evidence that the accused, with a deadly weapon, shot and killed the said Julia Simmons, the intent and the malice may both be inferred from such act."

8. Instructions to the jury must be taken and read as a whole, and if, upon being so read and construed, they state the law correctly, and do not misstate it in any particular, and no proper instruction asked for has been refused, the verdict will not be disturbed on the ground that additional proper instructions could have been given, or that some particular instruction, standing alone, might tend to mislead the jury.

(Syllabus by the Court.)

Error to Circuit Court, Pocahontas County; J. M. McWhorter, Judge.

Jerome Kellison was convicted of murder in the first degree, and brings error. Affirmed.

C. H. Scott, for plaintiff in error. The Attorney General, for the State.

POFFENBARGER, P. Jerome Kellison, convicted of murder of the first degree in the circuit court of Pocahontas county, and sentenced to life imprisonment, complains of alleged errors in the judgment. The order entered on the 4th day of October, 1899, merely shows the return of the indictment, and no other order in the case was made until the 2d day of October, 1901, when the accused was arraigned, and entered his plea of not guilty and took a continuance. As more than three regular terms of the court, after the finding of the indictment, had passed without a trial, and the record did not show any of the reasons therefor that, under the statute (section 25, c. 159, of the Code of 1899), excuse such failure, it is said that he was entitled to his discharge from prosecution for the offense. "Every person charged with felony, and remanded to a circuit court for trial, shall be forever discharged from prosecution for the offense" if there be such failure, unless certain specified reasons therefor are shown. The accused does not appear by the record to be within the provisions of this statute. It does not show that more than three terms had passed without a trial after he was taken into custody. He had not been arraigned, nor entered any plea, nor, so far as is disclosed by the record, had he been remanded to the circuit court for trial. There can be no presumption that at any time before October, 1901, he had demanded or desired a trial, or was so situated that the court could try him. The fact is, as shown by the testimony, that he was never arrested on the charge until May, 1901. Had he moved for a discharge before going to trial, this fact would have precluded it.

*Rehearing denied.

If, after trial and conviction, he could demand his discharge in this court at this late day, that fact would clearly bar him here, as the record shows it. The word "remanded" in said section is not consistent with the present statutory provisions relating to procedure in felony cases. Since the necessity of a preliminary examination as a prerequisite to trial has been dispensed with, and indictments are no longer found in courts having no jurisdiction to try on charges of felony, the expression is inaccurate. But under the Code of 1860, and the statutes as they existed prior thereto, it was consistent with other provisions, and only applied to persons in custody or under recognizance. Hence it can only apply under such conditions now, and is to be construed as if it read "held" for trial, instead of "remanded" for trial. In *Virginia* the statute, as amended, so reads. *Kibler v. Com.*, 94 Va. 804, 28 S. E. 858.

No order entered in the case, except the one in which the verdict is recorded discloses that the accused had the assistance of counsel, and an assignment of error is based upon the failure of the record to show that fact. The trial seems to have been in progress on three successive days, but there is no mention of counsel until the third day. Nothing in this record indicates that he asked for the assistance of counsel, or that he was denied it, or that he did not have it. The Constitution does not make assistance of counsel a prerequisite to conviction as it does a trial by jury. The clause contains no prohibitory language. It only says he shall have the assistance of counsel. The common law did not permit persons charged with felony to have the advice and assistance of counsel, and this clause of section 14 of article 3 of the Constitution was inserted to cure the shameful defect of the common law in this respect by guarantying said right to such persons. *Cooley's Const. Lim.* 474. Even if said clause makes it the duty of the state to furnish counsel when demanded, it does not follow that such action is to be taken unless demand therefor has been made, nor that the silence of the record on the subject raises a presumption of the denial of the privilege. This clause is in the same section with the one which says the accused shall be confronted with the witnesses against him, under which it has been held to be reversible error to permit the examination of witnesses in the absence of the accused. *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *State v. Greer*, 22 W. Va. 800; *State v. Sutfin*, Id. 771; *State v. Conkle*, 16 W. Va. 736; *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791. In those cases it was held that the record must affirmatively show the presence of the accused at all stages of the trial. But in arriving at that conclusion the court very properly read that clause in connection with the constitutional inhibition of

a conviction without a trial by jury, and the testimony of the witnesses is an inseparable part of the trial. The assistance of counsel is a matter of a different kind. Both at common law and under our Constitution a trial in a felony case may be had without the assistance of counsel. The prisoner himself may be learned in the law, and skilled in its practice. Can it be said that it is the duty of the court, or was the intention of the framers of the Constitution, to compel a man to accept the assistance of counsel whether he desires it or not? Even in the case of the personal presence of the accused at the trial, the presumption of regularity operates to some extent. It is sufficient to show his presence at the commencement of the proceedings of any day, and, if the record does not affirmatively show his absence thereafter, his presence is presumed to have continued throughout the session.

Although it appears from the record that the jury were selected and tried, an assignment of error is predicated upon the failure of the order to say they were "good and lawful men," but it is not insisted upon in the argument. The record shows no objection to the jurors, or any of them, on the ground of incompetence or disqualification, and, as a rule, there is a presumption in favor of the regularity of the proceedings of a court of general jurisdiction. In felony cases there are some exceptions to the rule, but no reason is perceived why the record should affirmatively show these formal words. The observations hereinafter made respecting the oath of the jurors apply here with equal force.

Another objection is that the jury were not sworn to return a verdict according to the law and the evidence. The order recites that they were "sworn the truth to speak upon the issue joined." Under several decisions of this court this is sufficient. The record does not purport to set out the form in which the oath was administered, nor show anything which negatives the presumption that it was in the usual form. In *Lawrence's Case*, 30 Grat. 849, the order recited that the jury "were sworn the truth of and upon the premises to speak." *Moncure, P.*, delivering the opinion of the court, said: "And the effect is the same as if it had been said, that the jury were sworn 'well and truly to try and true deliverance make between the commonwealth and the prisoner at the bar, and a true verdict render according to the evidence.' The prisoner and his counsel were in court when the jury were sworn, and might and no doubt would, have objected, if the jury were not properly sworn. The fact that no objection was made shows that they were properly sworn. It is not necessary that the form of the oath administered to jurors on the trial of a felony case should be copied into the record. It is sufficient that the record shows they were duly sworn."

This language is quoted with approval by Johnson, P., in *State v. Sutfin*, 22 W. Va. 771, 773, and it clearly covers the objection raised here. The syllabus in *State v. Sutfin* says: "It is not necessary that the form of the oath administered to a jury in a felony case should be entered on the record. It is sufficient if the record shows that the jury were duly sworn." To the same general effect, see *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Russell v. State*, 10 Tex. 288; *Wrocklege v. State*, 1 Iowa, 168; *State v. Ostrander*, 18 Iowa, 436.

A further objection is that the jury were given in charge of the sheriff of the county and one of his deputies "with instructions to keep them together without communication with any other person, and not to speak to them relative to this trial." This is the recital of the record, which does not show the name of the deputy. This court cannot presume, in the face of the recital of the record, that the person to whom they were given in charge was not a deputy sheriff, and the name of the deputy is wholly immaterial, as any one of the deputies was a person qualified for such duty. The instructions to the officer, as recited in the order, were not in the language of the statute, but they substantially conformed to it so far as the order purports to set them out. No objection was made or exception taken for want of proper instructions, nor does the statute say the court shall give any instruction to the officer, though it is usually done, in the form of an oath administered to the officer. This court has decided that the oath is unnecessary, and imposes no additional obligation upon the sheriff. The law makes it his duty without any instruction from the court. *State v. Polndexter*, 23 W. Va. 805.

At the instance of the state several instructions were given over the objection of the defendant. As the propriety of giving them depends upon the character of the evidence, a brief statement of the material facts becomes necessary. Kellison's victim was Mrs. Julia A. Simmons, who was killed in her own dooryard, at about 10 o'clock at night, by a pistol shot fired by him, and which took effect in the right breast. Her daughter and several other persons were on the porch, but a few feet distant from the gate at or near which she and Kellison were standing when the shot was fired. But whether any of them actually saw what occurred between the accused and the deceased at the moment the shot was fired is not made clear by the evidence. Kellison was more or less intoxicated, and had come to the place a short time before the killing in company with Charles Apperson, another young man, in quest of two girls, Ess Clunen and Eliza Campbell. On the evening before they had called upon these girls at the home of Elizabeth Clunen, mother of Ess Clunen, and had possibly

arranged to see the girls at the same place on the evening of the homicide. Apperson says they had, but other witnesses state the contrary. At any rate, they went, and were informed upon their arrival that the girls had gone to Mrs. Simmons' that day to work, but would return that evening. After waiting for some time, Kellison and Apperson started to meet the girls, taking with them Jason Clunen, a young boy, and brother of Ess Clunen. Not meeting them, they went on to the premises of Mrs. Simmons, a distance of two or three miles. Instead of going to the house, they sent Jason Clunen in to tell his sister that her sister at home was sick, and that she must return at once. She started out, accompanied by Lucy Simmons, a daughter of the deceased, and, being in distress over the news, she was soon informed by her brother that her sister was not sick, but that the boys were down at the fence, and wanted to see her and Eliza Campbell, and take them back home. Later Apperson went to the house, but Kellison did not. The evidence shows that he was noisy, abusive, and indecent in his language, and fired one or more shots from his pistol while in conversation with the girls and Mrs. Simmons. He made threats against one John Edmiston, of whom he was jealous, saying he had come there to kill him. Mrs. Simmons had interposed an objection to the demand that the girls go home that night, and Kellison used abusive and offensive language toward her. It seems that at one time he retired from the fence near the house, but came back, and in the meantime Lucy Simmons had armed herself with a sword. Kellison was ordered to leave the premises, but, instead of going, he continued to make threats and use abusive and indecent language. Mrs. Simmons took the sword from the hands of her daughter and went to the gate, saying that she would protect her house and her children from him, or that she would make him leave. As stated, the daughter and others, including Ess Clunen and Charles Apperson, were on the porch, in front of which there were some hop vines, which may have obstructed the view of what transpired at the gate. They say, however, they heard Kellison order Mrs. Simmons to stand back, and that immediately afterwards the shot was fired, which killed her almost instantly. Apperson testifies that there was a cut on Kellison's hand, which might have been made by the sword. He had a ring on a finger of that hand, which also had an indentation, which might have been made in the same way.

The first instruction was objected to because it tells the jury they may believe or refuse to believe any witness, and that when passing upon the credibility of a witness they may take into consideration his interest in the matter in controversy and his demeanor upon the witness stand. It is said this instruction conveyed an intimation to the jury

that some of the evidence must be disbelieved, and that they might reject that part of it which was favorable to the accused. Though probably a little informal, the instruction states the law correctly, and, though there was very little conflict or inconsistency in the statements of the several witnesses, it is not perceived that the instruction could have had any such effect as is claimed. It does not refer to the evidence of any particular witness, and leaves all questions of credibility to the jury.

Instruction No. 2 told the jury that a reasonable doubt was not a vague or uncertain doubt, and that what the jury believe from the evidence as men, they should believe as jurors. This, taken in connection with the instruction given for the defendant, saying it was the duty of the state to prove the accused guilty beyond all reasonable doubt in order to convict, states the law with sufficient accuracy. They were told that their belief must be founded upon the evidence, and that a vague and uncertain doubt is not a reasonable doubt within the meaning of the law. How there could be any difference between their belief as men and their belief as jurors is not perceptible. Being jurors, they were still men, and the only belief possible is that which fastens itself upon the human mind, and they were told that it must be belief beyond all reasonable doubt. All the authorities say that reasonable doubt is difficult to define, but that its meaning is not difficult for a jury to comprehend. *State v. Sheppard*, 49 W. Va. 582, 609, 610, 39 S. E. 676. As the jurors were acting under oath, it cannot be assumed that they were men of such feeble understanding as to deem themselves relieved from the obligations thereby imposed by the terms of the instruction.

Instruction No. 3 told the jury that a man is presumed to intend that which he does, or that which is the immediate or necessary consequence of the act. As far as it goes, this is old and sound law.

Instruction No. 4 was, in substance, that if the jury believed the deceased had come to her death from a pistol shot at the hands of the accused, and he relied upon self-defense, the burden was upon him to show it by a preponderance of the evidence. This is good as far as it goes, and, if it is incomplete in any respect, the deficiency is supplied by the full instruction on the subject of self-defense given at the request of the defendant.

Instruction No. 5 is, in substance, the usual one to the effect that when a homicide is proven it is presumed to be murder of the second degree, and that the burden is upon the state to elevate it, and upon the prisoner to reduce it.

Instruction No. 6 is point 11 of the syllabus in *Cain's Case*, 20 W. Va. 679, which is as old, almost, as the criminal law.

Instruction No. 7 reads as follows: "The court instructs the jury that, to convict a per-

son of murder, it is not necessary that malice should have existed in the heart of the accused against the deceased, and if they believe from the evidence that the accused, with a deadly weapon, shot and killed the said Julia Simmons, the intent and the malice may both be inferred from such act." The court evidently meant to say that express antecedent malice is not a necessary element of the crime, and that proof of express malice was unnecessary, all of which is sound law; and it was certainly proper to say that, if the jury believed from the evidence that the accused had shot and killed the deceased, they might infer from the act both malice and the intent to kill. Though the instruction does say it is not necessary that malice should have existed in the heart of the accused against the deceased, this statement is qualified by what follows, and the instruction as a whole tells the jury that malice is an element of the crime; but that it may be inferred from the act of taking life with a deadly weapon, and the jury could not have reasonably construed it to mean more than that proof of express malice was unnecessary. It could have been more perspicuously stated, but verdicts are not set aside for rhetorical imperfections or awkward phraseology in instructions, when the meaning intended to be conveyed is clearly manifest.

Instruction No. 8 reads as follows: "If the jury believes from the evidence that the prisoner, Jerome Kellison, went to the home of Mrs. Julia Simmons with a deadly weapon for the purpose of committing a felony or some other illegal purpose, or that the prisoner formed that purpose after coming on the property of Mrs. Julia Simmons, he was from that moment a trespasser, and it was his duty to leave when ordered away by Mrs. Simmons; and Mrs. Simmons had a right to use all forces necessary to make the prisoner leave; and if the prisoner refused to leave after repeated orders to go from the deceased, and used abusive, insulting, and blackguarding language to her, and upon the deceased going towards the prisoner with a saber in her hand, from her front door, saying she intended to protect her home and children, and that the prisoner should leave, the prisoner continued to curse and blackguard the deceased and her family, refused to leave, and drew a pistol and shot and killed the deceased, they must find the prisoner guilty of murder in the first degree, unless they further believe from the evidence that the prisoner had reason to believe, and did believe, he was in imminent danger, and could not retreat without endangering his life, or great bodily harm." If it can be said that this instruction conveys an intimation that the deceased had the right to make a deadly assault upon the accused upon his refusal to leave, such intimation can be nothing more than a mere inference from the language used. The instruction does not say she had the right to kill or

main, but only that she might use such force as was necessary to compel his retirement from the premises. The other instructions given in the case, both for the state and the defendant, leave no room for any such inference. The jury were plainly and repeatedly told that, if he fired the shot under such circumstances as made it lawful to do so, naming them, although upon the grounds of the premises of the deceased, he was guilty of no offense; and also that if the prisoner was upon the grounds of the deceased without legal right, and using profane language, the deceased was not justified in attacking him with, or attempting to eject him by the use of, a deadly weapon. The instructions must be taken and read as a whole, and if, upon being so read and construed, they propound the law correctly, and do not misstate it in any particular, they afford no ground for setting aside the verdict. The last clause of the instruction propounds the law correctly. The accused was in fault. On this question there is no conflict in the evidence. He brought on the quarrel. Having done so, nothing could justify his taking the life of the deceased except the necessity of doing so in order to save his own life, or prevent the infliction upon him of great bodily injury. There are two grounds upon which a man may stand his ground, and, if need be, kill his adversary, when he has opportunity to escape by retreating. When the attack upon him is made with murderous intent, with a sufficient overt act, he is under no duty to fly. *Bish. Cr. Law*, § 850; *State v. Clark*, 51 W. Va. 457, 41 S. E. 204. When one is assaulted in his own dwelling house, he need not retreat, but he cannot take the life of his adversary unless it is necessary in order to save his own life or prevent other felony. *State v. Clark*, cited; *Bish. Cr. Law*, § 858; *Beard v. United States*, 158 U. S. 550, 15 Sup. Ct. 902, 39 L. Ed. 1086. Exceptions are taken to some clauses of the instruction on the ground that they are incorrect recitals of the evidence, but a careful examination shows that they are not recitals. They constitute a hypothetical statement of facts as to which there is evidence, leaving it to the jury to determine whether they are established.

As it does not appear that the court erred in any of its rulings, the judgment will be affirmed.

(119 Ga. 745)

SLATON v. STATE.

(Supreme Court of Georgia. March 29, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. No error of law was complained of, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Jack Slaton was convicted of crime, and brings error. Affirmed.

W. A. Slaton, for plaintiff in error. D. W. Meadow, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(119 Ga. 777)

PEEPLES et al. v. SETHNESS CO.

(Supreme Court of Georgia. March 29, 1904.)

JUSTICE OF THE PEACE—PROCEDURE—VERIFIED ACCOUNT—PLEA—DEFAULT—JUDGMENT.

1. Where a verified account is attached to the summons in a justice's court, and served on the defendant personally, the affidavit performs the office of evidence, and the plaintiff is entitled to a judgment, unless a verified defense is filed.

2. Suit on an unverified account may be met by an unverified plea.

3. But where a suit on an unverified account has been personally served, and the same is met by no defense whatever, the defendant's silence is to be treated as an admission of the correctness of every item in the account, and the plaintiff is entitled to judgment on the call of the docket, and without the case being assigned for trial.

4. Questions as to the description or misjoinder of the parties are concluded by the judgment.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Sethness Company against H. C. Peeples and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The Sethness Company brought suit on an account in a justice's court against the Southern Bottling Company and H. C. Peeples, which was personally served. There was no appearance for the defendants, and on the first day of the term and on the call of the docket the court rendered judgment for the plaintiff. The defendants presented their petition for certiorari, on the grounds (1) that the judgment could not be lawfully rendered without proof of the correctness of the account being first made by the plaintiff; (2) that judgment could not be rendered on the call of the docket without first assigning the case in its regular order; and (3) because it was not alleged whether the Southern Bottling Company was a partnership or a corporation and Peeples was improperly joined as a defendant. The court refused to grant the writ of certiorari, and the petitioners therefor excepted.

J. W. & J. D. Humphries, for plaintiffs in error. Mark J. McCoard, for defendant in error.

LAMAR, J. If, in a justice's court, the plaintiff attaches to his summons a verified account, and the same is served upon the de-

defendant personally, the affidavit as to the correctness of the account serves the office of evidence, which will be sufficient to make out the plaintiff's claim unless the same is met by a verified defense. An unverified account thus sued on may be met by an unverified plea. But where an unverified account sued on has been personally served, and is met by no defense whatever, the defendant's silence is to be treated as an admission of the correctness of every item in the account; "the case shall be considered in default," and the plaintiff is entitled to a judgment. *Parris v. Hightower*, 76 Ga. 631; Civ. Code 1895, §§ 5077, 5078. This judgment may be entered on the call of the docket, and as soon as the fact of default is ascertained.

Judgment affirmed. All the Justices concurring.

(119 Ga. 817)

MATHIS et al. v. GORDY.

(Supreme Court of Georgia. March 30, 1904.)

PUBLIC SCHOOLS—BOOKS—RENTAL CHARGE.

1. While the act of December 16, 1897 (Acts 1897, p. 90, § 8), empowers county boards of education to purchase schoolbooks and rent them to the pupils, it does not authorize them to compel the pupils to rent such books, and make the payment of the rental charge a condition precedent to admission to the schools, without regard to whether the pupils already have such books.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Mandamus by S. M. Gordy against J. B. Mathis, superintendent of schools, and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Blalock & Cobb and Hooper & Dykes, for plaintiffs in error. Shipp & Sheppard, for defendant in error.

SIMMONS, C. J. To an order granting a mandamus absolute against the school authorities of Americus, directing them to admit certain children to the schools without requiring them to pay certain rental charges for books, the defendants excepted. The question in the case is whether, by section 8 of the act of December 16, 1897 (Acts 1897, p. 90), the school authorities were authorized, where they had purchased the books needed for the schools and offered to rent them to the pupils, to make the payment of the rental charge a condition precedent to the admission of a child, without regard to whether he was already possessed of the books needed. The act above mentioned authorizes the proper school authorities to purchase such books as may be needed or adopted for the schools, and then sell them to the patrons and pupils of the schools. Section 3 then provides "that in cases where said boards of education shall purchase the books needed in said schools under their control, as

herein provided for, they may rent the same to the pupils at such fees or for such charges as they may deem just and proper, and the boards may make all proper rules to insure the payment of said fees and charges and proper care in the preservation of said books." The judge below held that the proper construction of this act did not authorize the school authorities to make the renting of the books a condition precedent to admission to the schools, but that, while such authorities may purchase the books, and rent them to the pupils, adopting rules and regulations to insure the collection of the rental charges and the preservation of the books, "yet should a parent, as in the present case, whose children are otherwise entitled to be admitted to the educational privileges of said schools, supply such children with such books and stationery as are necessary for the use of such children under the regulations of such school, such children would be entitled to registration and admittance to said schools without the payment of such rental fees or charges." We think that the judge below properly construed the act in question. While the act conferred upon the school authorities full power to purchase the books and rent them out, it did not contemplate a compulsory renting. It authorized the rental, but did not authorize the school authorities to compel the pupils to rent. The rules the school authorities were authorized to make were not such as required the pupils to rent books, but such as would secure the payment of the rental charges by those who did rent, and insure the preservation of the books. The act did not contemplate a regulation that each pupil must rent his books from the school authorities even though he already has all the books he will need, or is required to have by the regulations of the school. The act did not, expressly or by implication, authorize the school authorities to compel the pupils to rent.

One of the questions argued in this court and in the court below was whether the act would be unconstitutional if a contrary construction were given it. This question was not passed upon by the judge below because its decision was rendered unnecessary by his construction of the act. For the same reason we also find it unnecessary to decide the question.

Judgment affirmed. All the Justices concurring.

(119 Ga. 808)

BALLARD v. PARKER.

(Supreme Court of Georgia. March 29, 1904.)

ERROR—AFFIRMANCE—CERTIORARI—RECORD.

1. The answer of the justice of the peace does not set forth the evidence introduced on the trial of the case, nor verify that contained in the petition for certiorari; and, as none of the assignments of error can be properly considered and determined without a reference to the ev-

idence, an affirmance of the judgment overruling the certiorari necessarily results.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action between F. D. Ballard and L. B. Parker. From a judgment affirming a certiorari, Ballard brings error. Affirmed.

James F. Rogers, for plaintiff in error. H. D. Meador, for defendant in error.

OOBB, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 812)

PERRY et al. v. BRUNSWICK & W. RY. CO.

(Supreme Court of Georgia. March 30, 1904.)

ERROR—REVIEW—CERTIORARI—RAILROADS—LIABILITY OF LESSOR—SERVICE OF SUMMONS.

1. In reviewing a judgment of a judge of the superior court overruling a certiorari, questions which might have been made in the inferior judicatory, but which are not referred to in the petition for certiorari, will not be considered.

2. The act of December 20, 1899 (Acts 1899, pp. 54, 55, § 1), providing that in certain cases railroad companies which have leased their property or lines of railroad may be held liable for claims against the lessee, does not contemplate that service upon the agent of the lessee will amount to service upon the lessor. While the act imposes a liability on the lessor, such lessor should be properly served.

3. Where in such a case the sheriff makes a return of service which is traversed by the defendant (the lessor), the latter may introduce evidence to show that no service was in fact made upon it.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by T. D. Perry and others against the Brunswick & Western Railway Company. Judgment for defendant on overruling of certiorari in the superior court, and plaintiffs bring error. Affirmed.

Claude Payton, for plaintiffs in error. D. H. Pope and Perry & Tipton, for defendant in error.

SIMMONS, C. J. Suit for damages was brought in the county court of Worth county against the Brunswick & Western Railway Company. The sheriff made a return of service, which was traversed by the defendant. Upon the hearing of the issue thus made, the court decided in favor of the defendant. The plaintiff sued out a writ of certiorari, and on the hearing in the superior court the certiorari was overruled. The plaintiff excepted.

1. In one of the exceptions taken to the ruling of the judge of the superior court, the plaintiff in error seeks to raise the question whether the traverse filed in the county court by the defendant was insufficient, in that it was not signed by any one. The record shows that, while there was no signature to the body of the traverse, the attor-

ney at law of the defendant subscribed the affidavit thereto. This would seem sufficient (see *Neal v. Fox*, 114 Ga. 164, 39 S. E. 860), but, whether it is or is not, the point is not properly before this court for determination. The petition for certiorari did not show, or even intimate, that any such question was made or passed upon in the county court, or suggest that the traverse was insufficient in the matter now pointed out. The plaintiff in error cannot, by bill of exceptions, raise points which were not made in the county court or in the certiorari. The judge of the superior court had no authority to consider any rulings of the county court which were not assigned as error in the petition for certiorari. Civ. Code 1895, § 4650; *Fouché v. Morris*, 112 Ga. 143, 37 S. E. 182; *Brown v. Alexander*, 112 Ga. 247, 37 S. E. 368. In reviewing his decision, this court is confined to points which were properly before him.

2. From the evidence introduced in the county court, it appears that the defendant, the Brunswick & Western Railway Company, had once run and operated a railroad which ran through Worth county, but had in July, 1901, transferred its property and franchises to another company, and had since that time done no active business in the county. The present suit was filed in September, 1902, and the injuries set out in the petition were alleged to have been inflicted in April, 1902. The sheriff served the suit by leaving a copy with the agent in the railroad office at the depot in Sylvester, Ga. The evidence showed that this agent had been employed by the defendant while it operated the railroad, and prior to July, 1901, but had not been in its employment since that time; being at the time of the service employed by the company to which the defendant had transferred its property and franchises. It also appeared that the office at the depot above mentioned was not at the time of the service the office of the defendant, but of the other company. This evidence makes it very clear that there was no service upon the defendant or its agent. Counsel for the plaintiff relied, however, upon the act of December 20, 1899 (Acts 1899, pp. 54, 55, § 1). This act provides that a railroad company which leases its property or line of railroad to another person shall have the "contract of lease or other contract of like nature, evidencing the change of control and possession," recorded in the clerk's office of the superior court in each county through which the line of road may run. It then provides that "any such railroad refusing or failing so to do, will authorize any person having a right of action against said railroad, or the lessee or lessees thereof, * * * to file and prosecute said action against said railroad company in all respects as if the same were the proper party defendant, and any plea or other defense attempting to shift liability to such lessee or lessees or denying control or possession of such property or line of road shall not avail to

protect any such railroad against liability that falls or refuses to record as provided." It is at least doubtful if this act is applicable to the defendant in the present case, for the act deals with railroad companies which have leased their lines, while the defendant appears to have transferred to another all of its property and franchises. Conceding, however, that the act would apply in such a case, the judgment of the court below was still correct. The act does not provide that a railroad company sued under its provisions need not be served, nor does it prescribe that service on the lessee shall amount to service on the lessor. It does not deal at all with the question of service, but simply fixes liability. If, under this act, the plaintiff may recover against the defendant, it is still true, under the general law, which is not changed by this act, that the defendant must be served. Even if the defendant was properly sued, it was not served. There was no service upon it or its agents, and the traverse of the sheriff's return of service was properly sustained.

3. Complaint was made of the admission of the defendant's evidence as to the transfer of its property and franchises, and as to the control of the office and the employment of the agent with whom the copy of the suit was left. Objection was made to this evidence on the ground that, under the act above quoted, the defendant was estopped to show nonliability or to shift the liability to the lessee. From what has been said just above, it will be seen that this objection was properly overruled. This evidence was not introduced to show that the defendant was not liable to the plaintiff, but for the purpose of showing that there had been no service upon it. For this purpose it was clearly admissible.

Judgment affirmed. All the Justices concurring.

(19 Ga. 752)

COOPER v. NISBET.

(Supreme Court of Georgia. March 29, 1904.)

BILL OF EXCEPTIONS—FILING—EVIDENCE—REBUTTAL—INSTRUCTIONS—NEW TRIAL.

1. It is essential to the legal filing of a bill of exceptions, or other paper which the law provides may be filed in the office of the clerk of a court, that the intention to place the paper on file be in some intelligible manner communicated to the clerk or his deputy by the party desiring to have the paper filed.

2. Where a witness (the deputy clerk of a court) testifies that it his custom to make a pencil memorandum on a certain class of papers filed with him, and that a paper of that class involved in the suit had no such memorandum on it at a certain time, it is not competent to rebut such testimony by proof that a paper of a different class in the same suit had no memorandum on it; there being no evidence that such latter paper had ever been filed.

3. The failure to give instructions to the jury not demanded by the evidence will, in the absence of a written request to so charge, in no event be cause for a new trial. Especially is this true where the principle of law invoked by

the complaining party is in fact charged substantially by the trial judge.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by John R. Cooper against Robert A. Nisbet. Judgment for defendant, and plaintiff brings error. Affirmed.

Hardeman & Jones, Ross & Grace, and Davis & Turner, for plaintiff in error. Jno. R. L. Smith, for defendant in error.

CANDLER, J. This was a petition for mandamus, addressed to the judge of the superior courts of the Macon circuit. The petition alleged that on June 13, 1903, in a case pending in Bibb superior court in which the petitioner was plaintiff, the judge of that court signed a writ of error sued out by the petitioner, returning it to his counsel on June 15th, on which day service of the bill of exceptions was acknowledged by counsel for the opposite party; that, immediately after obtaining the acknowledgment of service of the bill of exceptions, counsel for petitioner "carried said bill of exceptions * * * to the office of the clerk of the superior court of said county, and in person delivered said bill of exceptions to B. J. Holt, the deputy clerk, and thereby lodged said bill of exceptions in the office of the said clerk for filing and transmission to the Supreme Court; that on August 4, 1903, the clerk certified and transmitted the bill of exceptions and a transcript of the record in the case to the Supreme Court, but failed and neglected to mark said bill of exceptions as of file in his office on June 15, 1903"; that petitioner applied to the Supreme Court for a writ of mandamus to require the clerk to mark the bill of exceptions "Filed," and that that court passed an order directing the bill of exceptions to be retransmitted to Bibb county in order that appropriate proceedings might be had in the superior court of that county to determine the true date of such filing. The prayer of the petition was that the clerk be commanded to show cause why he should not be required nunc pro tunc to mark the bill of exceptions as of file June 15, 1903. The respondent answered, denying that the bill of exceptions had been lodged for filing in his office on June 15, 1903, and averring that his failure to mark it as of file on that date was due not to negligence, but to his refusal to do so. On this disputed issue of fact the case was submitted to a jury, who found for the respondent. The plaintiff moved for a new trial, and to the overruling of his motion he excepted.

As to the material issues the evidence introduced at the hearing was directly conflicting. One of the attorneys for the plaintiff testified positively that on June 15, 1903, after the bill of exceptions had been certified by the trial judge, and service thereof had been acknowledged by opposing counsel, he took it

to the office of the clerk of the superior court; that the clerk was not in, but his deputy, Holt, was; that witness delivered the bill of exceptions to Holt, calling his attention to it, and remarking: "Mr. Holt, here is another William" (meaning a bill of exceptions); that Holt took it and opened it; and that, as witness was in a hurry, he left the office immediately. This testimony was emphatically contradicted by Holt, who testified that the attorney did not leave the bill of exceptions with him on the date mentioned, and that it was found for the first time in the files of the office on July 29, 1903. How or when it came into the files, no one connected with the office seemed able to explain.

The motion for a new trial contains numerous grounds, but several of them complain of charges or refusals to charge which relate to the same point. We shall therefore not deal with each ground of the motion separately, but rather with the different questions raised by the various grounds.

1. Error is assigned upon the charge of the court to the effect that, to constitute a legal filing, it is necessary that the paper be tendered to the clerk or his deputy "with directions that the same be filed in the case." As explanatory of this instruction, the judge further charged: "To illustrate what I mean, an attorney cannot put a paper among a lot of papers, and carry the whole bundle to the clerk's office and hand them to the clerk, and expect the clerk to seek out from that bundle papers that have not been filed, and enter the fact that they were filed upon them. That does not constitute, in law, a legal filing." Complaint is also made of the refusal of the court to charge, as requested, that "it is not necessary that the party who tenders to the clerk for filing a paper should in terms request the clerk to file such paper. It is sufficient for a party to tender the paper to the clerk and call his attention to what it is, and it is then his duty to file it, if it is a paper such as he is required to file in office." We do not construe the language of the court below, to the effect that, to constitute a legal filing, a paper must be tendered to the clerk or his deputy with directions that it be filed, to mean that, in filing a paper, one must use express words of command or instruction, but, rather, that the clerk must in some way be acquainted with the intention of the party to file the paper. So construing it, we hold that the charge is free from error. It is not enough that the clerk know the character of the paper tendered to him. There should, in simple justice to him, be something to put him on notice that the exercise of his official duties is required. And in a broad sense, any words or conduct which will bring home to him notice of an intention to file may be termed a direction that the paper be filed. To hold that filing is a purely physical act, which may be accomplished without intention, or the communication of that intention,

would, in our opinion, be almost an absurdity, and would open up possibilities for many grotesque errors and numerous hardships to both litigants and clerks. The true rule, we think, is that stated by the Illinois court in the case of *Hamilton v. Beardslee*, 51 Ill. 478, that, to constitute a legal filing, the paper must pass into the custody of the clerk, "and that the object be communicated to him in some manner capable of being understood." See, also, *Pfirman v. Henkel*, 1 Ill. App. 145; *Boyd v. Desmond*, 79 Cal. 250, 21 Pac. 755; *Phillips v. Beene*, 38 Ala. 248. And in the case of *Jolley v. Rutherford*, 112 Ga. 342, 37 S. E. 358, it was held that where papers were left on the clerk's desk, and his attention was not called to the fact that they were so left or that there was any intention to file them, there was no legal filing. That, it is true, is not this case; but the following language of Mr. Presiding Justice Lumpkin (page 344, 112 Ga., page 359, 37 S. E.) bears closely upon the question now under discussion: "It is scarcely reasonable to expect a clerk to duly file papers left upon his desk or elsewhere in his office, when his attention is not in some way directed to the fact that the person depositing them in or upon his office furniture wishes him to assume charge thereof and file the same." As laying down a different rule from the one now announced, the cases of *Floyd v. Chess-Carley Co.*, 76 Ga. 752, and *McDaniel v. Columbus Fertilizer Co.*, 109 Ga. 284, 34 S. E. 598, are cited by counsel for the plaintiff in error. A careful reading of these cases, however, will show that they do not support this contention, and that they are in entire harmony with what is here laid down. In both of these cases the papers were placed in the custody of the clerk with the expressed intention of filing them, and in neither was there any question raised as to the communication to the clerk of the parties' intention to file the papers. The *Floyd Case* simply holds that, where affidavits to foreclose laborers' liens were in fact filed in the office of the clerk, the failure of the clerk to mark them "Filed" did not authorize the dismissal of the executions issued on them. It is, of course, quite plain that, where a party has in reality filed a paper, his rights will not be prejudiced by the failure of the clerk to perform the purely clerical duty to mark it "Filed"; but this has no bearing on the question of what constitutes a legal filing. In the *McDaniel Case*, the second headnote reads as follows: "Causing a bill of exceptions to be actually placed in the hands of the clerk of a trial court within the time prescribed by law for filing the same in his office is all that is, in this respect, required of a plaintiff in error or his counsel." It appeared in that case that the clerk received the bill of exceptions by mail, that he was at the time sick in bed, and that when he returned to his office, several days

later, he marked the bill of exceptions "Filed" as of the latter day. The question involved was not whether there had been a legal filing, but whether the clerk should have marked the paper "Filed" as of the date that it reached him, or the date when he returned to his office. It will be seen at a glance that this ruling does not affect the question whether, to constitute a legal filing, it is necessary that the party tendering the paper to the clerk shall call the attention of the latter to his intention to file.

2. Holt testified that it was his invariable custom, when a bill of exceptions was filed with him, to make a pencil memorandum on it and hand it to the clerk, and that there was no such memorandum on the bill of exceptions involved in this case when it was found in the files. For the purpose of rebutting or impeaching this testimony, the plaintiff offered in evidence a motion to dismiss the certiorari made when the case was pending in the superior court, together with the order of the court overruling the motion; it appearing that there was no pencil memorandum or entry of filing on this paper. The rejection of this evidence is assigned as error in the motion for a new trial. This complaint is obviously without merit. Even admitting that it had been filed in the clerk's office, it was not a bill of exceptions, and had no probative effect whatever on the witness' testimony as to what his custom was with reference to bills of exceptions. Regardless of this, however, there was not a particle of evidence that the motion to dismiss had ever been filed in the clerk's office; but, to the contrary, there was positive evidence that it had not been filed. The only basis for its introduction was that it was taken from a bundle of papers containing the record in the case which had been handed by the clerk to one of the attorneys. It is not, of course, competent to prove the filing of a paper by introducing another paper in the same case which bears a physical similarity to it, but which, as to filing, is not shown to be on any different footing from the paper the filing of which is sought to be proven.

3. Error is also assigned on the failure of the court to charge that the finding of the bill of exceptions in the filing case in the clerk's office, with other papers in the case to which it related, would show prima facie that it had been filed with the clerk, and would put the burden on him of showing that it had not been filed, but came into the filing case in some other way than by having been filed. It does not appear that any written request to charge on this subject was made on the trial. The motion also complains of the charge which the court actually gave on this subject, which was as follows: "If you believe the fact to be true that the bill of exceptions introduced in evidence in this case was found in the filing case with the other papers in the case, you may take, if you see proper to do so, that

evidence, together with the other testimony in the case, for the purpose of determining the true question in the case at issue between these parties—as to whether or not, in point of fact, Mr. Jones tendered that bill of exceptions to Mr. Holt to file it." We see nothing in this charge of which the plaintiff can justly complain; nor, indeed, is there an appreciable variance between it and the instruction which it is contended the court should have given, but failed to give. The charge as given, we think, states more correctly the principles of law and the rule of evidence applicable to the case than that which the plaintiff insists should have been given without request.

The foregoing disposes of every material issue raised by the record. Other grounds of the motion complain of the failure of the court to give certain instructions alleged to have been pertinent to the case, but, as there was no written request by counsel to give these instructions, and as they were not demanded in the absence of such a request, the failure to give them will not be held ground for a new trial. The judge's charge, taken as a whole, was eminently fair, and correctly stated the principles of law applicable to the case, and whatever inaccuracies it may have contained were not of sufficient materiality to require the grant of a new trial. As before pointed out, the evidence was sharply conflicting on the vital points at issue. The jury resolved this conflict in favor of the defendant, the trial judge was satisfied with their finding, and this court will not interfere with his order overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(119 Ga. 305)

CULBERSON v. STATE.

(Supreme Court of Georgia. March 30, 1904.)

WEAPONS—CARRYING TO HOUSE OF WORSHIP.

1. An accusation which charged the accused with carrying a pistol about his person to a place of public worship, the same being a designated church, where a congregation was then assembled for public worship, was not supported by proof that he came into possession of the weapon at a spring from which the congregation was using water, and which was so near the church as to be, in legal contemplation, at the church. "Coming into possession of a pistol at a place of public worship is not carrying a pistol to a place of public worship."

(Syllabus by the Court.)

Error from City Court of Hamilton; J. B. Burnside, Judge.

Anderson Culberson was convicted of carrying a pistol to a church, and brings error. Reversed.

B. H. Walton, for plaintiff in error. R. A. Russell, Sol., for the State.

FISH, P. J. An accusation was preferred against Anderson Culberson in the city court of Hamilton, charging that on July 19,

1908, in Harris county, he carried "about his person a pistol to a place of public worship; the same being Jehovah Colored Baptist Church, Whitesville, Ga., where a congregation was then assembled for the purpose of public worship." Upon the trial the evidence for the state was to the effect that, on the day named, a congregation was assembled at such church for public worship; that there was a public spring about 200 yards from the church, but not on the church ground, where it was customary for the congregations which assembled at this church to get water, there being no other source of water supply; that during the noon recess, when many of the congregation were going to and fro between the church and the spring, the accused was seen with a pistol in his hand, going from the direction of the spring towards the church, and that he so carried it to within 15 or 20 steps of the church; that when asked, at the time, by several of the witnesses, what he was doing with the pistol, he replied that he had taken it from a man by the name of Hodo at the spring, and, at the request of one of the witnesses, he immediately turned it over to him. The accused introduced no testimony, but made a statement in which he said that he took the pistol from Hodo at the spring because Hodo seemed to want to shoot some one with it, and that he (the accused) carried it in his hand towards the church till Hood, one of the state's witnesses, asked him for it, when he delivered it to him. The jury found the accused guilty. He moved for a new trial upon both general and special grounds. His motion was overruled, and he excepted.

Pen. Code 1895, § 342, makes it a misdemeanor for any one, except certain designated officers of the law, to carry about his person a pistol, or any kind of deadly weapon, to any place of public worship, or any other public gathering, in this state, except militia muster grounds. The declaration of the accused, to the effect that he took the pistol from another person at the spring, made while he was in the act of carrying the weapon, was a part of the *res gestæ* of the transaction, and, moreover, was put in evidence by the state. There was nothing to show that it was not true. The question, therefore, is whether the accused, having become possessed of the pistol at the spring, which was 200 yards from the church, and having carried it to within 15 or 20 steps of the church, was guilty of the offense charged. In *Modesette v. State*, 115 Ga. 582, 41 S. E. 992, it was held that "one who goes to a public gathering, having no pistol upon his person at the time he arrives at the place where the gathering is to be, and, after having reached there and mingled with the other persons assembled, becomes possessed, innocently or designedly, lawfully or unlawfully, of a pistol, is not guilty of any offense under this section [Pen. Code 1895, § 342],

although after having become possessed of the pistol he may retain possession thereof, and move about from place to place, and use the pistol for purposes of offense or defense. Coming into possession of a pistol while at a public gathering is not carrying a pistol to a public gathering." In *Minter v. State*, 104 Ga. 743, 30 S. E. 989, it was held: "A charge in an indictment that the accused disturbed a congregation of persons lawfully assembled for divine service 'at' a named church is sustained by proof that he disturbed a congregation so assembled for such purpose at a bush arbor near such church; both places being within the jurisdiction of the court." There it appeared that the bush arbor was 175 or 200 yards from the church. So, in *McCrigh v. State*, 110 Ga. 261, 34 S. E. 368, it was held: "An indictment which charged the accused with disturbing an assemblage of a public school at a named schoolhouse was supported by evidence showing that, though the assemblage of the school which was disturbed was not in the school building, it was at a bush arbor near thereto." The record in that case shows that the arbor was from 75 to 100 yards from the schoolhouse. According to the rulings made in these last two cases, we think that the spring which was so near the church, and from which the congregations which there assembled were in the habit of procuring water, should be held, in contemplation of the statute alleged to have been violated, to be at the place of public worship. Although the services in the church building had been temporarily suspended for the purposes of rest and refreshment, the people who had assembled at the place of public worship, and who at the time of the alleged violation of the statute by the accused were going to and fro between the church and the spring for the purpose of getting drinking water, were still a part of the "public gathering" which had assembled for public worship; and it is the "public gathering," and not the precise spot where the services or proceedings for which it has assembled may be held, which the law intends to protect. The law throws its protection around the "public gathering," whether the same be assembled at a court of justice, an election precinct, or ground, a place of public worship, "or any other [place] of public gathering in this state." And this protection continues until the public gathering has finally dispersed. A mere temporary cessation of the services or exercises at a country church or schoolhouse, during which the people composing the public gathering which has assembled there scatter about the grounds for the purpose of eating their lunches, getting drinking water, caring for their horses, etc., does not so terminate the public gathering as to render it not unlawful for a person to carry a deadly weapon about his person to the place or grounds where the gathering has assembled. Hence one who, during such

an intermission of the services or exercises, carries a pistol about his person to a point so near the precise spot where the services or exercises are held as that he will come in contact with a considerable portion of the people who constitute such public gathering, during the time that the assemblage for the purpose which has brought the people together may be said to still exist, violates this section of the Penal Code. It is he who thus brings the weapon to the public gathering, and not one who may there become possessed of it, who violates this statute. When the accused took the pistol from another at the spring, he, in effect, came into possession of it after it had been carried to the place of public worship; and, under the case of *Modesette v. State*, supra, he was not guilty of the offense charged, and the court erred in not granting a new trial on the general grounds of the motion.

Judgment reversed. All the Justices concurring.

(119 Ga. 778)

THOMAS v. H. C. BAGLEY & CO.

(Supreme Court of Georgia. March 29, 1904.)

NOTE.—SEPARATE AGREEMENT—EVIDENCE—DEFOULATIONS OF AGENTS.

1. In an action on an unconditional promissory note, a separate agreement signed by special agents of the holder in their individual capacity, and which does not purport to bind the holder, by the terms of which it is stipulated that if, at the maturity of the note, the maker is unable to pay it, he may surrender the life insurance policy for the premium of which it was given, and cancel the note, is not admissible in evidence to bind the holder.

2. Nor, in such a case, is it competent to prove, as a part of the *res gestae* of the transaction, declarations of the special agents that their representations were made by authority of their principal; these representations having been reduced to writing, and the writing showing on its face that it bound only the agents in their individual capacity.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. B. Thomas against H. C. Bagley, trading under the name of H. C. Bagley & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Felder & Rountree, for plaintiff in error. H. W. Dent and Mark J. McCord, for defendant in error.

FISH, P. J. This was a suit on a promissory note for \$241.50, brought against W. B. Thomas, as maker, by H. C. Bagley, trading under the name of H. C. Bagley & Co., the payee. The defendant admitted the execution of the note and his refusal to pay it, and denied his indebtedness thereon. He averred that the note was given for the first premium on a policy of life insurance issued to him by the Penn Mutual Life Insurance Company; that the insurance was solicited by two agents of the plaintiff, Laird

and Nelms, who were desirous of having him take a policy in their company, in order that certain of his employes might be influenced to take policies also; and that at the time they took his application they entered into a written agreement with him as follows: "Atlanta, Ga., January 1st, 1902. This agreement witnesseth that we agree with W. B. Thomas that if his note, given this day for \$241.50, premium on policy No. 200, 357, in the Penn Mutual Life Insurance Company, due at six months, is not paid, or his condition is such that he cannot pay same, he may surrender said policy and cancel said note. L. J. Laird, T. H. Nelms." The answer further set up that when the note matured the defendant offered to surrender the policy to the plaintiff, and demanded, in pursuance of the agreement already set out, that the policy be accepted and his note canceled. This demand was refused, and, because of the facts set out, he denied indebtedness. On the trial (the execution of the note, as before stated, having been admitted, and the defendant having assumed the burden of proof) the only evidence introduced was that of the defendant, which was substantially in accord with the averments of his plea. The court, on motion, directed a verdict for the plaintiff for the full amount sued for. The defendant made a motion for a new trial, which was overruled, and he excepted.

1. The assignment of error mainly relied on in this court is based on the refusal of the court to admit in evidence the agreement made by Laird and Nelms with the defendant, which was set out in the plea, and to which we have already referred. It appears that the first time the existence of this agreement came to the knowledge of the plaintiff was after the maturity of the note sued on, and after the policy of insurance for the premium of which it was given had been in force for six months. It also appears that Thomas, the defendant, was aware that Laird and Nelms were special agents, appointed for the sole purpose of soliciting insurance and collecting the premiums thereon by taking either notes or money. No principle of law is better established than that persons dealing with an agent appointed for a particular purpose are bound to inquire as to the extent of his authority. The application for insurance, and the policy issued thereon, contained the terms of the contract between the defendant and the company for which the plaintiff was general agent. The sayings of neither of them were admissible to change that contract. The note taken by Laird and Nelms, and payable to the plaintiff, expressed the contract between the defendant and the plaintiff, by the terms of which time was given to the defendant for the payment of the first annual premium. The agreement sought to be introduced in evidence, although made contemporaneously with the note, was clearly

an individual undertaking on the part of Laird and Nelms, neither of whom was a party to the note sued on. It did not purport to bind the plaintiff in any way, and it was wholly irrelevant on the trial of this case.

2. Nor was it material to inquire how far Bagley, as principal, was bound by the representations of Laird and Nelms, his special agents, because the agreement made by them is clear and unequivocal, and in no way involves the plaintiff. It does not even purport to have been made by Laird and Nelms as agents of Bagley, but was clearly their own act, done in their individual capacity. If the defendant, who appears to have had the benefit of the life insurance for the full period represented by the premium for which the note was given, has been damaged in any way, his remedy would seem to be against Laird and Nelms for a breach of their contract. Civ. Code 1805, § 3041. The defendant sought to prove by declarations of Laird and Nelms made prior to the delivery of the policy and the signing of the application, the note, and their private agreement, that in making that agreement they were acting within the scope of their authority as agents of Bagley. There are several good reasons why this evidence was inadmissible. It is well settled that an agency cannot be established by proof of declarations of the alleged agent. In this case the declaration as finally made was in writing, and this writing, as has been seen, did not purport to be an agreement in any but their individual capacity. This case is clearly distinguishable from that of *Williamson v. Tyson*, 105 Ala. 644, 17 South. 336, where it was held that declarations of a party assuming to act as agent for another are admissible as *res gestæ* to establish the agency where the principal is suing on the contract, and thereby ratifying the methods used by the party in securing it. Here all the representations made were reduced to writing, and this writing showed on its face that the agreement in question was the individual act of the parties making it. In order to constitute a ratification, it is necessary that the party should have knowledge of the act that he is ratifying, and in this case it appears that the first intimation the plaintiff had of the separate agreement made by Laird and Nelms was when it was exhibited to the agent who presented the note for collection. If Bagley had accepted the note with knowledge of this separate agreement, though not expressly countenancing it, his conduct might have constituted such a ratification of the means used by Laird and Nelms to secure the note as to prevent him from recovering on it. That, however, is not this case. There is likewise nothing in conflict with this ruling in the case of *Andrews v. Robertson* (Wis.) 87 N. W. 190, 54 L. R. A. 673, 87 Am. St. Rep. 870, where it was held that the holder of a promissory note, taken for him

of the maker by an agent upon a condition not disclosed to such holder, and outside the scope of the agent's authority, cannot repudiate the condition and insist upon holding and enforcing the note, but that he is bound, if he does not intend to abide by the condition, to restore or offer to restore the note within a reasonable time after discovering the facts. It can be seen at a glance, without giving the facts upon which the ruling was based, that the holder of the note had full knowledge of the facts and the circumstances under which his agent obtained the note, and this clearly distinguishes it from the case at bar. We think it is clear that Thomas could not testify to declarations made by Laird and Nelms which contradicted the written agreement made by them, even though it should be held that their declarations were admissible to bind the plaintiffs, as having been made contemporaneously with the execution of the note, and as part of the *res gestæ* of the transaction involved. See *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Holland v. Van Bell*, 89 Ga. 223, 15 S. E. 302; *Harris Co. v. Elliott Co.*, 110 Ga. 302, 34 S. E. 1003.

Judgment affirmed. All the Justices concur

(119 Ga. 801)

WOOD et al. v. CALLAWAY.

(Supreme Court of Georgia. March 29, 1904.)

SUMMONS—RETURN—PERSONAL SERVICE—TRAVERSE.

1. A return of service of a justice court summons which alleges that the constable served the defendant "by serving him at his most notorious place of abode, * * * personally, by calling at the door" of his residence and handing the summons to a man who answered to the name of the defendant, is a return of personal service.

2. A finding by a jury in favor of a traverse to such a return is demanded, when the evidence shows that no personal service was had upon the defendant, even though it may also appear from the evidence that service was perfected by leaving a copy of the summons at his usual and most notorious place of abode.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by I. M. Wood and others against R. C. Callaway. Judgment for defendant. From an order of the superior court overruling a certiorari, plaintiffs bring error. Affirmed.

W. J. Speairs, for plaintiffs in error. Bishop & Ripley, for defendant in error.

COBB, J. A justice court summons was sued out against Callaway, and the constable returned the summons, with an entry thereon that he had served a copy thereof upon the defendant personally. The defendant not having appeared, judgment was entered against him. During the pendency of a garnishment which had been issued on the judgment, the defendant made an affidavit trav-

ersing the return of service. When the issue made by the traverse came on for a hearing before a jury in the justice's court on appeal, the constable amended his return of service as follows: "I served R. C. Callaway by serving him at his most notorious place of abode, to wit, at No. 314 Luckie street, Atlanta, Georgia, on October 18, 1898, personally, by calling at the door; and a man came to the door and answered to the name of R. C. Callaway, and I handed him the copy of the suit." On the trial the undisputed evidence showed that the defendant was not in Atlanta on the day when the service was purported to have been made, and also that the constable did leave a copy of the summons at the defendant's residence, by handing the same to a person who came to the door. The jury found in favor of the traverse, and the judge of the superior court overruled a certiorari sued out by the plaintiff in the suit and the constable jointly. They excepted.

Service of a justice court summons may be made by handing the defendant a copy of the same in person, "or by leaving such copy at his usual and most notorious place of abode." Civ. Code 1895, § 4118. If, therefore, the amended return of the constable is to be construed as a return of personal service, then the undisputed evidence showed that no such service was made, and the traverse was properly sustained. On the other hand, if such amended return is to be construed as a return of service by leaving a copy at the usual and most notorious place of abode of the defendant, then the uncontradicted evidence showed that such service was made, and the verdict of the jury in favor of the traverse cannot be sustained. We think it clear that the amended return was a return of personal service. The constable does not aver that he served the defendant by leaving a copy at his usual and most notorious place of abode, as the statute requires, but he alleges that he served the defendant "by serving him at his most notorious place of abode, * * * personally by calling at the door," etc. Evidently the constable intended by the amendment simply to amplify and explain his original return. He had construed his act in handing a copy of the summons to a man who answered to the name of the defendant to be personal service on the defendant; and he amended by simply setting forth what he actually did, and expressly averred this to be personal service. Inasmuch as the evidence showed that there had been no personal service on the defendant, the jury properly sustained the traverse, and the judge of the superior court properly overruled the certiorari. It is wholly immaterial that there may have been a good service upon the defendant by leaving a copy of the summons at his residence. In order for the court to obtain jurisdiction of a defendant, he must not only have been served in the manner pointed out by law, but there must be a legal return of such service. Callaway v. Douglasville College, 99 Ga. 623,

25 S. E. 850; News Printing Co. v. Brunswick Publishing Co., 113 Ga. 160, 38 S. E. 333.

Judgment affirmed. All the Justices concurring.

(119 Ga. 804)

AUGUSTA SOUTHERN R. CO. v. CITY OF TENNILLE.

(Supreme Court of Georgia. March 29, 1904.)

MUNICIPAL CORPORATIONS—ACTION—CORPORATE NAME.

1. The act of December 15, 1900, incorporating the city of Tennille, in express terms declares that no suit shall be brought against that municipality save in its corporate name, to wit, "The City of Tennille." Acts 1900, p. 448, § 3.

2. It follows that a petition brought apparently with a view to seeking relief as against that municipal corporation, but in which process is prayed against the "Mayor and Council of the City of Tennille, a corporation," is not maintainable. *Boon v. Mayor & Council of Jackson*, 25 S. E. 518, 98 Ga. 490; *Town of Dexter v. Gay*, 42 S. E. 94, 115 Ga. 765.

(Syllabus by the Court.)

Error from Superior Court, Washington County; H. M. Holden, Judge.

Action by the Augusta Southern Railroad Company against the city of Tennille. Judgment for defendant, and plaintiff brings error. Affirmed.

Evans & Evans, for plaintiff in error. James K. Hines, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 773)

SOUTHERN RY. CO. v. RAGSDALE, HARPER & WEATHERS.

(Supreme Court of Georgia. March 29, 1904.)

CARRIERS—TRACING ACT—CONSTITUTIONAL LAW.

1. The tracing act of 1891 (Civ. Code 1895, §§ 2317, 2318), properly construed, applies only to initial and connecting carriers doing business within this state, and, when so interpreted, is not such a discrimination against such carriers as to render the act unconstitutional on the ground that it denies to them the equal protection of the laws.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Ragsdale, Harper & Weathers against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Dorsey, Brewster & Howell, Sanders McDaniel, and J. D. Bradwell, for plaintiff in error. J. F. Golightly, for defendant in error.

FISH, P. J. This was an action under the tracing act of 1891 (Civ. Code 1895, §§ 2317, 2318). The shipment originated outside of the state, and the notice to trace was served upon a connecting carrier within this state,

which had undertaken to deliver the freight at the point of destination. The defendant, by demurrer to the petition, raised many, if not all, of the questions in reference to the act which were involved and decided in the case of *Central of Georgia Railway Company v. Murphey*, 116 Ga. 863, 43 S. E. 285, 60 L. R. A. 817. So far as any questions determined in that case are concerned, counsel for the defendant state in their brief that they do not desire to again press them upon the court. In fact, counsel insist upon the determination of but one question which the demurrer raises, conceding that the decision just referred to is controlling upon all the others. It is contended that the act should be construed to be applicable only to initial and connecting carriers who are engaged in the business of common carriers within the limits of this state, for the reason that the lawmaking power of this state has no authority to regulate or impose duties upon common carriers who operate entirely without the limits of the state. We think this is the proper construction of the act. See *Philadelphia Ry. Co. v. Venable*, 117 Ga. 142, 43 S. E. 407. It is argued that, if this be the proper construction of the act, the law imposes upon initial and connecting carriers doing business within this state duties and responsibilities which are not imposed upon other carriers connected with the same shipment who are engaged in business without the limits of this state, and that this is such a discrimination against the local carriers as to deprive them of that protection of the law which the nonresident carrier handling the same shipment receives, and that for this reason the act is violative of that portion of the fourteenth amendment to the Constitution of the United States, which guaranties to all persons the equal protection of the laws. The law applies with equal force to every carrier engaged in business within the limits of this state which may be one of the links in a line of carriage either beginning in this state and terminating beyond its limits, or originating without this state and terminating within its limits. The state certainly has authority to make reasonable regulations controlling the conduct of those engaged in the business of a common carrier within its limits; and it was held in the *Murphey* Case that this act was reasonable in its terms, and was not such a regulation of interstate commerce as to be beyond the power of the General Assembly of this state. When this conclusion is reached, it seems to follow that the act does not deprive any carrier within its terms of the equal protection of the laws in such a way as to be subject to the objection that is urged against it at this time.

It was argued that, if the General Assembly had no power to impose the duty of tracing upon nonresident carriers, it had no right to impose upon resident carriers a penalty for a failure to obtain information from such nonresident carriers, when no means

were furnished or could be furnished to the resident carrier for compelling the nonresident carrier to give the information necessary to enable the resident carrier to comply with the requirements of the act. This contention was made in the *Murphey* Case, and it was there said, in substance, that if a case should arise where the evidence showed that it was really impossible for the carrier upon whom the notice to trace was served to obtain the information required within the time prescribed by the act, it would then be decided whether this would constitute a defense to a suit under the act. So we say now that if, in a given case, it should appear that the resident carrier upon whom the notice to trace has been served has exercised due diligence in attempting to get the information, and that the failure to obtain it was not the result of its own fault or failure to use all of the means at its command to do so, a question might arise as to whether the defendant would be liable under the act. But no question of that character was involved in the *Murphey* Case, nor is it involved in the case now before us. The petition alleges that no reply whatever was made to the plaintiff's demand to trace. It might be that, if it was really impossible for the carrier to obtain the information, it could, with propriety, be held that it had not violated the provisions of the act, on the theory that it is not to be presumed that the lawmaking power intended to impose a penalty for a failure to do a thing which was impossible of performance. But we will not now decide whether this is a proper construction of the act, or whether it amounts to a legislative determination that the information can be obtained, and that the carrier will not be heard to say that it cannot.

Judgment affirmed. All the Justices concurring.

(119 Ga. 863)

PEARSON v. NEWTON COUNTY.

(Supreme Court of Georgia. March 30, 1904.)

COUNTIES—PRESENTATION OF CLAIMS.

1. In order for the bringing of a suit against a county to constitute a presentation of the claim to the county officials, within the meaning of Pol. Code 1895, § 362, the petition must not only be filed, but served, within 12 months after the claim accrues. In *Dement v. De Kalb County*, 25 S. E. 882, 97 Ga. 733, the petition was filed and served within the 12 months.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by S. M. Pearson against Newton County. Judgment for defendant, and plaintiff brings error. Affirmed.

L. L. Middlebrooks and James F. Rogers, for plaintiff in error. J. M. Pace and G. H. Conwell, for defendant in error.

COBB, J. A petition in a suit for personal injuries against the county of Newton was

filed in the office of the clerk of the superior court on August 2, 1902, and was duly served on August 6, 1902. The injuries for which the suit was brought occurred on August 3, 1901. At the September term, 1902, the case, on motion, was dismissed, on the ground that the claim was not presented to the county commissioners of the county within 12 months after it accrued; the order of dismissal reciting that plaintiff's counsel admitted that the claim had not been so presented. The granting of the order of dismissal is assigned as error.

"All claims against counties must be presented within twelve months after they accrue or become payable, or the same are barred, unless held by minors or other persons laboring under disabilities, who are allowed twelve months after the removal of such disability." Pol. Code 1895, § 362. It is most probably true that when this statute was enacted the General Assembly had in mind the presentation of claims otherwise than by a suit. But in *Dement v. De Kalb County*, 97 Ga. 733, 25 S. E. 382, it was held that "the bringing of the suit within the time limited was a sufficient presentation of the claim, within the meaning of" this statute. In the opinion in that case, Mr. Justice Lumpkin uses this language: "The main object of the law was doubtless to provide that the county officials should have timely notice of all demands against the county, in order that they might intelligently and advisedly take proper action concerning the same. The giving of such notice is as effectually accomplished by the filing of a declaration against the county, and having the same duly served, as could be done by handing to the ordinary or board of commissioners a written statement setting forth the nature of the claim. Indeed, it is more than likely that the information contained in a declaration would be fuller and more satisfactory than in a less formal document tendered by the claimant in person." It is contended by counsel for the plaintiff in error that this case is controlling in his favor, while counsel for the county ask that the decision be reviewed and overruled. An examination of the facts of the case referred to, as they appear in the original record, will show that the petition was not only filed, but served, within 12 months after the cause of action accrued, whereas in the present case service was not had until after the expiration of 12 months. It is argued, however, that this does not constitute any valid distinction between the cases, because the filing of the petition is the commencement of the suit, and stops the running of the statute of limitations. This principle has no application to the present case. The sole question to be determined here is, what constitutes a sufficient presentation of a claim, within the meaning of the statute above quoted? Mr. Justice Lumpkin, in the above-quoted language from the *De Kalb County Case*, says that the main object of the statute was to

provide that the county officials should have timely notice of all demands against the county, and that the giving of such notice is as effectually accomplished by the filing of a petition, and having the same duly served, as by a written statement setting forth the nature of the claim. Manifestly the mere filing of the petition does not give the county officials any notice of the claim, and certainly cannot constitute a presentation of the claim, unless followed by service of a copy of the petition. As stated above, the question is not what effect the filing of the ordinary petition has with reference to the statute of limitations, but whether a claim can be said to be presented to the county officials within 12 months after the claim accrued, when nothing more is done than to file suit, and the county officials have had no notice of the claim, either by service of the suit or otherwise. When the question is thus stated, there certainly cannot be any difficulty in deciding it adversely to the contentions of the plaintiff in error. The decision in 97 Ga., 25 S. E., is not only not controlling in his favor, but the language in the opinion contains a very clear intimation that service of the petition would be necessary to constitute the bringing of a suit a presentation of the claim, within the meaning of the statute.

Judgment affirmed. All the Justices concurring.

(119 Ga. 856)

CARROLL v. BARBER et al.

(Supreme Court of Georgia. March 30, 1904.)

ABATEMENT—DEATH OF PARTIES—TRIAL DE NOVO—COMPETENCY OF WITNESS.

1. As a general rule, the death of a party pending the trial causes a mistrial, and no further proceedings can be had in the cause until parties have been made, when the case must be tried de novo. This rule applies to a case pending before an auditor.

2. When the competency of a witness depends on the determination of a question of fact, the decision of the judge will not generally be disturbed, if there is any evidence to authorize his finding.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action by Elizabeth Carroll against one Barber. On his death his personal representatives, Sally Barber and others, were made parties. Judgment for defendants, and plaintiff brings error. Affirmed.

Anderson, Anderson & Thomas, for plaintiff in error. R. L. Berner and W. L. Waterson, for defendants in error.

SIMMONS, C. J. Carroll sued Barber, and the case was referred to an auditor. Pending the case, Barber died, and his legal representatives were made parties in his stead. The auditor made a report, to which the

¶ 2. See *Abatement and Revival*, vol. 1, Cent. Dig. § 291.

plaintiff filed exceptions both of law and fact. All the exceptions of fact were withdrawn, as well as all of the exceptions of law, except four. The court overruled these four exceptions, and the plaintiff brings the case here in a bill of exceptions assigning error upon this ruling.

1. During the lifetime of Barber the auditor proceeded to hear the case, and, after having heard several witnesses for the plaintiff, including the plaintiff, the hearing was adjourned until a future day. Before this day arrived, Barber died, and nothing further was done by the auditor until the defendant's legal representatives were made parties to the case by an order of the judge of the superior court. After parties were thus made, the auditor proceeded to hear the case, and a motion was made to exclude so much of the testimony of the plaintiff which had been delivered at the former hearing as related to transactions or communications between her and Barber, the deceased. The auditor sustained this motion, and this ruling was made the subject of one of the exceptions of law. In the argument here, there was a disagreement between counsel as to whether the testimony of the plaintiff was completed at the former hearing, or whether the adjournment was had with a reservation of the right of the defendant to further cross-examine the plaintiff. For the purposes of this decision, we will treat the matter as if the contention of the plaintiff in error was correct; that is, that, at the time the auditor adjourned the hearing, the examination of the plaintiff in her own behalf had been completed. Such being the case, should the auditor, at a subsequent hearing, after the defendant had died, and his legal representatives had been made parties in his stead, have excluded this testimony, so far as it related to transactions or communications between the plaintiff and the deceased? While the case is dealt with upon the assumption that the testimony of the plaintiff in her own behalf had been completed, it must be kept distinctly in mind that the testimony in the case was not completed, and that the defendant had not been heard in his own behalf, at the time the adjournment took place. The general rule seems to be that if, pending a reference, one of the parties dies, the effect upon the proceeding is the same as if the trial had been in progress before the court making the order of reference. 17 Enc. P. & P. 1042. If the case had been on trial before a jury in the superior court, and the plaintiff had testified in her own behalf, had been fully cross-examined, and had retired from the stand, and, pending a recess of the court, without reference to the time of the recess—whether one hour, one day, or longer—the defendant had died, the effect upon the proceeding would have been that a mistrial would have been declared; and, after parties had been made, the case would have been for trial *de novo*. The result would be sim-

ilar in the event the trial was proceeding before the judge without the intervention of a jury. We see no reason why the death of the defendant would not have a similar effect upon the case when it was pending before the auditor. The auditor would be powerless to proceed until parties were made by an order of the court in which the case originated. While the authority of auditors has been very much enlarged by legislation in recent years, there is, so far as we know, no law authorizing an auditor to make parties where one of the parties dies pending the reference. Even if the death of a party does not revoke the order of appointment, the auditor has no authority to proceed with the case until parties have been made in the manner above referred to. When the auditor proceeds with the hearing after the making of parties, the case is to be dealt with just as if a new order of reference had been made. If testimony has been heard at a former hearing, that testimony is not to be considered, unless by consent of the parties as they exist at the time of the new hearing; and objections to the competency of witnesses may be made upon grounds which exist at that time, without regard to whether they existed at the time of the former hearing. When the hearing was had before the auditor after parties had been made in the place of the defendant, the plaintiff was an incompetent witness as to transactions or communications between her and the deceased, and, by the very terms of the statute, her evidence was to be excluded. Civ. Code 1895, § 5269 (1). The judgment of the auditor was therefore right, and it is immaterial upon what ground he based his ruling, or upon what ground the judge overruled the exception to this ruling.

2. The three remaining exceptions relate to the exclusion of testimony of the plaintiff's husband. The auditor held that, under the evidence, the plaintiff's husband was her agent, and that he was incompetent to testify to any transactions or communications between himself and the deceased. When the competency of a witness depends upon the determination of a question of fact, the judge whose duty it is to pass upon the question of competency determines this question from the evidence before him, and his decision on such question is to be treated as his decision on other questions of fact would be, and is not generally to be interfered with by a reviewing court, if there is any evidence to support his conclusion on the question of competency. See, in this connection, *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 286. In reference to the fourth exception of fact, which relates to a conversation between the plaintiff's husband and the deceased concerning certain cotton which the former had delivered to the latter, there appears to have been in the evidence objected to, without reference to other portions of the evidence, enough for the auditor to find that, so far as

the delivery of the cotton was concerned, the plaintiff's husband was acting on her behalf, and was her agent for this purpose. What was the motive of the wife in sending the cotton, is another question. Whether she was influenced by interest in her husband's welfare, or by a previous agreement that had been made between him and the deceased, in which he had promised to carry her cotton to the deceased, to be applied to his debt, is immaterial. The husband was carrying the wife's cotton to his creditor with the authority and under the direction of the wife, and whether this was in pursuance of a lawful or unlawful agreement, so far as the delivery of the cotton was concerned, the husband was the wife's agent; and what was said by either party pending the delivery constituted communications between the deceased and the agent of the living party, and was therefore properly excluded under the very terms of the evidence act. Civ. Code 1895, § 5269 (5). The objection was not under paragraph 4 of the section just cited, which provides that a person not a party, when interested in the result of the suit, is incompetent under certain circumstances; and therefore the decisions in *Hidell v. Dwinell*, 89 Ga. 532, 16 S. E. 79 (2), and *Crawford v. Parker*, 96 Ga. 156, 23 S. E. 196 (2), are not in point. While it does not distinctly appear in the evidence set forth in the second and third exceptions that the plaintiff's husband was acting as her agent at the time of the communications therein referred to, we do not think the exclusion of this testimony was erroneous, for the reason that it simply related to an agreement between the husband and the deceased that the wife's cotton should be used in payment of the husband's debt. But no cotton was delivered at the time of these communications, and what was then said would have little or no material bearing on the question as to whether cotton which was subsequently delivered was or was not the wife's cotton, or, if it was, whether the deceased knew the fact. The husband might have agreed to deliver the wife's cotton, and still the cotton actually delivered have been his own. We do not think there was any error in excluding any of the evidence objected to.

Judgment affirmed. All the Justices concurring.

(119 Ga. 309)

GEORGIA R. & BANKING CO. v. MAYOR, ETC., OF TOWN OF UNION POINT.

(Supreme Court of Georgia. March 30, 1904.)

MUNICIPAL CORPORATIONS—OPENING STREET—RAILROAD RIGHT OF WAY—COMPENSATION—EMINENT DOMAIN.

1. Where, in the charter of a town, the Legislature has granted to the municipal corporation authority "to require any railroad running through said town to make such crossings as may be needed for public conveniences," this does not confer upon the municipal authorities

power to open a new street across the right of way and tracks of a railroad company whose railroad runs through such town, against the consent of the company, and without making compensation for the taking or damaging of its property for such purpose. Nor does the grant of such authority confer upon the municipality the right to exercise the power of eminent domain for this purpose.

2. The right to exercise the power of eminent domain for the purpose of laying out and opening a new street cannot be implied from the grant, in a municipal charter, of authority, "to establish and lay out new streets as public necessity requires."

3. The laying out and opening of a public street across the right of way and track of a railroad company without the consent of the company is a taking or damaging of private property for a public purpose, which requires the exercise of the power of eminent domain.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by the Georgia Railroad & Banking Company against the mayor and council of Union Point. From the judgment both parties bring error. Reversed on first bill of exceptions, and writ of error dismissed.

Jos. B. & Bryan Cumming and J. B. Park, for plaintiff. Samuel H. Sibley, for defendant.

FISH, P. J. The town of Union Point undertook to open a street at a designated point within the incorporate limits of the municipality across the tracks and right of way of the Georgia Railroad & Banking Company, without instituting any condemnation proceeding for such purpose, and without the consent of the railroad company. The railroad company brought a petition to perpetually enjoin the town "from taking or undertaking to take the land of petitioner" for this purpose, alleging that the municipality had no authority to do so, and that, if certain provisions of its charter, which will be hereinafter considered, were intended to give it such authority, they were unconstitutional. At the interlocutory hearing the following judgment was rendered: "Upon hearing evidence and argument in the case, * * * it is concluded that the defendant has power under its charter to open said crossing, or to have the petitioner to do so; that the charter of the defendant is not unconstitutional. It is further concluded that such legal damages as the railroad may suffer should be assessed and ascertained under the provisions of the general law for condemning property. It is therefore ordered that the defendant be enjoined from opening up said crossing until it shall have had an inquiry into the damages as aforesaid." Neither side to the controversy was satisfied with this judgment, and we have before us two bills of exceptions, one sued out by the petitioner and the other by the defendant. The railroad company excepted to so much of the judgment as held that the defendant has power, "under its charter, to open the crossing described," or to have the railroad com-

pany do so, and for specific assignment of error alleged that "such portion of the judgment is contrary to law." For further assignment of error it alleged that so much of the judgment as held that the charter of the town was not unconstitutional was erroneous, in that the portion of the defendant's charter alleged in the petition to be unconstitutional is so "for the reason that it fails to provide for the paying of just compensation for opening of any street across the lands of petitioner or others." The municipality excepted to so much of the judgment as held that, in order for it to cross the tracks of petitioner with its street, condemnation proceedings must be had, and damages paid, and that an injunction should issue till this be done.

Section 10 of the charter of the town of Union Point provides that the mayor and council of the town shall have power "to require any railroad running through said town to make such crossings as may be needed for public conveniences," and shall have power "to establish and lay out new streets as public necessity requires." Acts 1901, p. 669. The main question in the case is whether, under these provisions of the charter, the state has granted to the municipal corporation the right to exercise the power of eminent domain for the purpose of laying out and opening streets. The exercise of the power of eminent domain being in derogation of common right, the power cannot be inferred or implied from vague or doubtful language, but must be given in express terms or by necessary implication. Lewis on Eminent Domain, § 240. Another eminent author has said: "The right to appropriate private property to public uses lies dormant in the state until legislative action is had pointing out the occasions, modes, conditions, and agencies for its appropriation." Cooley's Const. Lim. (5th Ed.) 653. The fact that the Legislature has undertaken to confer upon the municipal corporation authority to require any railroad company whose railroad runs through the town to make such crossings over the road as may be needed for public convenience, does not necessarily imply that the Legislature intended to confer upon the municipality the right to exercise the power of eminent domain for this purpose. It is rather a negation of such an intention, for it contemplates, not a necessity for the exercise of a power which cannot be exerted without compensation for the property taken or damaged by its exercise, but a right to compel a given thing to be done without compensation. So the town construes its own charter, for its bill of exceptions is based upon the idea, and it contends here, that it has the right to open the street across the right of way and tracks of the railroad company without paying the railroad company any compensation whatever. Authority to require a crossing to be made does not involve the idea of purchasing the right to cross, either under condemnation

proceedings or otherwise, but presupposes the existence of such right. The clause now in question seems to contemplate the exercise by the municipality of the police power of the state, which is exercised without compensation for the loss occasioned thereby, instead of the power of eminent domain, which cannot be exercised without compensation. Certainly, there is nothing in this provision of the charter which by clear and necessary implication confers upon the municipality the right to exercise the power of eminent domain.

2. It has been decided by this court that power granted to a municipal corporation to lay out and open streets when there is no grant of power to take or damage private property for the purpose or to make compensation therefor, does not enable the municipality to lay out and open a street over the land and tracks of a chartered railway company without the consent of the company. Brunswick & Western Railway Co. v. Waycross, 94 Ga. 102, 21 S. E. 145. In the opinion the present chief justice said: "Such authority cannot be implied from the grant of power to lay out and open streets. In the absence of any further provision authorizing the municipal authorities to condemn property for that purpose, the presumption is that the Legislature intended that the necessary property should be acquired by contract." A similar ruling was made by the Supreme Court of Washington in City of Tacoma v. State, 4 Wash. 64, 29 Pac. 847. In delivering the opinion of the court, Stiles, J., said: "It may be contended that the seventh subdivision of section 5 of the act, which is a grant of power to 'lay out, establish,' etc., 'streets, alleys, avenues,' etc., necessarily includes the implied power to condemn lands for those purposes. But there have been many such contentions in the courts, and they have been, with entire uniformity, resolved the other way, as there is nothing in such a grant which may not be accomplished by purchase of necessary lands by agreement with the owners. A very strong case of this kind is that of Chaffee's Appeal, 56 Mich. 244, 22 N. W. 871. An act of the Legislature of Michigan authorized the city of Detroit to open, extend, widen, or straighten streets and alleys, and to take private property therefor, under proceedings further specified in the act. But, although the jury were instructed by the act how they were to award compensation for the opening of streets and alleys, nothing was said about compensation for widening; and it was held that the whole act, so far as concerned widening of a street, was inoperative. The authority remained, but the method of taking was completely paralyzed, because no compensation was provided." The Supreme Court of Illinois took the contrary view, holding that the power to lay out and open a new street necessarily implies and includes the power to institute a condemnation proceeding to carry such pow-

er into effect. *Chicago & Northwestern Ry. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574. The decision of this court in the *Waycross Case* is in line with the decision in *Markham v. Howell*, 33 Ga. 508, where it was held: "Authority by the Legislature to inferior courts of this state to establish smallpox hospitals does not authorize those courts to impress private property of citizens. This power, to be exercised by individuals, etc., does not arise by implication, but must be specially conferred by the Legislature." In the opinion *Lyon, J.*, said: "This is too dangerous and extraordinary power to be conferred by implication. It must be expressly granted, and must provide in the grant the mode of compensation," etc. This ruling was adhered to in *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73, in which *Walker, J.*, said: "The right of the inferior court to provide hospitals for smallpox patients, under the law, is one thing; but their right to seize or impress the private property of the citizen for that purpose is another, and quite a different thing. No express power is given them in the law to do so, and we cannot give it to them by implication." The Supreme Court of Missouri held broadly that "the power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language." *Schmidt v. Densmore*, 42 Mo. 225. So, in *Phillips v. Dunkirk, Warren & Pittsburgh R. Co.*, 78 Pa. 177, it was held: "The right of eminent domain will not be presumed to exist in a corporation unless by express legislative grant." In *Boston & Lowell Railroad Corporation v. Salem & Lowell Railroad Co.*, 2 Gray, 36, Chief Justice *Shaw* said: "It must appear that the government intend to exercise this high sovereign right by clear and express terms or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognize the right of private property, and mean to respect it; and under our Constitution the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. * * * In general, therefore, when an act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the Legislature to exercise the right of eminent domain, but simply to confer a right to do the act or to exercise the power given on first obtaining the consent of those thus affected." The decision of this court in the *Waycross Case* is in accordance with the great weight of authority; and, even if it were not, it would be controlling authority in the case under review. It is contended by the defendant in error, however, that the de-

cision in that case is not controlling in the present one, because at the time it was rendered there was no statutory authority to which the municipality could resort for the purpose of having compensation for property taken or damaged by the opening of a street assessed; while at the time the charter of the town of Union Point was enacted there was in existence a general law providing the method for condemning private property for public uses, which went into effect on December 18, 1894. Acts 1894, p. 95; Civ. Code 1895, § 4657 et seq. Undoubtedly, there is that difference between the two cases. Still we do not think the contention is sound. If the right to condemn private property cannot be implied from the grant of authority to lay out and open streets, then a municipal corporation, which, in reference to streets, has been granted no more authority than this, is not authorized to exercise the power of eminent domain for the purpose of opening a street, and it is only corporations or persons who are authorized to exercise this power who can resort to the provisions of the act of 1894 in order to condemn private property. The purpose of that act, as declared in its title, was "to provide a uniform method of exercising the right of condemning, taking, or damaging private property," and its first section declared that "all corporations or persons authorized to take or damage private property for public purposes shall proceed as herein set forth." The codification of the act did not enlarge its purpose, for Civ. Code 1895, § 4657, adopts literally the language above quoted from the first section of the act. This statute was certainly not intended to confer power, or to enlarge or supplement the meaning of any statute then in existence or which might thereafter be passed, but was simply intended to provide a general and uniform method of exercising a power which had been or should thereafter be given. It applies only to "corporations or persons authorized to take or damage private property for public purposes." The authority of a given corporation "to take or damage private property for public purposes" must be looked for in its charter. If it is not expressed there, it must be necessarily implied from what is expressed there. When the authority is found in the charter, the method of its exercise is found in the provisions of the Civil Code taken from the act of 1894. If the right to exercise the power of eminent domain had been conferred by the Legislature upon the town of Union Point, the method for the exercise of such right would be found in the provisions of the act of 1894, but, as this right has neither expressly nor by necessary implication been conferred upon the municipality, the provisions of this statute have no application to anything contained in its charter.

3. The contention of the municipal corporation that the opening of the street across the right of way and tracks of the railroad

company is not a taking or damaging of private property, "but is a mere subjection of the railroad right of way and tracks to another consistent public use, which the Legislature may lawfully authorize the town authorities to impose, without any compensation or provision therefor," is contrary to the decisions of this court upon the subject. Undoubtedly, the right of way and tracks of a railroad company may be subjected to another and consistent public use, provided the power to condemn the property of the railroad company for such a purpose exists, and just compensation is first paid the railroad company for the damage its property will thereby sustain. But this court has held that the right of way and tracks of a railroad company cannot be subjected to another and consistent public use, against the consent of the company, except under condemnation proceedings duly authorized. *Georgia Midland R. Co. v. Columbus R. Co.*, 89 Ga. 205, 15 S. E. 805; *Brunswick Ry. Co. v. Waycross*, *supra*; *Atlantic & B. R. Co. v. Seaboard Air Line Ry.*, 116 Ga. 412, 42 S. E. 761. While all three of the cases just cited are directly in point so far as the principle involved is concerned, the ruling in the Waycross Case is especially applicable here; for, if the contention that there is nothing to condemn when a municipal corporation seeks to open a street across the right of way and track of a railroad company were sound, this court would not have decided that the city of Waycross could not open a street across the right of way and tracks of the Brunswick & Western Railroad Company, because it had no power to condemn the property of the railroad company for this purpose. There is nothing to the contrary in *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 594, 43 L. R. A. 633, upon which the municipal corporation relies to sustain its contention. There the railroad corporation constructed its railroad across an existing public highway or street, while here the effort is to construct a public street across an existing railroad. The learned counsel for the municipality says in his brief: "For the correctness of the proposition that the requirement of the railroads to construct crossings is an exercise of the police power, and not a taking of private property, no better proof or argument can be presented than the opinion of this court in the" *Cleveland Case*. We are entirely satisfied with the decision of this court in that case, and think the compliment paid by counsel to the able opinion delivered by Mr. Justice Little is well deserved. But there is as much difference between requiring a railroad company to maintain a street crossing over its track at a point where such track has intersected an existing public street and requiring a railroad company to extend a public street over its right of way and tracks as there is between the exercise of the police power and the exercise of the power of eminent do-

main. In the one case the municipal authorities do not have to acquire the right to subject the property of the railroad company to a new public use, as the railroad company acquired its right of way and constructed its track across the street subject to the existing public use; while in the other the position of the parties is reversed, and it is the municipal corporation which seeks to subject the property of the railroad company to an additional public use. Whenever municipal authorities have lawfully subjected the property of a railroad company to the public use for street purposes, then, and not until then, can the railroad company be required to maintain a street crossing over its tracks. In this case it has only been necessary to decide whether the municipality, under its charter, has the power to lay out and open a street across the right of way and tracks of the railroad company, against the consent of the company. But in determining this question it was necessary to decide whether the railroad company had any property right which would be taken or damaged by the laying out and opening of the street across its right of way and tracks. This last question, as we have seen, was already settled by decisions of this court which are cited above. As the municipality has no power to exercise the right of eminent domain for the purpose in question, it has, of course, not been necessary for us to determine what would be the amount of damages, in such a case, under condemnation proceedings, or what elements would go to make up the damages. There are many cases which hold that the expense of maintaining a street crossing over a railroad cannot be taken into consideration in determining the amount of damages to be assessed for acquiring the right to lay out and establish a street across the right of way and track of a railroad company; but that, after the street has been lawfully laid out and established over the property of the railroad company, the company is bound, under statutes requiring it to maintain in good order street crossings over its tracks, to keep up such crossings at its own expense, such statutes being held to be a legitimate exercise of the police power of the state. So it may be that in most cases the damages to be awarded for acquiring the right to subject the right of way and track of a railroad company to the public use for street crossing would be merely nominal in amount.

Judgment reversed on the first bill of exceptions; writ of error dismissed on the second. All the Justices concurring.

(119 Ga. 821)

SEARS v. JEFFORDS et al.

(Supreme Court of Georgia, March 30, 1904.)

BILL OF EXCEPTIONS—AMENDMENT—NEW PARTIES—SERVICE.

1. While a bill of exceptions is amendable by the record so as to introduce the names of par-

ties, it is futile to thus make new parties defendant in error unless they will waive service, and consent that the case be heard by the Supreme Court on its merits.

2. An acknowledgment of service upon a bill of exceptions does not relate to or bind any person not actually named or sufficiently designated therein as a defendant in error when the acknowledgment is entered.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by Hiram Sears, Sr., against S. V. Jeffords and others. Pending the action plaintiff and Jeffords died, and their executors were substituted. Judgment for defendants, and plaintiff brings error. Dismissed.

S. W. Hetch and Quincey & McDonald, for plaintiff in error. J. L. Sweat and L. A. Wilson, for defendants in error.

COBB, J. "Hiram Sears, Sr.," brought an equitable petition against S. V. Jeffords, praying for an injunction to restrain the defendant from cutting timber, for the cancellation of a lease, for damages for timber already cut, and for general relief. By an amendment, which was offered in the name of "Hiram Sears," it was alleged that S. P. Jeffords and Bailey had combined and confederated with S. V. Jeffords to cut and remove the timber before certain notes given by S. V. Jeffords were due; and the prayer of the amendment was that S. P. Jeffords and Bailey be made parties, and that the plaintiff have an accounting with them for the timber cut and removed by them from the land in controversy. An order was passed granting the prayer of the amendment, and making the persons named parties defendant to the case. While the case was pending, plaintiff and S. P. Jeffords died. Hiram Sears, as administrator of the estate of Hiram Sears, deceased, was made a party plaintiff; and Mrs. S. P. Jeffords, as executrix of the will of S. P. Jeffords, was made a party defendant. After parties were thus made, the case came on to be heard on demurrers to the petition filed by the three defendants. The court sustained the demurrers and dismissed the petition. The case is here upon what is claimed to be a bill of exceptions sued out in the case. This bill of exceptions recites that "the case of Hiram Sears, Sr., v. S. V. Jeffords, S. P. Jeffords, and J. S. Bailey, the same being a petition for injunction," etc., came on to be tried, etc., and, after reciting the filing of the demurrers and hearing of the same, avers that the demurrers were sustained, and the case dismissed; and this ruling is assigned as error. Upon this bill of exceptions appears an acknowledgment of service, signed as follows: "J. L. Sweat, L. A. Wilson, Attorneys for

Plaintiffs." When the case was called here, a motion was made to dismiss the writ of error because it was sued out in the name of a dead person, and because one of the persons described as defendant in error was dead at the time the bill of exceptions was sued out. In reply to this motion to dismiss the plaintiff in error moved to amend the bill of exceptions by adding after the name of the plaintiff in error the words, "as administrator of estate of Hiram Sears," and by prefixing to the name of the defendant in error S. P. Jeffords the abbreviation "Mrs.," and following the name with the words, "as administratrix of estate of S. P. Jeffords."

If it appears from the record that one who should have been joined as a defendant in error to the bill of exceptions has not been named as such therein, he may be made a party by amendment, provided he is willing to waive service and consent that the case be heard on its merits. An acknowledgment of service of a bill of exceptions, entered prior to the time such an amendment is made, will not be construed as an acknowledgment of service by the party thereafter made. *Western Union Tel. Co. v. Griffith*, 111 Ga. 551, 38 S. E. 859. An acknowledgment of service in behalf of "defendants in error" has been held not to be a sufficient acknowledgment of service for a defendant in error who was made a party to the bill of exceptions after the date of the acknowledgment. *Orr v. Webb*, 112 Ga. 303, 38 S. E. 93. If this rule is sound, certainly an acknowledgment of service by attorneys describing themselves as "attorneys for plaintiffs," when it appears from the record that they were not attorneys for any one who was a plaintiff in the court below, would not be held to be a sufficient acknowledgment of service for a defendant in error who was not a party to the bill of exceptions at the date of such acknowledgment. It follows that Mrs. Jeffords, as administratrix of the estate of S. P. Jeffords, could be made a party to the bill of exceptions, provided it was made to appear that she was willing to waive service and consent that the case be heard. This has not been made to appear, and it would therefore be useless to allow the bill of exceptions to be amended. The writ of error must be dismissed for want of proper parties defendant in error. Under this view of the case, it is unnecessary to determine whether the bill of exceptions was sued out in the name of the dead plaintiff, Hiram Sears, or in the name of the living administrator, Hiram Sears, and, if in the name of the latter, whether the bill of exceptions is amendable by adding his representative capacity.

Writ of error dismissed. All the Justices concurring.

(119 Ga. 901)

GREENE v. BARRON et al.

(Supreme Court of Georgia. March 31, 1904.)

BILL OF EXCEPTIONS—PARTIES—DISMISSAL—SERVICE—ACKNOWLEDGMENT.

1. When in an action on a bond against the principal and his sureties the petition was dismissed on joint demurrer of all the defendants, the sureties were necessary parties defendant to a bill of exceptions sued out by the plaintiff, alleging error upon the judgment sustaining such demurrer and dismissing the petition. *Western Union Tel. Co. v. Griffith*, 36 S. E. 859, 111 Ga. 551, 556, 557, and citations.

2. Where persons who are essential parties defendant to a bill of exceptions are neither named nor designated therein as such, and the only attempt to do so is by using with reference to them the abbreviation "et al.," following the name of one who is a proper defendant in error, a motion to dismiss the writ of error for want of necessary parties thereto will be sustained. *Farr v. Farr*, 38 S. E. 962, 113 Ga. 577.

3. An acknowledgment of service upon a bill of exceptions does not relate to or bind any person not actually named or sufficiently designated therein as a defendant in error when the acknowledgment is entered. *Orr v. Webb*, 38 S. E. 98, 112 Ga. 806 (3); *Sears v. Jeffords* (Ga.) 47 S. E. 186.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by M. A. Greene against J. H. Barron and others. Judgment for defendants, and plaintiff brings error. Dismissed.

J. M. & H. J. McBride, for plaintiff in error. Brown & Roop, Lloyd Thomas, and Head & Head, for defendants in error.

FISH, P. J. Writ of error dismissed. All the Justices concurring.

(119 Ga. 948)

RITTER et al. v. FAGAN et al.

(Supreme Court of Georgia. March 30, 1904.)

NONSUIT—WHEN GRANTED.

1. The plaintiffs having failed on the trial to prove their case as laid, the court below properly sustained the defendants' motion to nonsuit.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by S. F. Ritter and others against W. J. Fagan and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Burton Smith, J. W. Moore, George Gordon, and J. D. Kilpatrick, for plaintiffs in error. Aldine Chambers, W. M. Smith, and Walter R. Daley, for defendants in error.

TURNER, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 966)

HUMPHREYS v. BROWN.

(Supreme Court of Georgia. March 31, 1904.)

FRAUD—QUESTION FOR JURY.

1. The case presented an issue of fraud. The evidence was of such a character as to authorize a finding either way. The judge submitted the

issues fairly to the jury, and there was no error of law requiring the granting of a new trial. (Syllabus by the Court.)

Error from Superior Court, Jefferson County; B. D. Evans, Judge.

Claim case between Henry Humphreys and O. B. Brown, executor. From the judgment, Humphreys brings error. Affirmed.

Henry C. Roney and Phillips & Phillips, for plaintiff in error. Cain & Hardeman, for defendant in error.

SIMMONS, C. J. This was a claim case. The issue was one of fraud. The transaction involved a sale of land by the defendant in execution to her sister, made while the suit on the debt of the plaintiff in execution was pending. The issue as to whether the deed made in pursuance of this sale was valid or fraudulent was fairly and fully submitted to the jury. The evidence was of such a character as to have authorized a verdict either way; and, such being the case, this court will not interfere with the judgment refusing a new trial, unless some material error of law was committed. Complaint is made that the court erred in admitting certain evidence. Even if this assignment of error is presented in such a way that it can be dealt with, there was no error in admitting the evidence. The requests to charge, so far as they were legal, pertinent, and appropriate, were sufficiently covered by the general charge. After a careful examination of the record, we find no reason for reversing the judgment refusing a new trial.

Judgment affirmed. All the Justices concurring.

(119 Ga. 767)

HOLLY v. SOUTHERN RY. CO.

(Supreme Court of Georgia. March 29, 1904.)

CARRIERS—LOSS OF BAGGAGE—PASS.

1. One who receives of a railroad company a gratuitous pass over its line, which by its terms is "issued only on condition that the person accepting it assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, for any injury to the person, or loss or damage to the property of the person using it," cannot recover of the company the value of baggage lost while traveling on such pass.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. I. Holly, as next friend of Lillian Leslie Holly, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Anderson, Anderson & Thomas, for plaintiff in error. Dorsey, Brewster & Howell, Sanders McDaniel, and J. D. Bradwell, for defendant in error.

CANDLER, J. The plaintiff, as next friend of her minor daughter, Lillian Leslie Holly,

sued the Southern Railway Company for damages on account of the loss of a trunk and its contents. The original petition set out merely the delivery of the trunk to the defendant in Washington, D. C., and the receipt of a check therefor, a demand for it in Atlanta, and the failure then and subsequently to comply with that demand, and charged that the trunk was lost by reason of the negligence of the defendant company. By an amendment the allegation of negligence was stricken, and in lieu thereof it was alleged that the plaintiff demanded the trunk of the defendant, and its delivery was refused. From another amendment it appeared that, at the time the trunk was alleged to have been lost, the plaintiff and her daughter were riding over the defendant's line of railroad on a free pass. The defendant, in its answer, denied liability, and averred, "by way of plea in bar" to the action, "that plaintiff was not its passenger in the sense alleged in said declaration, so as to make it legally liable for any loss of her baggage, for that plaintiff at the time was gratuitously on its train, and without the payment of fare; she being allowed to ride upon said train by virtue of a complimentary pass gratuitously furnished her, without any consideration whatever to defendant. Such pass from Atlanta to Washington was allowed her upon the following conditions, which it contained: 'This ticket is issued only on condition that the person accepting it assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, for any injury to the person, or loss or damage to the property of the person using it.' * * *. These conditions are binding upon the plaintiff, and bar her right to recover for the alleged loss of her baggage." The plaintiff demurred to the portion of the answer which we have quoted, but the demurrer was overruled. At the trial the plaintiff proved the delivery of the trunk to the defendant in Washington; that, upon presentation of the check for it at the baggage depot in Atlanta, it could not be found; that diligent search was made for it then and afterwards by the employees of the defendant company, without result; and that the trunk had never been returned to its owner. It was not shown how the trunk was lost, or that the agents of the railroad company had been in any manner negligent in handling it. The only evidence introduced by the defendant was in support of that portion of its plea which we have already set out. The court, on motion, directed a verdict for the defendant. To this ruling, and to the overruling of her demurrer to the answer, the plaintiff excepted.

From the foregoing it will be seen that the only question presented for our determination is whether, in an action against a railroad company, by one who has ridden over its line on a free pass, to recover the value of baggage alleged to have been lost by it, it is a complete defense to show that, as a condition

of the gratuity extended him, the plaintiff agreed that the defendant should not be liable for any loss of property or damage to person which he might sustain while using the pass. In the present case the plaintiff seems to have recognized that the ordinary relation of carrier and passenger did not exist between her and the defendant, for by an amendment she struck the allegation of negligence in her original petition, and stood squarely on the bailment of her property, which, by her own showing, was entirely gratuitous. Regardless of any agreement or condition involved in the issuance of the pass, the defendant, as a gratuitous bailee, could only be held liable for gross negligence, which, under ordinary circumstances, it would be bound to disprove upon the introduction by the plaintiff of evidence of the bailment, and the loss of the property bailed. Civ. Code 1895, § 2896. Stated a little differently, then, the question now before us is, may a gratuitous bailee, as a consideration of the gratuity, stipulate against his own gross or wanton negligence? The precise point involved seems never to have been squarely decided in this state, and, while there are numerous authorities on the subject to be found in the Reports from other states, the conclusions reached by the various courts present, unfortunately, a hopeless conflict of opinion.

It is well settled in Georgia that a railroad company may, by a special contract, change the nature of its liability, provided the contract be founded upon a sufficient consideration, be reasonable, and be not void as against public policy. It has been held that it may stipulate that it shall be liable only as a private carrier, and not as a common carrier; the consideration of the stipulation being the grant of a reduced rate of freight. *Central of Georgia R. Co. v. Glascock*, 117 Ga. 938, 43 S. E. 981. Upon a like consideration a contract has been held valid which provided that the company should be liable only for gross negligence. *Cooper v. Raleigh R. Co.*, 110 Ga. 659, 36 S. E. 240. These cases are in entire harmony with the principle ruled in *Georgia R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197, where a contract was held invalid which did not seek to change the nature of the company's liability, but named an arbitrary amount which might be recovered in the event of loss or damage by the defendant's negligence. In the present case the railroad company, in the absence of any agreement, condition, or stipulation, could, as a gratuitous bailee, only be held liable for gross negligence. The plaintiff paid it no fare, and offered to pay it none, but solicited of it the favor of free transportation for herself and her baggage over its line of railroad. This favor it was under no obligation whatever to grant. Why, then, could it not legally impose as a condition to the extension of this favor that she should assume all the risks of the journey, and that it should not be held

liable for any loss to her property or injury to her person? Why may not the railroad company say: "I will give you a free ride, and carry your baggage for you, but I will not assume responsibility for the security of your property or the safety of your person. The duties imposed upon me by law to safeguard the persons and property of those whom I am obliged to carry give me all that I can do, and, while I do not object to your riding on my train without the payment of fare, I cannot undertake to assume a responsibility as a result of my courtesy."

The only reason that can be urged against the validity of such conditions to the grant of a free pass is that it is opposed to public policy, and we confess our inability to see the force of this argument. If gratuitous transportation by railroads were of such common occurrence as to involve the public, or any considerable proportion thereof, it might well be said that considerations of public welfare would forbid that the company should in any way restrict its liability in a matter of this sort. But for every gratuitous passenger carried by a railroad company, many are carried who have paid full fare, and to whom the company is due the full measure of extraordinary diligence; and it is a self-evident proposition that negligence as to gratuitous passengers would involve the greater consequences of negligence to passengers who have paid fare. The person riding on a free pass is, in a sense, protected by the fact that on the same train and in the same car with him are others to whom the railroad company owes the highest degree of care known to the law, and the further fact that any negligence to him necessarily involves the safety of those around whom the law throws a more ample protection than he would otherwise enjoy. In this view of the case, we fail to see how the question of public policy can affect the imposition of conditions to the grant of a free pass, by the terms of which the company is exempted from liability. What we now hold is in no way in conflict with the ruling of this court in the case of *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665, 38 S. E. 202, 50 L. R. A. 873. In that case it was held that section 2276 of the Civil Code of 1895, which provides that a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold, but that he may make an express contract, by which he will be governed, has no application to a carrier of passengers; and it was further decided that a carrier of passengers for hire cannot by contract exempt himself from liability for his negligence. A broad distinction is to be noted between the *Lippman* Case and the case now under consideration. There the relation of carrier and passenger existed between the defendant and the plaintiff in its full sense, while here there was no

consideration whatever for the carriage, and the plaintiff herself, by her petition as amended, treated the transaction out of which the suit arose as a mere bailment, entirely gratuitous in its nature.

As before stated, the various courts of this country hold widely divergent views on the subject now under consideration. We will call attention to a few of the cases which support the ruling now made, and which, in our opinion, afford excellent reasons for our position. In the case of *Quimby v. Boston R. Co.* (Mass.) 23 N. E. 205, 5 L. R. A. 846, it was held that "an agreement by one who accepts a railroad pass purely as a gratuity, that he will assume all risks of accident, of every name and nature, is not against public policy, and will prevent a recovery by him for injuries occasioned by the negligence of the railroad company's servants." It appeared in that case that the pass was issued with a proviso that the plaintiff sign the agreement referred to, but, as a matter of fact, he did not sign it, not having been required to do so by the conductor; and the court held that his failure to sign the agreement was unimportant, for, it was said, "having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not." It was further said in the opinion that the reasoning that the agreement or condition involved was void as against public policy "can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. * * * The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested." In *Kinney v. Central R. Co.*, 82 N. J. Law, 407, 90 Am. Dec. 675, it was held that a contract that, in consideration of a free passage, a passenger will assume the risk of injuries to his person from the negligence of the servants of the railroad company, is valid in law, and that a passenger who receives knowingly a free ticket, with an indorsement of such a contract upon it, will be bound by its terms, and cannot recover for injuries sustained from the cause specified. A well-reasoned case on this subject is that of *Muldoon v. Seattle R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901, wherein it was held: "A passenger riding upon a free pass which contains conditions limiting the liability of the carrier on account of negligence cannot recover for injuries received through the negligence of the carrier's servant." On the question of public policy, *Stiles, J.*, delivering the opinion, said: "When the intending passenger proposes to the carrier that it do

something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz., to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon condition like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the limbs and lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled, and, of all the passengers carried, but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers and employees of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be, while the doctrine of respondeat superior has its present healthy existence." See, also, *Griswold v. New York R. Co.* (Conn.) 4 Atl. 261, 55 Am. Rep. 115; *Wells v. R. Co.*, 24 N. Y. 181; *Perkins v. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281; *Bissell v. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Northern Pac. R. Co. v. Adams* (decided February 24, 1904) 24 Sup. Ct. 408, 48 L. Ed. —.

In conclusion we will say that, reasoning by analogy, it seems to us clear that if, as has been held by the Georgia cases to which we have already referred, a railroad company, acting in its public capacity as a common carrier, may by special contract relieve itself from liability for any but gross negligence, it may, as a consideration for doing something which it is under no obligation to do, and in the performance of which it would under no circumstances be liable for anything less than gross negligence, require that it shall, in the event of loss or damage, be held liable under no circumstances whatever. It follows that in the present case the railroad company made out a complete defense, and that the court properly directed a verdict in its favor.

Judgment affirmed. All the Justices concur.

LAMAR, J. (with whom concur FISH, P. J., and TURNER, J.). It appears that the trunk was lost, and there is neither allegation nor evidence of any negligence by the gratuitous bailee. The case at bar does not, therefore, involve a decision on the effect of gross, willful, or criminal negligence, nor do the cases cited deal with injuries or losses occasioned by such negligence. I concur in the judgment of affirmance, but not in all the reasoning of the foregoing opinion.

(119 Ga. 866)

GEORGIA R. & BANKING CO. v. TURNER.
(Supreme Court of Georgia. March 30, 1904.)
APPEAL—REVIEW—KILLING STOCK—CONFLICT-
ING EVIDENCE.

1. The defendant admitted the killing and value of the stock, assumed the burden of proof, and made out a defense by the testimony of the engineer and fireman. The testimony in rebuttal, as to the rate of speed, the time when the brakes were applied, the position of the cattle, and the distance at which they could have first been seen, was in conflict with that for the company, and sufficient to sustain a verdict for the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by H. A. Turner against the Georgia Railroad & Banking Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Turner sued the Georgia Railroad & Banking Company for \$100, being the value of three cows killed by the company's train on March 15, 1902. The defendant admitted the killing, and that the animals were of the value claimed, and assumed the burden of making out the defense that it was impossible, by the exercise of ordinary care and diligence, to avoid the injury complained of. It successfully carried the burden in chief by the testimony of the engineer and fireman, who testified that a lookout was kept; that the animals were in a cut, and on a curve distant from a crossing; that the train was running between 40 and 50 miles an hour; that the cows could not have been seen more than 200 feet from where they were struck; that as soon as seen the stock alarm was given, the emergency brakes were applied, and everything possible done to avoid the injury; and that the train did not stop when it was seen that they had been knocked from the track. But the evidence for the plaintiff by passengers on the train and eyewitnesses standing near the track was to the effect that the train was not checked when the whistle was blown; that there was no slackening of speed until about the moment of striking the cattle; that the cattle were at the mouth of the cut when first seen; and that they were in full view of the engineer for as much as 300 or 400 yards. There was also some evidence that the cattle ran a considerable distance along the track and away from the approaching train.

Jos. B. & Bryan Cumming, G. M. Beasley, and M. A. Candler, for plaintiff in error. R. W. Milner, for defendant in error.

LAMAR, J. From the statement of facts it will be seen that the effect of the admission by the company, and the consequent presumption of negligence, was not necessarily removed. On consideration of all of the evidence introduced by both parties, it appears that there was sufficient to sustain a verdict in plaintiff's favor, and the judgment is affirmed. All the Justices concurring.

(119 Ga. 768)

BORUM v. GREGORY.

(Supreme Court of Georgia. March 29, 1904.)

EJECTMENT—WHO MAY MAINTAIN—LIFE TENANT—DEATH.

1. One who has no estate in land, but who is entitled to a support therefrom, which, so far as appears, is being received, cannot maintain an action for the recovery of such land.

2. Upon the death of one who has a life interest in land such interest ceases, and her administrator cannot maintain an action to recover the land.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by D. M. Borum, administrator for use, against J. H. Gregory. Judgment for defendant, and plaintiff brings error. Affirmed.

E. F. Strozler and Shipp & Sheppard, for plaintiff in error. Hall & George and Whipple & McKenzie, for defendant in error.

SIMMONS, C. J. Complaint for land was brought against Gregory by Mary S. Borum, who claimed a life estate in such land under the will of Alexander Borum. The plaintiff died, and D. M. Borum, her administrator, was made a party and allowed to amend the petition by alleging that the land sued for was "charged with a comfortable support of Mary S. Borum during her life, the support to be provided by the executor"; that the executor had been discharged and D. M. Borum appointed administrator cum testamento annexo; and "that this land is necessary for the support of said Mary S. Borum." The prayer of the amendment was that D. M. Borum, as administrator of Alexander Borum, recover the land for the use of Mary S. Borum's administrator. The defendant moved to dismiss the petition as amended, and the court sustained the motion. The plaintiff excepted.

1. The will of Alexander Borum, attached as an exhibit to the petition, shows that no life estate was thereby left to Mary S. Borum, but that the land was charged with her support, to be provided out of the estate by the executor. The original petition therefore set out no cause of action. Mary S. Borum was entitled to a support out of the estate, but to no more than this. If the estate yielded more than was necessary for her support, she had no interest in the surplus. The executor was charged with the duty of providing such support, and to him she was to look for it. She had no estate for life or for years, and no interest on which could be based an action of ejectment in her name. She did not even allege that the executor had failed to provide her with a support out of the estate.

2. Whatever may be D. M. Borum's rights, as administrator of the estate of the testator, in a proper proceeding as such administrator to recover the land, he cannot, by amendment to Mary S. Borum's petition, maintain an action to recover her interest in the land

for the use of her administrator. The amendment does not allege that she was entitled to any payments which should have been made to her, but which were not in fact made. The suit is simply for her interest for the use of her administrator. That interest continued only while she was in life, and ceased at her death. See *Sawyer v. Flemister*, 29 Ga. 347, where it was said that the interest of a certain person "was but an interest for her life. It follows that at her death there was none of it to pass to her administrator, and therefore that he had no right to sue for the property, or any interest in it." The court below was right in sustaining the motion to dismiss.

Judgment affirmed. All the Justices concurring.

(119 Ga. 830)

VAN DYKE v. VAN DYKE.

(Supreme Court of Georgia. March 30, 1904.)

DEED—COMPLETION—NAME OF GRANTEE.

1. An incomplete deed, being without a grantee, cannot be completed in this respect without authority from the grantor.

2. The doctrine of estoppel by deed has no application to the present case.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Suit by Mary J. Van Dyke against Alice M. Van Dyke. Judgment for defendant, and plaintiff brings error. Reversed.

W. W. Haden and R. O. Lovett, for plaintiff in error. Culberson, Willingham & Johnson, for defendant in error.

TURNER, J. An equitable petition was brought by Mary J. Van Dyke against Alice M. Van Dyke to establish the plaintiff's claim of title to a certain tract of land described in her petition, to have a deed under which the defendant held possession of the premises delivered up and canceled, and for other relief. The petition set forth the following allegations of fact: During the year 1895, and prior thereto, the plaintiff owned in fee simple the tract of land above mentioned. In April of that year she decided to give to her son, E. A. Van Dyke, some of her property, being moved to do so by natural love and affection, and by the fact that, in her opinion, under a division which had been made of his father's estate, the share thereof allotted to him was of less value than were the shares set apart to the other heirs of her husband. In furtherance of this design she signed a paper in the form of a deed, a copy of which she attached to her petition. At the time she signed this paper it was not completed and perfected, because no grantee was named therein, the space designed for the insertion of the name of her grantee being left blank. She never afterwards filled in this blank space, or caused it to be filled

in, with the name of the defendant (which now appears in that instrument, as grantee), nor did she (the plaintiff) ever direct or authorize any person whomsoever so to do. She is informed that her son, or some other person, did fill in said blank space with the name of Alice M. Van Dyke; but this was done without plaintiff's knowledge or consent, long afterwards, to wit, on November 30, 1895. The defendant bases her claim of title solely upon this instrument, notwithstanding "said paper, even in its incomplete form, was never delivered to the said Alice M. Van Dyke, nor to any one for her." The "recital in said paper of a consideration of twelve hundred dollars is not true or correct. * * * No consideration was paid or intended to be paid to petitioner by any one," but, on the contrary, it was her intention that this paper, when completed, should "be a gift to said E. A. Van Dyke, and not a sale to his wife, the said Alice M. Van Dyke," and plaintiff never intended to convey the land, or any interest therein, to the defendant. For the above reasons "said paper was inoperative and void, and passed no title, * * * and said land is the right and property of" the plaintiff. The defendant "has incumbered said land to the extent of \$2,000 to Mrs. Belle Berk, who loaned said Alice M. Van Dyke said sum on said land in good faith, as petitioner is advised, believing that said Alice M. Van Dyke owned said land; and as said sum was, as petitioner is advised, expended on said land," she admits that the land is rightly chargeable with that sum. The prayers set forth in the plaintiff's petition were that she recover possession of the land; that the paper referred to as having been signed by her be delivered up and canceled, etc. To this petition the defendant demurred generally on the ground that it did not set forth either a legal or an equitable cause of action, and also specially on the ground that, as the instrument attached to the petition and alleged to be a copy of the deed signed by the plaintiff showed that it was made for a valuable consideration, to wit, the sum of \$1,200, it was "not competent for the plaintiff to thus impeach her own deed." The court below, after hearing argument on the defendant's demurrer, sustained the same, and dismissed the plaintiff's suit, whereupon she sued out a bill of exceptions to this court, assigning as error the disposition thus made of her case.

1. "The great question in this case," as Nisbet, J., said in the opinion delivered by him in *Ingram v. Little*, 14 Ga. 182, 58 Am. Dec. 549, "is upon the validity of the deed. It was duly signed, sealed, attested, and written out, except as to the name of the feoffee." This instrument, "before its completion and delivery, was inoperative, because made to no person." *Id.*, 183 (2). Judge Nisbet also said in that case: "We put our decision upon authority, conceding that the books in England and in this country are in 'dis-

trressing' conflict, and with some misgiving whether reason and common sense do not condemn it. This is, however, just the kind of a case in which it is safest to be guided by the weight of authority. The rule, although a technical one, is single, clear, and easy of observance. If abrogated, the title to property might be left too much to the mistakes of memory, or to the corruptions of humanity." Chief Justice Marshall and Lord Mansfield both seem to have entertained this view, though they intimated doubts and difficulties on the subject. Whether or not the precedent established by the case in 14 Ga. 182, 58 Am. Dec. 549, just referred to, has been practically overruled by later decisions of this court in *Brown v. Colquitt*, 78 Ga. 59, 54 Am. Rep. 867, *Weaver v. Carter*, 101 Ga. 213, 28 S. E. 869, and *Smith v. Ins. Ass'n*, 111 Ga. 737, 36 S. E. 957, suffice it to say that in the present case, which was decided on demurrer, it does not appear from the plaintiff's petition that she ever in fact delivered the incomplete deed to her son, or authorized him or any one else to perfect it. She distinctly negatives any authority on the part of her son or other person to fill the blank space left in the deed with the name of her daughter-in-law. None of the cases last above cited can be properly regarded as authority for the proposition that such an incomplete deed can, without some sort of authority, be completed by any other person than the grantor.

There was no merit in the defendant's contention that it was not competent for the plaintiff to assert that the instrument signed by her was not, in fact, based on the valuable consideration therein recited. The doctrine of estoppel by deed in any respect does not apply to an incomplete deed. We accordingly hold that the judgment of the court below, dismissing the plaintiff's case on demurrer, was erroneous.

Judgment reversed. All the Justices concurring.

(119 Ga. 745)

WOOTEN v. STATE.

(Supreme Court of Georgia. March 29, 1904.)

CRIMINAL LAW—VENUE—EVIDENCE.

1. Evidence that the accused committed the crime charged in Pinehurst, without showing the county or that the Pinehurst referred to is in Georgia, is not sufficient proof of venue. *Cooper v. State*, 32 S. E. 23, 106 Ga. 119; *Moye v. State*, 65 Ga. 754.

(Syllabus by the Court.)

Error from City Court of Hamilton; J. B. Burnside, Judge.

Charles Wooten was convicted of crime, and brings error. Reversed.

Busbee & Busbee, for plaintiff in error. E. F. Stozler, for the State.

SIMMONS, O. J. Judgment reversed. All the Justices concurring.

(119 Ga. 804)

EUBANKS v. WEST & BAGGETT.

(Supreme Court of Georgia. March 29, 1904.)

**LOGGING LIEN—FORECLOSURE—NEW TRIAL—
GROUNDS—REVIEW.**

1. When, in the trial of a proceeding to foreclose a sawmill man's lien, the jury return a verdict in favor of the plaintiff for the full amount claimed, with interest, the verdict will be construed to be a finding in favor of the lien claimed.

2. Objection to a judgment that it does not follow the verdict cannot be properly made a ground of a motion for a new trial.

3. The evidence was conflicting, and probably preponderated in favor of the defendant, but there was some evidence from which the jury could find that the plaintiff was entitled to a lien for the amount claimed; and, if there was any error in any of the charges complained of, such error was not of a character requiring the granting of a new trial.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. P. Taliaferro, Judge.

Action by West & Baggett against Mary Eubanks. Judgment for plaintiffs. Defendant brings error. Affirmed.

Rawlings & Howard, for plaintiff in error.
Evans & Evans, for defendants in error.

COBB, J. This was a proceeding to foreclose a sawmill man's lien. The evidence was sharply conflicting, both as to what was the contract and as to whether the contract, even as claimed by the plaintiffs, had been substantially complied with. The evidence authorized a finding in favor of either party, and hence the judgment refusing a new trial will not be reversed unless some error of law was committed which was prejudicial to the losing party. The judge charged the jury that if they found in favor of the plaintiffs they should return a general verdict for so many dollars, with interest. This charge amounted to an instruction that such a finding as that indicated would be construed to mean a finding in favor of the lien claimed. A finding in favor of the plaintiffs for a given sum, especially when that sum is the exact amount claimed, is equivalent to a finding in favor of the lien sought to be set up. Under this view, the grounds of the motion for a new trial, which complain that the judgment did not follow the verdict, are without merit. In any event, however, these grounds are without merit, for such an objection cannot be made the ground of a motion for a new trial. *Berry v. Clark*, 117 Ga. 964, 44 S. E. 824 (4); *Chason v. Anderson*, 119 Ga. 495, 46 S. E. 629. Even if the charge in relation to the change in the terms of the agreement as to the time when the money for the sawing would be due was subject to the criticisms made upon it, the error was not of such a character as to require a reversal of the judgment, for the reason that the judge distinctly told the jury that the plaintiffs would not be entitled to enforce the lien claimed until after the work was completed. Under the charge of the judge the jury could not find

in favor of the lien unless they believed the work had been finished. None of the other charges complained of were erroneous for any reason assigned. After a careful examination of the entire motion for a new trial, we find no reason which would justify us in reversing the judgment.

Judgment affirmed. All the Justices concurring.

(119 Ga. 721)

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. PARKER.

(Supreme Court of Georgia. March 7, 1904.)

**CORPORATIONS—SERVICE ON AGENT—RETURN—
DEFAULT—OPENING—PLEADING—AMENDMENT—NEW TRIAL.**

1. This court cannot say, as matter of law, that the court below erred in holding that the person served with copy and process in this case was an agent of the defendant, within the meaning of Civ. Code 1895, §§ 1899, 1900.

2. Nor did the court err in holding that the sheriff's return of service, as amended, was legally sufficient.

3. The trial judge did not abuse his discretion in refusing to open the default for any of the reasons assigned in the motion presented by the defendant.

4. The amendment to the plaintiff's petition allowed by the court at the trial did not materially change his cause of action, and therefore did not open the petition to demurrer or plea.

5. The jury, under the state of the pleadings, being confined to the question of the amount of the damages suffered by the plaintiff, and no complaint being made in the motion for a new trial that their finding was excessive, the court below committed no error in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by Roy Parker against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Burton Smith, Greer & Felton, Roland Ellis, Hall & Wimberly, Dorsey, Brewster & Howell, and Sanders McDaniel, for plaintiff in error. Lane & Maynard, for defendant in error.

TURNER, J. The plaintiff below, Roy Parker, brought suit against the Southern Bell Telephone & Telegraph Company in the superior court of Macon county, and in his petition set forth the following allegations: The defendant company is a corporation duly chartered under the laws of Georgia, and had and operated on the 2d day of April, 1901, a line of telephone wires and telephones in said county for the use of the public and for hire, and also had on that day, and still has, in that county, an agent for the transaction of its business. Plaintiff is a merchant and is engaged in business in the town of Oglethorpe, Ga. Prior to the 2d day of April, 1901, the defendant company placed one of its telephones in plaintiff's store, at his instance and request, for use in his business; he having paid therefor the usual charges.

This telephone was negligently, carelessly, unskillfully, and unscientifically placed in his store by said company, in this: that said company neglected and failed to attach and connect a ground wire to said telephone, and also neglected and failed to attach and equip the telephone apparatus with the necessary and usual appliances to prevent injury and damage from lightning or electricity, all of which was usual and necessary for the safety of one using the telephone. Plaintiff applied to the agent of the company to have the aforesaid appliances attached and placed and connected with the telephone in his store, and gave warning of the dangerous condition in which the telephone had been left by the company; but, notwithstanding this notice and warning that the telephone was incomplete and dangerous, the company continued to neglect to attach the necessary appliances to render the use of the telephone safe, and thus prevent injury to persons near the same at all times. On April 2, 1901, the plaintiff, while standing about four feet distant from the telephone, was suddenly struck by a volt of electricity transmitted and conveyed over said telephone wires to this telephone, and from it to him, by which volt of electricity plaintiff was knocked senseless to the floor, and from the effect of which he remained unconscious for a considerable time. For several days his suffering was so intense as to require him to have medical attention; the shock to his entire system was so severe as to leave him partially paralyzed; and although some 10 months had elapsed since his injuries were received, he had not fully recovered from the effects of said shock, continued to suffer from his injuries, and feared that they might prove permanent. By reason of the aforesaid gross negligence on the part of the defendant company, he had been damaged in the sum of \$1,900, for which amount he prayed judgment against it. The process attached to the plaintiff's petition was directed against the defendant company, and the entry of service made by the sheriff was as follows: "I have this day personally served Dr. M. F. Crumley, agent of the Southern Bell Telephone & Telegraph Company at Oglethorpe, Ga., with a copy of the within writ and process. This February 27, 1902." No appearance was made by the defendant at the first term of the case, which was on the second Monday in May, 1902. At the November term following, the sheriff was allowed to amend his entry of service so as to make it read as follows: "By permission of the court, I hereby amend my entry of service by saying that I served the defendant by personally serving Dr. M. F. Crumley, agent in charge of the office of the Southern Bell Telephone & Telegraph Company at Oglethorpe, Ga., with a copy of the within writ and process. This November 10, 1902." At the November term, 1902, the defendant appeared and filed a traverse to the return of service on the grounds (1) that service had not

in fact been made upon any officer or agent of the company; and (2) that, even if there had been an attempt to perfect service in the manner recited in the sheriff's return, Dr. Crumley was not such an agent of the company as that service on him would bind it. The sheriff was made a party to the traverse, and was duly served. Counsel for the respective parties agreed that the issues thereby raised should be passed on by the court without the intervention of a jury. A hearing on the traverse was had at the May term, 1903, at which time the judge, after the evidence relied on by the defendant company had been submitted, announced his decision that the traverse had not been sustained. Thereupon the defendant challenged the sufficiency of the service, as shown upon the face of the sheriff's return; conceding, for the purposes of its contention, that his entry was true, but denying its legal sufficiency, because it did not disclose that the company had any place of transacting its usual and ordinary public business in Macon county, or elsewhere within the jurisdiction of the court, nor that the office of which Dr. Crumley was alleged to be in charge was the place of transacting the usual and ordinary public business of said corporation, nor that service was perfected upon the defendant in accordance with the provisions of Civ. Code 1895, § 1899. The court held the return of the officer to be legally sufficient, and declined to quash the entry of service or to dismiss the suit for want of proper service. Counsel for the defendant then made a motion to open the judgment of default which had been rendered at a previous term. This motion recited that, while the company had branch offices located at several named cities in this state, the defendant had never established a telephone exchange or had an operator or regular agent or place of transacting its usual and ordinary business in Oglethorpe, Ga., though it did have at that point a long-distance telephone toll station, located in the drug store of Dr. Crumley, who was authorized to receive toll from customers using the telephone placed in his store, and who was paid a commission on the tolls received at that station. The grounds on which this motion was based were, in substance, that it was never contemplated by the company that he should represent it in the matter of receiving notices of suits; that none of the company's officers, or any person authorized to act for it, had any notice of the plaintiff's suit until a short time before the November term, 1902, of the court wherein it was pending; that, if service was ever made upon Dr. Crumley, he wholly failed to advise the defendant of such service; that the company had a meritorious defense, and that, unless the judgment of default were opened, and it was allowed to file a plea to the merits, a great hardship would be worked upon it, amounting to a denial of the protection guaranteed it by the fourteenth amendment to the Constitution of the

United States. After argument had upon this motion to open the judgment of default and allow the defendant to file an answer, the presiding judge entered an order overruling the motion. Immediately thereafter, and before the case proceeded to trial on its merits, counsel for the defendant moved orally to dismiss the plaintiff's petition on the ground that there was no allegation therein that his alleged injury occurred in Macon county, and therefore the jurisdiction of the court was not made to appear. The court, after announcing that he would sustain the defendant's motion to dismiss the suit, permitted the plaintiff to amend the second paragraph of his petition by inserting an allegation disclosing that the store wherein he was injured was located at Oglethorpe, in Macon county, Ga. Counsel for the company then asked leave of the court to answer the petition, insisting that the amendment thereto was material, and accordingly it was the right of the company to then interpose its defense. The judge declined to permit the company to file its proposed answer, but stated to counsel that they could, if they so desired, answer that paragraph of the plaintiff's petition which had been amended so as to allege the necessary jurisdictional facts. The case was thereupon submitted to the jury and tried upon the only issue presented for determination by the pleadings, viz., the amount of damages sustained by the plaintiff, and a verdict for \$807.08 was returned in his favor. The defendant company subsequently filed a motion for a new trial, and, upon its being overruled, sued out a bill of exceptions to this court; therein assigning error upon each of the several rulings mentioned above as having been invoked by the defendant during the progress of the case, and also complaining of the refusal of the judge to grant it a new trial.

1. The evidence introduced in support of the traverse showed that the defendant company had in the town of Oglethorpe, Ga., what is known as a "long-distance telephone toll station," which was placed in the charge of Dr. Crumley, whose duty it was to collect fees or tolls from patrons of the company, and to give such patrons desired connections with the telephone system which had been established in the city of Americus. The operators in charge of the exchange located in that city connected the telephone at Oglethorpe, when called on to do so by Dr. Crumley, with other telephones located in Americus and in adjacent towns, so that the company's patrons at Oglethorpe could get into communication with parties at Americus and at other points where telephone service had been established by the company. "A toll station is a station where your message is paid for, for talking, at a certain rate of toll, governed by the location or distance of the station at which the party is." There were a number of toll stations under the management of the central office at Americus. The

company "never ran a toll station without some one in charge of it as collector," who was in that sense the company's agent, and was, as such, held responsible for the tolls he received from its patrons. The manager at the central office would "check him up each morning." Dr. Crumley, who was the collecting agent at the toll station established in Oglethorpe, looked after that "little station, in the way of managing the business," but he had "no authority whatever to make contracts for defending suits, or anything of that sort." The telephone was placed in a booth in his store, and he was "in charge of the protection and care of the instrument, to see that it was not abused or harmed," and he was under a duty "to do such work about the instrument as would assist the Americus office in keeping the line in good shape." He attended to the "cleaning of the carbons on the lightning arrestors," but probably did "nothing else, unless it was to change fuses in the office. All the rest was done by the lineman from the Americus exchange, and that only was done for the purpose of saving the expense of sending a lineman from the Americus office to do those things. There was no responsibility resting upon Dr. Crumley to report all things arising as necessary or important. As a matter of accommodation," the company's manager "expected him to do that, but only as a matter of accommodation." He was paid for receiving such tolls as he was directed to collect, and was furnished with a printed list "of charges from one station to another," to which he could refer. If a patron talked longer than the time limited for the minimum toll, the extra charge was fixed at the Americus office, the operators in which did "the timing" in all instances. On February 26 and 27, 1902, the company had two telephones at Oglethorpe—one "a regular toll station," and the other what was called "a switch-service station," which was also a toll station, at the store of Roy Parker," the plaintiff. Dr. Crumley was paid a small amount per month "for switching service to the station of" Parker, who, it would seem, could get into communication with the central office at Americus only through the toll station placed in Dr. Crumley's drug store. It appears from the recitals of a written contract between the company and Dr. Crumley, which was offered in evidence, that he was "to furnish the necessary office room for the instruments and accommodation of patrons; * * * to facilitate and encourage the use of the telephones, and promote the business as much as possible; * * * to collect a toll, at the schedule rate, for every talk through the instruments" placed at his station; "to keep records and make reports and pay over or remit balances of money due the company, in accordance with such instructions" as might from time to time be given him from the central office. The contract further stipulated that the telephone instruments were to

"receive proper care," and were "not to be removed from one place to another except by a duly authorized employé of the company," and that Dr. Crumley was to receive, for the services rendered by him, certain commissions on all tolls paid by patrons of the company at his station. His understanding of the relation he bore to the company is indicated by the following statement which he made as a witness in its behalf: "There was an office of the company in my store. I was the agent of the company and transacted the company's business," being held responsible for all the receipts of this office at Oglethorpe. In view of the evidence above set forth, the question presented for determination is whether or not Dr. Crumley was an "agent" of the company, within the meaning of Civ. Code 1895, §§ 1899, 1900, which provide how service may be perfected on corporations of the class to which the defendant company belongs. If so, personal service on him as its agent would undoubtedly bind the company, and the return of the sheriff, as amended, should be held to be legally sufficient. This question is a close one. But we cannot say that the court below erroneously held that Dr. Crumley was such an agent as the above-cited sections of the Code contemplate. Of course, it was never intended that a corporation should be bound by service on a mere employé or a mere servant of the corporation, in a limited sense. At the same time, it is not necessary that service should be made upon one who is, in a technical sense, an official of the corporation to be served, for section 1899 expressly declares that service "may be perfected by serving any officer or agent of such corporation." While Dr. Crumley was certainly not an officer of the company, equally clear is it that he was not its mere servant, nor one to whom the term "employé," as commonly understood, could properly be said to apply. Apparently he belongs to that large class to the various members of which the broad term of "agent" is indifferently applied, without any attempt to distinguish one type from another. The cardinal rule of construction to be looked to and followed in giving effect to a statute is, as stated in Pol. Code 1895, § 4, that the "ordinary signification shall be applied to all words, except words of art," etc. There is nothing in the language of either of the sections of the Civil Code above referred to which suggests that the word "agent," as therein used, was intended to be understood in any unusual, limited, or restricted sense, or otherwise than is justified by its ordinary signification. Had the governing officials of the company so understood the statute, doubtless they would have frankly accorded Dr. Crumley recognition as its "agent," and instructed him as to his duty with respect to notifying them when service was made on him as the local representative of the company at Oglethorpe, through whom it conducted all the business with its patrons at

that point. Counsel for the company do not, as we understand their argument, for a moment contend that the term "agent," as commonly employed, cannot fairly be applied to one occupying the position of trust and confidence which was filled by the company's representative in that town, but, on the contrary, merely insist that it is unreasonable to suppose that the legislative will was that this term should be understood according to its ordinary signification or in its broad and popular sense. In other words, the argument of counsel was addressed to the consideration of the possible, if not probable, hardship which an application of the cardinal rule of construction above referred to would necessarily impose upon their client and other corporations. While, perhaps, we are authorized to take for granted that statutes are not intended to operate harshly or unreasonably, still we cannot ignore the well-established rules of construction, with reference to which statutes must be deemed to have been framed; else we might fall into the error of substituting our own views of the reasonableness of a statute for those of the General Assembly, by which the measure was supposedly deliberately discussed and considered before being enacted into law.

2. Read in connection with the provisions of Civ. Code 1895, §§ 1899, 1900, the entry of service made by the sheriff was, in its amended form, legally sufficient, for it showed that service had been perfected in one of the modes prescribed, viz., by personally serving an agent of the company who was in charge of its office at Oglethorpe. This being so, it was wholly unnecessary that the return of the officer should show at what point within the county of Macon the company transacted its usual and ordinary business, or that the agent served was the company's representative having charge of such business. The trial judge therefore properly refused either to quash the entry of service or to dismiss the suit for want of legal service upon the defendant.

3. The motion made by the defendant to open the default recited that it was presented more than 30 days after that judgment was entered. Indeed, it was for the first time made at the term at which the trial was had. If, as we are constrained to hold, the company was bound by the service made upon its representative at Oglethorpe, we cannot say that the trial judge abused his discretion in refusing to open the default for any of the reasons assigned in that motion. See Civ. Code 1895, § 5072. This court has held that while, by statute, a judge is given much latitude in this respect, he has no power to act arbitrarily, but must exercise a sound and legal discretion. See *Deering Harvester Co. v. Thompson*, 116 Ga. 418, 42 S. E. 772, and citations.

4. The amendment to the plaintiff's petition which the court allowed him to make at the trial did not materially change his cause

of action, but merely served to set forth facts disclosing that the court had jurisdiction to entertain his suit. Therefore the making of this amendment did not open the plaintiff's petition to demurrer or plea. Civ. Code 1895, § 5068; *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731.

5. As the pleadings stood when the case came on for trial before the jury, the only question presented for determination was as to the amount of damages suffered by the plaintiff. *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317. The evidence bearing on this question demanded a finding in his favor in some amount, and fully warranted the verdict returned by the jury. Indeed, there is in the defendant's motion for a new trial no complaint that their finding was excessive. The motion raises no question not covered by the foregoing discussion, and no reason appears why the company should have been granted a new trial.

On the argument before us, counsel for the company called attention to the fact that the return of service originally made by the sheriff was not such as would authorize the entering of a judgment of default at the first term of the case; and, in this connection, counsel insisted the company should have been permitted to file its defense, inasmuch as the judgment of default was to be treated as a mere nullity. But we cannot undertake to pass upon this matter, as no question of this kind appears to have been raised in the trial court, and certain it is that there is in the bill of exceptions no assignment of error which brings the matter under review.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 337)

BROWN v. RAWLINGS.

(Supreme Court of Georgia. March 31, 1904.)

DEED—CONSTRUCTION—CLAIM CASE—EVIDENCE—USURY.

1. Where one who was the sole devisee under a will and executor thereof undertook to convey, with covenant of warranty, realty of which his testatrix died seised and possessed, designating himself as grantor, and executing the deed in his own name, such conveyance was properly admitted in evidence as his personal deed, notwithstanding the recital therein that "this sale is made by me to pay the indebtedness of [the testatrix], I being the executor of the will, and to clear the estate of debts it is necessary to make this sale."

2. Where, in a claim case, the claimant relied upon such a conveyance, the duly probated will of the testatrix was admissible in evidence to show that the grantor in the deed was the executor and sole devisee. Evidence that he had paid all the debts of the testatrix from the proceeds of such sale was also admissible. While, as an abstract proposition, this evidence was admissible, its introduction in the present case simply established a fact which neither party to the issue on trial was in a position to dispute.

3. There was evidence sufficient to authorize a finding that the security deed from the defend-

ant to the plaintiff was made as a part of an usurious contract, and therefore was void.

(Syllabus by the Court.)

Error from Superior Court, Washington County; H. M. Holden, Judge.

Action by R. W. Brown against R. B. Jackson. Judgment for plaintiff was levied on certain realty, and C. G. Rawlings interposed a claim. Judgment for claimant, and plaintiff brings error. Affirmed.

Evans & Evans, for plaintiff in error. B. T. Rawlings, T. W. Hardwick, and Rawlings & Howard, for defendant in error.

FISH, P. J. An execution in favor of R. W. Brown against R. B. Jackson was levied upon certain realty, to which C. G. Rawlings interposed his claim. When the claim case came on for trial, the claimant made the following written admission in open court, and assumed the burden: "Claimant admits that on the 3d day of May, 1895, the premises levied on * * * were conveyed to the plaintiff in *fi. fa.* as security for debt, and that at the time of said conveyance said defendant in *fi. fa.* had a legal title to said premises, and was in possession of same; that the debt secured by said conveyance was regularly reduced to judgment, with a special lien upon said premises, and the execution proceeding in the case * * * was regularly issued thereon; and that before the levy in this case was made the plaintiff in *fi. fa.* had filed and recorded in the office of the clerk of Washington superior court an escrow deed to defendant in *fi. fa.*, in accordance with the provisions of section 2724 of the Civil Code 1895." The claimant put in evidence the will of Sarah L. Jackson, duly probated in January, 1895, in which it appeared that R. B. Jackson was the sole legatee of the testatrix, and that he was nominated as her only executor; also a warranty deed from R. B. Jackson to Wilson R. Rawlings, conveying the land in question, dated November 5, 1895; also a warranty deed subsequently executed by Wilson R. Rawlings to C. G. Rawlings, conveying the same property. There was also evidence in behalf of the claimant from which the jury could find that there was usury in the debt secured by the deed from Jackson to Brown. There was a verdict finding the property not subject. The plaintiff moved for a new trial, which was refused, and he excepted.

1. Complaint was made in the motion for a new trial that the court erred in admitting, over the objection of the plaintiff in execution, the deed from Jackson to Wilson R. Rawlings. This was an ordinary warranty deed in the usual form, except that following the description of the property conveyed, and immediately preceding the habendum clause, there was this recital: "This sale is made by me to pay the indebtedness of Miss N. L. Jackson, I being the executor of the will; and to clear the estate of debts it is

necessary to make this sale." The deed recited that R. B. Jackson was the party of the first part, and it was signed "R. B. Jackson." The objection urged to its admissibility was that it appeared on its face to be an executor's deed, and that no authority was shown, either in the will or by an order from the court of ordinary, for the executor to sell the property. We do not think that the objection was well taken, as, in our opinion, the deed was not an executor's deed, but was the personal deed of R. B. Jackson. Where the grantor acts in a trust relation, it should appear that the conveyance is made by him in his representative capacity, "for, unless apt words are used to transfer the title from the real party in interest, the deed, though it be signed by the trustee or executor, and designates him as such, will be held to be his own personal deed." 1 Devlin on Deeds, § 210, citing *Bobb v. Barnum*, 59 Mo. 394. In the deed under consideration there are no words of conveyance which indicate a purpose on the part of the grantor to convey the title as executor, and the deed is not even signed by him as executor. In *Endsley v. Strock*, 50 Mo. 508, it was held that where an heir undertook to convey inherited land, and described himself as agent for the heirs of the decedent in one part of the deed, but in the other portions designated himself as grantor, and executed the deed in his own name, the conveyance was admissible in evidence as his own deed. While the recital in the deed under consideration states that the grantor is executor of the will of Miss Jackson, it seems that his intention was to sell the property as his own, he being the sole legatee under her will, and with the proceeds of the sale to discharge the debts against her estate. But, granting that his intention was to sell the property as executor, he did not accomplish that purpose by executing a conveyance as an individual. In this connection, see *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep 420.

2. The motion for a new trial further complained that the court erred in admitting in evidence the will of Miss Jackson, over the objection of the plaintiff that it was irrelevant, because it conferred no authority upon the executor to sell the property belonging to the estate; and that the court also erred in permitting the witness B. T. Rawlings to testify that, as the representative of R. B. Jackson, he had, with the proceeds of the sale of the land in question by Jackson to Wilson Rawlings, paid all the indebtedness of the estate of Miss Jackson. While, for reasons which will presently appear, we do not think it was necessary for the claimant to introduce this evidence, it was clearly not subject to the objection urged against it by the plaintiff. As an abstract proposition, it was admissible, but its introduction simply proved something which needed no proof. As we have ruled that the deed from Jackson to Wilson Rawlings was not an execu-

tor's deed, it is immaterial whether the will conferred any power upon the executor to sell the property or not. The will did devise the property to R. B. Jackson, and it was admissible in evidence for the purpose of showing this. While there is no positive and direct evidence in the record that the land levied upon and claimed ever belonged to Miss Jackson, the deed from R. B. Jackson to Wilson Rawlings contained recitals which might be construed into an admission by the grantor that this was true. These recitals were as follows: "The lot herein conveyed is fully set out and described in a deed of conveyance from Wm. Watkins to Miss N. L. Jackson, recorded in Book H of Deeds, clerk superior court Washington county, Dec. 18th, 1885. This sale is made by me to pay the indebtedness of Miss N. L. Jackson, I being executor of the will," etc. The will was therefore admissible in evidence both for the purpose of showing that R. B. Jackson was the sole legatee of Miss Jackson and for the purpose of showing that he was the executor of her will; and the testimony of B. T. Rawlings that all the debts of the estate had been paid with the proceeds of the sale of the land by R. B. Jackson to Wilson Rawlings was also admissible. If the land belonged to Miss Jackson, and she devised it to R. B. Jackson, and he was the executor of her will, no one but creditors of her estate could object to his selling the land as an individual, instead of as executor; and if he took the proceeds of such sale, and fully satisfied all such creditors, even they could not attack the validity of the sale. When Jackson executed and delivered the deed to Rawlings, he certainly conveyed to the latter whatever interest in the land he had at that time. If he then had an interest as sole legatee under the will of Miss Jackson, such interest passed to Rawlings; and when the debts of her estate were all paid the unincumbered title vested in Rawlings. But, aside from this, neither the plaintiff in execution nor the claimant was in a position to deny that R. B. Jackson had held the legal title to the land. The plaintiff was seeking to subject the land as the property of R. B. Jackson under a judgment against him which had been made a special lien on this land by virtue of a security deed given by Jackson to the plaintiff, while the claimant was claiming under a deed from Jackson to Wilson Rawlings. It was admitted that the legal title was in Jackson at the time he executed the security deed to the plaintiff in execution. One side made this admission and the other relied upon it. Neither could deny it. So we do not see how the admission in evidence of the will of Miss Jackson could have hurt the plaintiff or benefited the claimant. The effect of the admission being that the legal title was out of the estate of Miss Jackson and in R. B. Jackson at the time he made the security deed to the plaintiff, and his individual deed to Rawlings be-

ing made subsequently to that date, we do not see how the will of Miss Jackson could injure one side or benefit the other. As both parties were relying upon Jackson's title, it was unnecessary for either to prove title in him. *Rogers v. Bates*, 19 Ga. 545.

3. As the case was submitted to the jury, the question for them to consider and determine was whether there was usury in the consideration of the security deed from the defendant in execution, Jackson, to the plaintiff in execution, Brown. If there was, this deed, under the provisions of Civ. Code 1895, § 2892, was void, and, as the plaintiff's judgment was obtained after Jackson had conveyed the property to Wilson Rawlings, and he having conveyed it to the claimant, the verdict finding the property not subject to the plaintiff's execution naturally followed. As there was evidence from which the jury could have found that the deed from Jackson to Brown was infected with usury, the verdict was not without evidence to support it.

Judgment affirmed. All the Justices concurring.

(119 Ga. 361)

NORTHINGTON-MUNGER PRATT CO. v. FARMERS' GIN & WAREHOUSE CO.

(Supreme Court of Georgia. March 30, 1904.)

SALE—CONTRACT—FAILURE TO DELIVER—PAYMENT.

1. One may contract to convey property in the future conditionally upon his being able to acquire title thereto.

2. If he contracts absolutely to convey property not then owned by him, he will be liable in damages for a breach, even if he is not able to secure the same so as to make delivery.

3. A written offer of \$1,000 for a described gin outfit, and "to pay for same upon the other party giving possession and a good title," when duly accepted, is an absolute contract of bargain and sale, and not conditional upon the vendor being able to acquire title so as to make delivery.

4. Under such contract the purchaser was bound to pay if, within a reasonable time, the vendor delivered the property and tendered good title thereto.

5. The seller was bound within a reasonable time to tender such title and make delivery.

6. If the impossibility of making title would prevent a decree for specific performance, it would not prevent the vendee from recovering damages for a breach.

7. If the vendor sold to a third person, and thereby disabled itself to convey according to the terms of the contract, it would be liable in damages.

8. The pleading, correspondence, and evidence established the agency and terms of the sale. The evidence sustained the verdict as to the quantum of damages, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Farmers' Gin & Warehouse Company against the Northington-Munger Pratt Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Northington-Munger Pratt Company sold a cotton gin outfit to Freeman & Williamson for \$1,500, payable in installments, retaining title until the purchase money was paid. The first note fell due December, 1899, and after the default had continued for about a month the company instructed Baker, their agent, to get possession of the gin outfit and sell. He notified Bates, president of the Farmers' Gin & Warehouse Company, of the default, and that he had to retake the gin, and thereupon negotiated for a sale of the gin plant to the Farmers' Company. It offered \$1,000. The offer was reported by wire to the Northington Company, which instructed Baker forthwith to accept the same. Thereupon the terms of the contract were reduced to writing, by which Bates, as president, offered "1,000 for the gin outfit, including the house located at Rover, and will pay for same upon the Northington Company giving possession and a good title to the same." This offer was marked "accepted," and signed by Baker for the Northington Company. Soon thereafter Baker demanded possession of the gin from Freeman & Williamson, who declined to surrender the same, explaining that one of the members of the firm was willing to pay his proportion of the purchase price, while the other was not. After further negotiations, Freeman, for \$1,250, took a transfer of the purchase-money notes, and took or retained the gin. Baker and the Northington Company reported these facts, and the refusal of Freeman & Williamson to deliver, in explanation of their failure and refusal to comply with the contract with the Farmers' Company, and insisted that the sale was not absolute, but conditional on the Northington Company obtaining possession from Freeman & Williamson, and being able to make good title. The Farmers' Company brought suit for damages. The judge of the superior court instructed the jury that the contract of sale was binding, that the breach was established, that the Northington Company could not sell to Freeman and then use that as the legal excuse for failure to comply with the agreement, and instructed the jury that the only question for their consideration was the amount of the damages. The jury found a verdict for \$750 for the plaintiff, and the defendant excepts to the refusal to grant a new trial.

C. J. Lester and W. W. Lambdin, for plaintiff in error. Thos. F. Corrigan and Jas. L. Mayson, for defendant in error.

LAMAR, J. There was no plea of the statute of frauds, and the pleadings of the defendant, as well as the correspondence, written contract, and undisputed evidence, leave no room to question the making of the contract on the terms stated or the authority of the agent to sell. The offer and acceptance made a complete contract, the obligation of each furnishing a sufficient consideration

for that of the other. Civ. Code 1895, § 3661. The defendant insists that, construed in the light of the circumstances when the contract was made, it appears that the acceptance was with full knowledge by the buyer that the vendor was not in possession of the gin, and that it would be obliged to secure the property before it could comply. One cannot make good title to that which he does not own. But that does not prevent him from contracting to convey property to be acquired by him in the future. He may make the obligation conditional upon his being able to acquire title from some one else (*Lacy v. Hall*, 37 Pa. 360; *Forsyth v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Civ. Code 1895, § 3537); but, if he contracts absolutely, he will be bound by the terms of his agreement. And even if, because of the want of title, a decree for specific performance could not be rendered, this would not deprive the purchaser of his right to damages for the breach. Here the contract was not conditional. The offer to buy and the acceptance were absolute. The only uncertainty was as to the time when the payment should be made. That, instead of being fixed by the date of the month, was postponed until the vendor made a good title and delivered possession. The 'Farmers' Company was bound to pay \$1,000 for the gin outfit, if within a reasonable time the seller tendered a good title and made delivery. On the other hand, the Northington Company was bound within a reasonable time to tender such title and surrender possession. If a destruction of the property sold, or other fact, had operated to release the vendor from its liability under the contract, it is elementary that the Northington Company could not sell the gin to Freeman, and claim that it had become impossible to comply with its agreement. It could not disable itself, and then take advantage of its own wrong when sued for the consequent breach. Civ. Code 1895, § 3725; *Pomeroy on Contracts*, Specific Per. (2d Ed.) § 475. There was evidence to sustain the verdict as to the amount of the damages.

Judgment affirmed. All the Justices concurring.

(119 Ga. 330)

RIDDLE v. SHEPPARD.

(Supreme Court of Georgia. March 31, 1904.)

PROCESSIONERS—POSSESSION OF LAND—CLAIM OF RIGHT—ASSIGNMENT OF ERROR—EVIDENCE.

1. The possession which the Civ. Code 1895, § 3248, requires processioneers to respect is a possession existing at the time the lines are marked.

2. There was evidence to authorize the judge to submit to the jury the question as to whether the protestant had not abandoned possession of the land in controversy before the institution by him of proceedings for the appointment of processioneers.

3. An assignment of error that a specified portion of a charge is erroneous because "misleading," without stating in what way it was cal-

culated to mislead the jury, is too general to be considered.

4. Mere naked possession, with no intention of asserting ownership, is not such actual possession under a claim of right as is contemplated by Civ. Code 1895, § 3248.

5. The evidence, though conflicting, was sufficient to authorize the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. D. Evans, Judge.

Application by W. H. Riddle against C. H. Sheppard for a processioneing. From the judgment, applicant brings error. Affirmed.

E. W. Jordan, for plaintiff in error. Rawlings & Howard, for defendant in error.

COBB, J. This was a case of processioneing. Riddle, the applicant, being dissatisfied with the return of the processioneers, filed a protest as to the line marked between his land and that of Sheppard. The jury returned a verdict in favor of the line as marked by the processioneers, and Riddle complains that the court erred in overruling his motion for a new trial. There was ample evidence to sustain the finding, and the discretion of the trial judge in overruling the motion for a new trial will not be interfered with, unless there was some error of law which was prejudicial to the rights of the losing party.

1. In one part of the charge the judge instructed the jury that if Riddle, "at the time of the processioneing, was in actual possession of any part" of the property in controversy, such possession should have been respected by the processioneers, and a line run otherwise should be set aside; and in another part of the charge instructed the jury to determine "whether or not, at the time of the survey, Mr. Riddle was in actual possession of the land under a claim of right." The error assigned upon these charges is that in one the possession is limited to the time of the processioneing and in the other to the time of the survey, whereas actual possession prior to the institution of the proceeding for processioneing should be respected, although such possession may have terminated before the institution of the proceeding. We do not think there was any error in these charges. The Code declares: "Where actual possession has been had, under a claim of right, for more than seven years, such claim shall be respected, and the lines so marked as not to interfere with such possession." Civ. Code 1895, § 3248. The possession referred to in this section is undoubtedly a possession existing at the time the line is marked by the processioneers. This is clearly inferable from the concluding words of the section, "and the lines so marked as not to interfere with such possession"; that is, not to interfere with the possession which the processioneers and the surveyor find existing at the time the line is marked. The processioneers are not required to investigate into any question

growing out of a claim of possession prior to the time the lines are to be marked, but they are to respect the possession as they find it at that time. See, in this connection, *Bowen v. Jackson*, 101 Ga. 817, 29 S. E. 40; *Amoss v. Parker*, 88 Ga. 754, 16 S. E. 200.

2. Complaint is made that the court erred in submitting to the jury the question as to whether Riddle had not abandoned possession of the land in controversy. There was sufficient evidence to authorize this issue to be submitted. It appeared that the land of an estate had been divided by partitioners; that Riddle acquired a portion of the land as an heir of the deceased; and that Sheppard acquired another portion, adjoining the lot of Riddle, by purchase from one of the heirs. It seems to have been agreed between Riddle and Sheppard that the true line between them was a line which had been drawn by Clark, a surveyor, and was known as the "Clark line"; that Riddle had placed his fence upon what he claimed was the Clark line, and had maintained it there for seven years or more; that Sheppard claimed that the fence was not upon the Clark line, and that Riddle was in possession of a portion of Sheppard's land. This controversy resulted in an application by Sheppard for the appointment of processioneers. When Riddle was notified of this application, and before any action was taken on the same, he moved the fence from the line on which it had been maintained back to what was claimed by Sheppard to be the Clark line. When this was done, Sheppard dismissed his application for the appointment of processioneers. We think this evidence was sufficient to shew, *prima facie*, an abandonment of the land in controversy. Riddle's explanation of his conduct that he did not intend to abandon the possession, but merely to move his fence in order to save the rails in the event the controversy in regard to the line was decided against him, and that he had continued to cultivate the land after the fence was moved back, was for the consideration of the jury, in connection with the other evidence, in determining whether there had been such an abandonment of the possession, prior to the time that the lines were marked by the processioneers, as to require them to treat the land as being no longer in the actual possession of Riddle.

3-5. Error is assigned upon the following charge: "If Mr. Riddle, at the time of the processioning, was in possession of said land, with no intention of asserting his occupancy beyond the limits of the survey made in the partition of the Seney Ann Riddle land, such possession would not interfere with the processioneers remarking the lines made by the partitioners in that division." Error is assigned upon this charge on the ground that it is "misleading" and misstates the law. As the assignment does not state in what way the charge is misleading, that part of it is too general to be considered. The only ques-

tion, therefore, to be determined is whether the charge complained of contains a proposition of law which is sound in the abstract; the assignment of error containing no suggestion that the charge is inapplicable to the facts of the case. Properly construed, this charge states simply that, if Mr. Riddle was in possession of the land in controversy, with no intention on his part to set up this possession as evidence of ownership, the possession was not of that character which the processioneers were required to recognize in marking the lines. When so construed, we think it embodies a correct and sound proposition of law. The possession that the processioneers are required to recognize is a possession under a claim of right, and a possession by one who has no intention whatever of making a claim of ownership resulting from such possession is not a possession under a claim of right. It is not actual possession alone that the processioneers are bound to respect, but it is actual possession accompanied with a claim of ownership; and when it appears to them that one having a mere naked possession is not asserting ownership the possession is not of that character which the law requires them to respect in marking the lines. Nothing here said is in conflict with the ruling in *Christian v. Weaver*, 79 Ga. 406, 7 S. E. 261. In that case the coterminous proprietors agreed that one should hold up to a certain boundary, and that holding continued for more than seven years under a claim of right. The case was not dealing with permissive possession under the law of prescription, but the permission referred to was the permission or consent involved in the agreement which the coterminous proprietors entered into, by which one was permitted to hold up to a certain boundary.

It is not necessary, under our view of the case, to discuss the question as to what would be the effect of a possession under a claim of right, but under a mistake of fact as to the location of the true line. Whether such possession would be adverse possession is a question upon which there is a decided difference of opinion among courts of respectable standing. See *Buswell on Limitations and Adverse Possession*, § 250; *Preble v. Central R. Co.*, 85 Me. 260, 27 Atl. 147, 21 L. R. A. 829, and notes, 35 Am. St. Rep. 306; *Tiffany's Mod. Law of Real Prop.* § 443, p. 1014. Our own decisions do not seem to be in accord with each other on this question. There are decisions which appear to hold that possession under a mistake of fact as to the identity of the land or the location of the boundary is not such adverse possession as will, after seven years, ripen into a prescriptive title, where the claim of prescription is set up under color. See *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Keel v. Pace*, 20 Ga. 190; *Howard v. Reedy*, 29 Ga. 152, 74 Am. Dec. 58. In *Shiels v. Roberts*, 64 Ga. 370, there was a distinct ruling that possession under a mistake of fact as to the true boundary was

such an adverse possession as would, in 20 years, ripen into a title. We find no reason for reversing the judgment.

Judgment affirmed. All the Justices concurring.

(119 Ga. 885)

PEAVY v. McDONALD.

(Supreme Court of Georgia. March 30, 1904.)

REFERENCE—ORDER TO FILE REPORT—EXCEPTIONS—JURISDICTION.

1. When, by an order of court referring a case to an auditor, he is directed to make his report at or before the next term of the court, and by subsequent orders duly passed the time within which he is authorized to file his report is limited to a given date, he is without power thereafter to act in the premises, his control over the case having become exhausted under the express terms of the orders conferring upon him jurisdiction over the same.

2. As the office of exceptions to an auditor's report is to assign reasons why it should not be adopted and made, the judgment of the court, the point that the auditor at the time he filed his report had lost all control over the case may, under the liberal practice which obtains in this state, be raised by way of an exception to his report, though the better practice would seem to be to, present an independent objection to its consideration by the court by way of a motion to disregard it, based on the ground that it amounted to a mere nullity, and should be treated as such.

3. That counsel for each of the parties may, after the time within which the auditor was authorized to make his report had expired, have requested him to file the same notwithstanding, "as each party was anxious to dispose of the case," did not have the effect of conferring upon the auditor jurisdiction to do so, nor estop either party from subsequently objecting to the consideration of the report, it not being within the power of the parties to waive his want of jurisdiction over the case, and the conduct of counsel not being such as to mislead either party, or to deprive him of any right which he otherwise might have asserted.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action between A. G. McDonald, administrator, and Eveline Peavy. From the judgment both parties bring error. Reversed in one case, and writ of error for the other dismissed.

J. W. & J. D. Humphries, for A. G. McDonald. J. W. Wise and W. L. Watterson, for Eveline Peavy.

TURNER, J. Judgment in one case reversed; writ of error in the other dismissed. All the Justices concurring.

(119 Ga. 886)

DIERKS v. SMITH.

(Supreme Court of Georgia. March 30, 1904.)

WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS—ADMINISTRATION—OBJECTIONS.

1. Where the only ruling complained of in the bill of exceptions is based on technical objections to the pleadings in the court below, and it appears as a matter of necessary inference that no evidence was introduced on the trial, the writ

of error will not be dismissed on the ground that the certificate of the trial judge "does not state that the bill of exceptions contains or specifies all of the evidence necessary to a clear understanding of the errors complained of."

2. One who has acquired by purchase the entire interest of an heir in the estate of a deceased person, and who is interested in preventing the waste incident upon an unnecessary administration, may object, upon proper grounds, to the grant of letters of administration by the ordinary; and this is true though the objecting party be neither an heir nor a creditor of the estate.

(Syllabus by the Court.)

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Petition of T. J. Smith for appointment as administrator of James M. Lofton. A. J. Dierks filed a caveat. From a judgment dismissing the caveat, the caveator brings error. Reversed.

J. H. Longino, for plaintiff in error. J. F. Golightly, for defendant in error.

FISH, P. J. On October 6, 1902, T. J. Smith filed in the court of ordinary of Campbell county a petition alleging that on February 21, 1875, James M. Lofton died, leaving an estate consisting of real and personal property of the probable value of \$1,500; that under the law it was necessary that the estate should be administered; and that the petitioner, by written agreement of the heirs, had been selected as administrator. The petition prayed for his appointment accordingly. Dierks filed objections to the grant of letters of administration, averring that the estate of Lofton owed no debts; that the property consisted mainly, if not entirely, of 100 acres of land; that there were five shares of the estate, and five distributees, all of whom were of full age; and that no administration was necessary for the purpose of distribution. He further set up that one share of the estate, consisting of a one-fifth undivided interest in the 100 acres of land referred to, which was the interest of W. H. Lofton, one of the original distributees, had been purchased by him, and that the estate could be divided in kind. By amendment he averred that by reason of his purchase of the interest of W. H. Lofton he had the same right to object to the appointment of an administrator that W. H. Lofton would have had. The ordinary granted the application, and appointed Smith administrator, whereupon the caveator appealed to the superior court. On the call of the case in that court Dierks further amended by averring that the estate of J. M. Lofton consisted entirely of the 100 acres referred to in the original caveat. A motion was then made by counsel for Smith to dismiss the caveat on the ground that Dierks was neither an heir nor a creditor of the decedent, and therefore had no right to object to the appointment of an administrator. This motion was sustained, and the caveat excepted.

1. On the call of the case in this court a

motion was made to dismiss the writ of error on the ground that the certificate of the trial judge to the bill of exceptions "does not state that the bill of exceptions contains or specifies all of the evidence necessary to a clear understanding of the errors complained of." As it affirmatively appears that the ruling sought to be reviewed was based on technical objections to the pleadings, and as there could not have been any evidence introduced after the striking of the caveat and dismissal of the appeal, the motion to dismiss is entirely without merit.

2. On the merits of the case the sole question presented for our determination is whether or not the caveator, Dierks, had such an interest in the estate of Lofton as to give him the right to object to the appointment of an administrator. It is worthy of note that more than 27 years had elapsed after the death of J. M. Lofton before the filing of the petition in this case. From the caveat as amended it appears that Dierks is the owner by purchase of one-fifth of the entire estate. There is no question that under our law a caveat to an application for letters of administration must show that the caveator is interested in the estate, and in *Williams v. Williams*, 118 Ga. 1006, 39 S. E. 474, it was held that, "in order for one to be heard in a proceeding before the ordinary for the appointment of an administrator of the estate of a deceased person, he must show that he has an interest in the choice of an administrator, either as heir or creditor of the deceased"; and that "a claim to own the property named in the petition for administration is not sufficient; some interest on the part of the objector in the assets and their distribution must appear." The reason of this rule, as was explained by Mr. Justice Cobb in *Towner v. Griffin*, 115 Ga. 966, 42 S. E. 262, is "that a mere interloper should not be allowed to interfere where a proper application has been made for letters of administration upon the estate. A person who is not concerned in any way in the question should, of course, not be heard before the court." We are clear that in the case at bar Dierks is not an interloper. He is vitally interested. He stands in the shoes of W. H. Lofton, who, as one of the children of J. M. Lofton, was entitled to one-fifth of the estate, which, according to the amended caveat, consisted entirely of the 100 acres in question. It is further claimed that the five persons interested are all sui juris, and can, without expense, divide the estate among themselves. Dierks having acquired all the interest that W. H. Lofton had in the estate, he has every right that Lofton would have had to come in and object to the waste which it is averred is threatened.

There is nothing in any of the cases cited by counsel for the applicant which is contrary to this view. *Tanner v. Huss*, 80 Ga. 614, 6 S. E. 18, was a contest for appointment as administrator between Huss, a cred-

itor, who had been nominated by other creditors, and Tanner, who was the heir of an heir to the estate. It was held merely that Tanner, not being a creditor, could not be nominated by the creditors to administer; and that Huss, who was nominated by other creditors, being himself a creditor, was eligible for appointment. Tanner, in addition to being supported by some of the creditors, was supported also by the divorced husband of the intestate; but the latter was not himself an heir of the intestate, his only interest in the estate being as heir of an heir. Nor is there anything in the case of *Augusta R. Co. v. Peacock*, 56 Ga. 146, which is in conflict with what is now held. In that case Peacock applied for letters of administration on the estate of his nephew, a child two years old, who was killed by the Augusta & Summerville Railroad Company, the petition alleging that the deceased had personal property in the county of Richmond. The railroad company objected on the ground that the deceased left no creditors in Georgia, nor any property at all; that he was killed by the railroad company without negligence; that the entire estate of the deceased consisted of a claim for damages for this homicide, and that the administrator would have no cause of action for that. The case was tried on appeal, when the applicant demurred to the objections, insisting that the railroad company could not be heard. This demurrer was sustained, and the judgment was affirmed on writ of error, this court holding that apprehension of suit by an administrator when appointed would not authorize a person to appear as a party in the court of ordinary to resist the grant of letters; and that, "before one can be heard as a party to the proceeding before the ordinary, he must show that he has an interest in the choice of administrator, either as heir or creditor; some interest on the part of the objector in the assets and their distribution must appear." Clearly, under the averments of the caveat in this case, Dierks has a one-fifth interest in the assets of the estate, and he is interested in not having them wasted by an unnecessary administration.

Judgment reversed. All the Justices concur.

(119 Ga. 884)

De LOACH et al. v. DELK.

(Supreme Court of Georgia. March 30, 1904.)

LANDLORD AND CROPPER—TITLE TO CROPS—LABORER'S LIEN.

1. Where, under the terms of a contract between an owner of land and another, who agrees to cultivate it on shares, the relation of landlord and cropper is created, the title to all crops grown on the land remains in the landlord until there has been an actual division and settlement whereby he receives in full his share of the produce. Civ. Code 1895, § 3131; *Wadley v. Williams*, 75 Ga. 272; *Almand v. Scott & Co.*, 4

¶ 1. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 1268.

S. E. 892, 80 Ga. 95, 12 Am. St. Rep. 241. That the cropper furnishes the labor necessary to the making of the crops, and is to receive a portion thereof as compensation for his services, does not place him in the situation of a partner having an undivided interest in the product of his labor. *Padgett v. Ford*, 43 S. E. 1002, 117 Ga. 510, and cases cited. So, if the owner of the land wrongfully refuses to comply with his obligations in the premises, the remedy of the cropper is to assert a laborer's lien on the crops grown by him (*McElmurray v. Turner*, 12 S. E. 359, 86 Ga. 215); for he cannot maintain against the landlord an action of trover, the title to the crops being in the latter (*Bryant v. Pugh*, 12 S. E. 927, 86 Ga. 525, 529).

2. In no view of the evidence in the present case was the plaintiff entitled to prevail in the action of bail trover brought against the defendants; and, this being so, the court below erred in not setting aside, on certiorari, the verdict returned against them in the city court wherein the suit was instituted.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. D. Evans, Judge.

Action by Z. L. Delk against A. J. and S. E. De Loach. Judgment for plaintiff, and defendants bring error. Reversed.

W. T. Burkhalter, for plaintiffs in error.
E. C. Collins and L. L. Thomas, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concurring.

(119 Ga. 926)

RAY v. ANDERSON.

(Supreme Court of Georgia. March 31, 1904.)

ACTION ON NOTE—TITLE OF HOLDER—PURCHASE-MONEY NOTE—DEFENSES—PLACE OF PAYMENT—INTEREST—DIRECTING VERDICT.

1. The defendant in a suit on a promissory note cannot inquire into the title of the holder, unless it is necessary for his protection, or to let in the defense which he seeks to make. Civ. Code 1895, § 3698.

(a) Under section 5432 of the Civil Code of 1895 the assignee or holder of a note given for the purchase money of land may, in appropriate proceedings, subject the land to his debt. Hence, in a suit brought on promissory notes of the character mentioned, and payable to named persons or bearer, it is not a good defense that title to the notes has (since the passage of the act of 1894, codified in the section above cited) been transferred without indorsement to other persons, and an amendment to a plea seeking to set up this defense, and claiming that the alleged owners of the notes would not, in a suit against the defendant, be entitled to a lien against the land for the purchase money of which the notes were given, was properly disallowed.

(b) Nor can the defendant, in defense to an ordinary common-law suit on a promissory note, set up a claim arising ex delicto. *Hecht v. Snook*, 114 Ga. 923, 41 S. E. 74, and authorities cited. The fact that the defendant might have this right in an equitable proceeding which has not been instituted will not avail him as a defense to a pending suit at law.

2. Statement of the place of payment in a promissory note does not affect the liability of the maker. "It is the duty of such party to come and pay." *Bigelow, Bills, Notes & Checks* (2d Ed.) 35. Therefore, in a suit on a note in which no place of payment was stipulated, evi-

dence that the payee resided in Chicago, and that the contract was to pay the note in that city, was properly excluded as immaterial. It was also immaterial that one of the payees was sui juris.

3. The interest on the debt sued for was properly computed. *Ray v. Pease*, 97 Ga. 618, 25 S. E. 360. The amendment to the defendant's plea, for reasons set out in the first headnote, was properly disallowed. A finding for the plaintiff was, under the undisputed evidence, legally necessary, and the direction by the trial judge of the verdict complained of will not be held error.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by C. L. Anderson against L. R. Ray. Judgment for plaintiff, and defendant brings error. Affirmed.

Lavender R. Ray, W. R. Hammond, and R. O. Lovett, for plaintiff in error. Anderson, Anderson & Thomas and Rosser & Brandon, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 776)

KENNESAW GUANO CO. v. WAPPOO MILLS et al.

(Supreme Court of Georgia. March 29, 1904.)

FACTORS—CONVERSION—EVIDENCE—JUDGMENT.

1. Where goods have been delivered to an agent to be sold by him on commission, and he subsequently, from time to time, ships varying quantities of the same, along with similar goods of his own, to numerous customers, without in any instance keeping or attempting to keep a record of the quantity, purchase price or destination of such of the goods as belonged to his principal, or of the name of the purchaser thereof, but taking from the purchaser a promissory note covering the price of the entire shipment, such agent is chargeable with at least a technical conversion of his principal's goods, and cannot escape the resulting legal liability to account for the fair market value of the same, irrespective of the motives which actuated him in thus indiscriminately dealing with the goods sold as though they belonged exclusively to himself. *Mechem on Agency*, § 529; *Hobbs v. Chicago Packing Co.*, 25 S. E. 584, 98 Ga. 576, 58 Am. St. Rep. 320.

2. Though the contract between the principal and his agent may have stipulated that the latter was not to be held responsible for the price of goods sold to such of his customers as might not be solvent, and that, as to all sales of the principal's goods of more than a specified quantity, he and his agent were to equally divide the excess over the minimum price at which all orders were to be filled, yet, before the agent could avail himself of these stipulations, he would have to successfully carry the burden of showing which of the customers to whom he sold goods of his principal were insolvent, and in what quantities the goods were sold. *Clafin v. Continental Works*, 11 S. E. 721, 85 Ga. 28 (4), 47.

3. Under the undisputed acts of the present case, as disclosed by the report of the auditor to whom it was referred with a view to bringing about an accounting between the parties, the defendant company was liable for an amount greater than that for which a decree was entered against it in the court below; and the judge of that court did not commit any error

which was prejudicial to that company, either in his rulings upon the questions raised by the exceptions of law to the auditor's report or in ordering an accounting upon an equitable basis more favorable to the defendant than it had any right, under the strict terms of the law governing its liability, to demand or expect.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Wappoo Mills and others against the Kennesaw Guano Company. Judgment for plaintiffs. Both parties bring error. Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

Ellis, Wimbish & Ellis, for plaintiff in error. D. W. Rountree, for defendants in error.

TURNER, J. Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed. All the Justices concurring.

(119 Ga. 908)

FRIAR v. CURRY, ARRINGTON & CO.

(Supreme Court of Georgia. March 31, 1904.)

APPEAL—AUTHORITY OF ATTORNEY.

1. An appeal may be entered by an attorney at law without written authority so to do. (Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by Curry, Arrington & Co. against E. J. Friar. Judgment for plaintiffs. From an order overruling a certiorari, defendant brings error. Affirmed.

J. A. Alexander and J. Z. Jackson, for plaintiff in error. Hendricks & Harrison, for defendants in error.

SIMMONS, C. J. The trial of a case in a justice's court having resulted adversely to the plaintiffs, they entered an appeal to a jury in the same court. A motion was made to dismiss this appeal on the ground that it had been filed by the attorney at law of the appellants, and that he had failed to file any written authority to do so, or to show a ratification by the appellants. This motion was overruled, and a verdict found for the plaintiffs. Upon certiorari, complaint was made of the overruling of this motion. The judge of the superior court overruled the certiorari, and the plaintiff in certiorari excepted.

Under Civ. Code 1895, § 4457, "an appeal may be entered by the plaintiff or defendant in person, or by his attorney at law or in fact, and, if by the latter, he must be authorized in writing, which authority shall be filed," etc. "Under this section an appeal can be entered only by the party, his attorney at law, or his attorney in fact; and it is essential to the validity of an appeal entered by an attorney in fact that the authority to

enter the appeal should be in writing and filed." *Lovelady v. Franklin Davis Nursery Co.*, 113 Ga. 326, 38 S. E. 748. The requirement as to written authority is very clearly applicable to attorneys in fact only, and not to attorneys at law. The latter are also given express authority by Civ. Code, § 4417, to bind their clients in entering appeals. See, also, section 4428. That an attorney at law may enter an appeal without written authority thus clearly appears, and the judgment below must be affirmed. All the Justices concurring.

(119 Ga. 927)

HARP v. SOUTHERN RY. CO.

(Supreme Court of Georgia. March 31, 1904.)

CARRIERS—EXPULSION OF PASSENGER—LOST TICKET—PLEADING—AMENDMENT.

1. As many tickets entitle the bearer to transportation, they might be used by the finder, with the result that two could ride for one fare, if the carrier were required to carry a passenger who has lost the ticket purchased by him.

2. A passenger who loses his ticket has no right to be carried upon making or offering to make proof that the one paid for has been lost. The loss falls on him, and not on the carrier.

3. It affirmatively appears from the allegations of the petition that the plaintiff neither had paid nor offered to pay the fare. On his failure to produce a ticket, he was lawfully evicted.

4. Where a petition has been dismissed on general demurrer, and the judgment thereon has been affirmed, there is nothing to amend by; nor do the facts here call for the exercise of any discretionary power by this court to grant an order allowing the plaintiff to amend before the entry of the remittitur in the trial court.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action by E. D. Harp, by his next friend, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Harp, a minor of 16, sued the Southern Railway Company for a wrongful ejection. He alleges that he bought a ticket entitling him to ride from Atlanta to Topeka Junction, in Upson county, on the line of defendant's road, passing through Clayton; that while on the rear platform of the train an employé of the company asked him how far he was going, whereupon the plaintiff showed him the ticket; that the employé looked at it and handed it back to the plaintiff, when the ticket was blown out of plaintiff's hands; that shortly thereafter the conductor asked the plaintiff for his ticket, and he, in the presence of the employé, explained the circumstances of its loss, the employé corroborating his statement; that notwithstanding this fact the conductor ordered the plaintiff to leave the train, and put his hand on him for the purpose of removing plaintiff from the moving car, and, to prevent being violently ejected, the plaintiff leaped from

¶ 1. See *Attorney and Client*, vol. 5, Cent. Dig. § 128.

¶ 2. See *Carriers*, vol. 9, Cent. Dig. § 1031.

the car, running at from 10 to 15 miles an hour, about half a mile before reaching Riverdale; that, when plaintiff handed the ticket to the employé, he thought the latter was the conductor; that he was compelled to walk to Atlanta, 14 or 15 miles; that there were few passengers for Topeka, and that it would have been easy on arriving at Riverdale for the conductor to have telegraphed to Atlanta, and verified petitioner's statement that he had purchased the ticket to the station named; that petitioner was young and unaccustomed to travel, and did not have sufficient money to pay his fare from Atlanta to Topeka at the time a ticket was demanded; and that the manner of his ejection was aggravated by the threats and commands of the conductor. The defendant demurred generally and specially, on the grounds that there was no cause of action set out; that the petition was duplicitous; that it was uncertain whether the action was for an illegal eviction, or for an abuse of duty in a lawful eviction. After argument the court passed an order rectifying that "the plaintiff admitted that the suit was only for the wrongful expulsion, and that the company had a regulation authorizing conductors to eject passengers who neither paid fare or produced a ticket," and directing that the general demurrer to the original and amended petition be sustained, and the case dismissed. In plaintiff's brief, he requests that, if the judgment be affirmed, leave be granted him to amend by alleging that the conductor failed to demand the cash fare.

M. D. Womble and W. R. Hammond, for plaintiff in error. Dorsey, Brewster & Howell, Arthur Heyman, and J. B. Hutcheson, for defendant in error.

LAMAR, J. This suit was for wrongful expulsion, and not for damages inflicted upon the plaintiff as a result of his being compelled to alight from a moving train. The fact that one actually purchased a ticket, and that this was known to the agent who sold it, or to the gatekeeper who examined or to employes on the train who saw it, would not relieve the passenger of the obligation to surrender it to the conductor. Tickets vary in their terms. Some are good only on certain trains; others only on particular dates; others require validation. The mere fact that the plaintiff has a ticket does not, therefore, necessarily establish his right to be transported on a given train. These matters must be passed on by the conductor, and not by other employes who are not charged with this duty by the company. When the conductor makes his demand, he is entitled to have the ticket surrendered. He cannot be required to hear evidence or investigate the bona fides of the passenger's excuse for

its nondelivery, nor to wait until he arrives at the next station, and, by telegraphic correspondence with the selling agent, undertake to verify the correctness of the plaintiff's statement, or determine the character and validity of the ticket sold. It is manifest that such course would necessarily give rise to delay, and seriously interfere with the operation of trains and the rights of the traveling public. Had the plaintiff's money blown out of his hand, it is evident that his misfortune would have to fall upon himself, and not upon the company. Such loss would not have prevented his lawful eviction. The same result would follow where the ticket itself was lost, for it might have come into the hands of another, and the company might thereby have been compelled to carry two passengers for one fare. Besides, any rule allowing an excuse as a substitute for a ticket would give rise to so much uncertainty and so many possibilities of fraud that the courts have uniformly held that the failure to pay the fare or produce the ticket warrants an eviction. In fact, the plaintiff in error concedes the general rule to be that the passenger must produce his ticket, pay his fare, or suffer expulsion. He insists, however, that the special circumstances take this case out of the general rule. We fail to find any case warranting such a holding. Those cited by him, including *Sloane v. Railroad Co.* (Cal.) 44 Pac. 320, 32 L. R. A. 193, and *Scofield v. Pennsylvania Co.*, 112 Fed. 455, 50 O. C. A. 553, 58 L. R. A. 224, as well as *Pullman P. Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232, were on facts essentially different. See, on the general subject, *L. & N. R. Co. v. Fleming*, 14 Lea, 128; *Rogers v. Atlantic City R. Co.* (N. J. Sup.) 34 Atl. 11; *Fetter on Carriers*, § 279. Compare *Southern Ry. Co. v. De Saussure*, 116 Ga. 53, 42 S. E. 479; *G. S. & F. Ry. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

Pleadings are to be more strictly construed against the pleader. Here it affirmatively appears that plaintiff did not have funds with which to pay the cash fare. The general demurrer having been sustained, and the judgment affirmed here, there is nothing to amend by. It is not like the case where the demurrer was overruled in the lower court, and the judgment reversed, nor like the case where the demurrer was sustained or should have been sustained only on a special ground, not concluding the merits. *Central R. v. Patterson*, 87 Ga. 646, 13 S. E. 525; *Savannah Ry. v. Chaney*, 102 Ga. 817, 30 S. E. 437; *Brown v. Bowman*, 119 Ga. 153, 48 S. E. 410. There is nothing in the facts here to require the exercise of any discretionary power by this court to permit such amendment.

Judgment affirmed. All the Justices concurring.

(119 Ga. 876)

LOYD v. ANDERSON.

(Supreme Court of Georgia. March 30, 1904.)

PLEADING AND PROOF—VARIANCE.

1. This being a suit for a balance alleged to be due on an open account, wherein the defendant was charged with a cash item and credited with various amounts representing the value of certain timber accepted in part payment, and the evidence adduced at the trial disclosing that the plaintiff's cause of action (if any) was for a breach of a covenant with respect to the number of feet in a quantity of hewn timber sold and delivered to him for cash, under an agreement between himself and the defendant to abide by a measurement of the timber subsequently to be made by a disinterested third person, a recovery in favor of the plaintiff was unwarranted, he having failed to prove his case as laid.

(Syllabus by the Court.)

Error from City Court of Wrightsville; V. B. Robinson, Judge.

Action by J. T. Anderson against B. F. Loyd. Judgment for plaintiff, and defendant brings error. Reversed.

J. L. Kent, for plaintiff in error. Wm. Faircloth, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concurring.

(119 Ga. 901)

SCHOFIELD MFG. CO. v. COCHRAN.

(Supreme Court of Georgia. March 31, 1904.)

BANKS—GENERAL DEPOSIT—FAILURE OF BANK—PRIORITIES.

1. One desiring to purchase goods which had been pledged as security for a debt was required by the pledgee, as a condition precedent to the release of the goods, to deposit the purchase price to his account in a named bank, and to "save him harmless in the transaction." Accordingly the purchaser deposited to the credit of the pledgee in the bank designated a draft drawn on a bank in another city for the amount in question. It was known to the officers of the bank first mentioned that the sole purpose of the draft and deposit was to obtain the release of the goods from the custody of the pledgee, but no special instructions were given them in regard to the funds so deposited. The draft was forwarded for collection and was duly paid, but, before the money was returned to the bank in which it was deposited, that bank failed, and was placed in the hands of a receiver. The purchaser of the goods, in accordance with his agreement, paid the amount of the draft to the pledgee, and brought suit against the depository bank. *Held*, that the deposit to the account of the pledgee was a general, and not a special, deposit, and did not entitle the purchaser, who was subrogated to the rights of the pledgee, to priority over the claims of other general depositors.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Proceedings between the Schofield Manufacturing Company and T. W. Cochran, receiver of the New South Savings Bank. Judgment for receiver, and plaintiff brings error. Affirmed.

W. W. Lambdin and Erwin & Callaway, for plaintiff in error. Allen & Tisinger, for defendant in error.

CANDLER, J. The Schofield Manufacturing Company, of Macon, desired to purchase some yarns of a manufacturer in Barnesville. The goods, however, were in the possession of the Barnesville agent of the Export Storage Company, of Cincinnati, who held them as security for a loan, and the consent of that company was necessary to the completion of the sale. A representative of the Schofield Company, who had gone to Barnesville in the interest of his company, drew a draft on a Macon bank for \$306.36, the purchase price of the yarns, payable to the order of the cashier of the New South Savings Bank, of Barnesville. The Macon bank having notified the bank in Barnesville by telegraph that the draft would be paid when presented, a duplicate deposit slip was issued to the agent in Barnesville of the Export Storage Company for the amount of the draft. Notwithstanding this deposit, the agent refused to release the goods until express authority to do so was given him by his superiors. The president of the Schofield Company then had a communication by telephone with Black, the Atlanta representative of the Export Storage Company, who seems to have had authority in the matter; and Black agreed to release the yarns, provided the Schofield Company would place the amount of the purchase price to his credit in the New South Savings Bank, and agree to "save him harmless in the transaction." In accordance with this agreement, the president of the Schofield Company directed the president of the New South Savings Bank to transfer the deposit already made to the account of Black, and duplicate deposit slips were accordingly made out for the amount in question in the name of C. H. Black, agent. The purpose of the draft and the deposit seems to have been made known to the president of the Barnesville bank. The draft was forwarded by the New South Savings Bank to its Atlanta correspondent, which in due course forwarded it to Macon, where it was paid; but before the money was returned to Barnesville the New South Savings Bank was placed in the hands of a receiver. The Schofield Manufacturing Company paid Black the amount of the draft, and filed an intervention in the suit against the New South Savings Bank, claiming that the deposit was received while the bank was in an insolvent condition, and known so to be by its officers; that it was a special deposit, in the nature of a bailment, which did not create the relation of debtor and creditor between the parties; and that it was entitled to preference over the creditors of the bank in the payment of the amount of the draft. By agreement the case was heard by the judge without a jury, and it was "ordered, considered, and adjudged that the interven-

er, the Schofield Manufacturing Company, is not entitled to a preference over the other creditors of the New South Savings Bank in any of the funds in the hands of the receiver, and judgment is therefore rendered in favor of the receiver, T. W. Cochran, on the question of priority; but the intervener, having paid to C. H. Black, agent, the amount of said deposit, is subrogated to the rights of said Black, agent, which are simply to have a general judgment against the New South Savings Bank for the sum of \$306.36." The intervener excepted, assigning error on the refusal of the court to give its claim priority over the other claims against the bank.

We are clear that the judgment complained of was in exact accord with the law as applied to the facts disclosed by the record. There is nothing in the evidence to show that the deposit made to Black's account was a special deposit, or even what is sometimes called in banking law a "deposit for a specific purpose." A special deposit is a bailment, and implies a setting apart of the specific money or chattel deposited, to be itself returned on demand. 1 Morse, Banks & Banking (4th Ed.) §§ 191, 193. Plainly, there was no such understanding between the parties in the present case. Nor was the deposit one for a specific purpose, any more than is every general deposit which is made for the specific purpose of having the bank keep the money safely and return it on demand to the one for whose account the deposit was made. No special instructions were given the bank officials as to how, when, or under what circumstances the money deposited was to be paid to Black. From aught that appears, it was to be held subject to his check, and he was at liberty to withdraw it in whole or in part, or to add to it by making other deposits, as he might see fit. The fact that the president of the bank knew that the payment to Black was being made for the sole purpose of releasing the yarns purchased by the plaintiff has no bearing upon the character of the deposit. The reasons which influenced the plaintiff to make the deposit to Black's credit were, in the absence of special instructions on the subject, of not the slightest concern to the bank, and could not alter its relation to Black, or affect the nature of the transaction as a general deposit in the ordinary course of business. Consequently Black became its creditor to the amount of the draft collected, on the same footing with other general depositors of the bank; and the Schofield Manufacturing Company, which, by virtue of its agreement with Black, simply stepped into his shoes, had no right to a preference over the other creditors of the bank. See, on this general subject, Tiedeman v. Imperial Fertilizer Co., 109 Ga. 661, 34 S. E. 999; Ober v. Cochran, 118 Ga. 396, 45 S. E. 382.

In view of this ruling, it is unnecessary to go further and discuss questions argued in

the briefs of counsel on the assumption that the deposit was a special one. If it was not a special deposit, it can, of course, make no difference whether the fund in question was sufficiently traced to permit of the judgment prayed for by the plaintiff. We find no error in the judgment rendered by the court below.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., disqualified.

(119 Ga. 911)

BENTLEY et al. v. CRUMMEY & HAMILTON.

(Supreme Court of Georgia. March 31, 1904.)

LIMITATIONS—AMENDMENT OF PLEADING—EJECTMENT—DEED—FORGERY—EVIDENCE.

1. When, in an action of ejectment, the declaration is amended by laying an entirely new demise, the statute of limitations, relatively to the plaintiff's right to recover, runs in favor of the defendant until the date of the filing of such amendment.

2. Where a proceeding in the superior court, brought under our uniform procedure act, is partly legal and partly equitable, the legal branch of the case should be controlled as far as possible by the legal principles which would have applied, had it been the basis of a separate proceeding.

3. Where such a proceeding for both legal and equitable relief embraces what amounts to a suit in ejectment for land, and an amendment is subsequently filed which lays an entirely new demise, such amendment, relatively to the statute of limitations, does not relate back to the date of the filing of the original petition, but should be tried as of the date of the filing of the amendment.

4. Where a deed is introduced in evidence and attacked as a forgery, and it is shown by strong and uncontradicted evidence that the blank on which it is written was printed long after the death of the party by whom the deed purports to have been executed, a finding that such deed is genuine is without evidence to support it, and should be set aside.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

Suit by W. H. Bentley and others against Crummev & Hamilton. Judgment for defendants, and plaintiffs bring error. Reversed in part.

J. W. Haygood and Eldridge Cutts, for plaintiffs in error. J. L. Bankston and J. H. Martin, for defendants in error.

SIMMONS, C. J. An equitable petition was filed in the superior court of Wilcox county by William H. Bentley, F. A. Bentley, Mary E. Denison, Roxie A. Lynd, and the children of Elizabeth Higgins, seeking to recover certain lots of land hereinafter designated as lots 11, 12, and 13, to have certain deeds canceled as clouds upon petitioners' title, to recover damages for alleged trespasses upon the land, and to restrain further trespass by the defendants. This petition was amend-

¶ 1. See Limitation of Actions, vol. 22, Cent. Dig. § 545.

ed by "inserting" another lot (No. 10), adopting as to this lot the prayers made in the original petition for the recovery of the other lots and for damages. Upon the trial there was a verdict for the defendants. The plaintiffs moved for a new trial upon the grounds that the verdict was contrary to law and the evidence and without evidence to support it. The motion was overruled, and the plaintiffs excepted.

At the outset it may be stated that the defendants did not show a good paper title to the land involved in this case. As to lots 10, 11, and 12, they showed a chain of title from a man who was not shown ever to have had either title or possession. As to lot 13, they introduced deeds showing a chain of title from the state of Georgia, but the deed from the state's grantee was attacked as a forgery, and the evidence was such that the jury could not lawfully have found the deed to be genuine. The court below, however, overruled the motion for new trial, upon the ground that the defendants showed a good prescriptive title.

The original petition was filed on March 4, 1895, and the amendment adding lot 10 to those sued for was allowed on September 24, 1895. Under these pleadings, the petitioners claimed as heirs at law of M. A. Bentley, to whom the state had granted these lots of land. It was alleged that the petitioners were his only heirs at law, except O. S. Bentley and M. A. Bentley's mother, and that the latter had died prior to the bringing of the suit. There was no allegation that the mother, Rachel H. Bentley, had died testate or intestate, or as to who were her heirs. There was certainly no express claim to her share of the estate by the petitioners as her heirs, and no intimation that she had ever had any interest in the lands, except as her son's heir. The abstract of title attached to the petition was thoroughly consistent with the body of the instrument. It showed the grant by the state to M. A. Bentley, the latter's death, and that petitioners were his heirs at law. On the trial of the case the defendants introduced in evidence a deed conveying lots 10, 11, and 12 to Rachel H. Bentley, executed by four of the petitioners, the parents of the other three, under whom they claimed, and O. S. Bentley. The petitioners thereupon filed an amendment to their petition, which alleged that the deed was a forgery, and that at the time of its date (1856) two of the petitioners whose names appeared as signing it were minors. This amendment also alleged that petitioners were the only heirs at law of Rachel H. Bentley, except O. S. Bentley and one Harriet Dimmick, and that, if the lands were ever conveyed to Rachel H. Bentley, they were inherited from her by the petitioners as her heirs. The amendment prayed that, if the conveyance to Rachel H. Bentley be upheld, petitioners recover as her heirs all of the lands, except the undivided interest of O. S. Bentley and

Harriet Dimmick. This amendment was allowed on September 18, 1902—more than seven years after the filing of the original petition. In the original petition it was alleged that the defendants were in possession of the lands sued for, and were asserting title thereto. It is true, the petitioners referred to the defendants as holding under a "pretended claim of right," and alleged that the title of defendants was "fraudulent and void in so far as it may affect the title of petitioners"; but the petition, taken as a whole, clearly means simply that the defendants' claim was not good as a paper title against the better title of the petitioners. It shows that the defendants entered under a claim of right, exercised acts of ownership and control, and held adversely under deeds which were good as color. These allegations were admitted by the answer. The amendment, allowed in September, 1895, was by consent. While it is very brief and not very explicit, it was clearly intended to adopt as to lot 10 all the allegations made as to the other lots in the original petition. The evidence showed that the defendants held under deeds which were good as color of title. The jury, by the verdict, found that the deed to Rachel H. Bentley by the other heirs was genuine. Such a finding was fully authorized by the evidence, as was also a finding that, if two of the petitioners were minors when they signed this deed, they were estopped by long acquiescence to set up their minority to defeat it. Thus as to the lots embraced in this deed—lots 10, 11, and 12—the plaintiffs must be held to have no rights as heirs of M. A. Bentley, but must rely upon the title, as set up in their amendment, derived from Rachel H. Bentley. Against this the defendants set up a prescriptive title based upon the deeds to them introduced in evidence, and dating back many years, together with the possession under a claim of right alleged by the petitioners, and admitted by the answer. If the amendment made in 1902 related back to the filing of the original petition, then there was not sufficient evidence to show a prescriptive title in the defendants prior to that time. If, however, the amendment amounted to a new demise, and the case should be tried as to it as though the action had been commenced at the date of its filing, then the defendants' title by prescription had ripened as to the lots to which this amendment related.

In the first place, we are clear that the amendment amounted to a new demise. As above stated, the original petition did not show who were the heirs of Rachel H. Bentley, nor whether she had died testate or intestate; the petitioners did not set up any claim under her as her heirs; and the abstract was based upon their inheritance from M. A. Bentley. The amendment under consideration set up that the petitioners were her heirs, and that there were no other heirs except O. S. Bentley, who had been named

in the original petition as an heir of M. A. Bentley, and Harriet Dimmick, to whom no reference had been made in the original petition. The original petition claimed under M. A. Bentley directly upon the ground that the petitioners were his heirs at law. The amendment set up a claim by petitioners under a deed by them to Rachel H. Bentley, and their inheritance from her as her heirs. Hence the amendment clearly set up a new demise. It is well established that when, in an action of ejectment, "the declaration is amended by laying an entirely new demise, the case as to it should be tried as though the action had not been commenced until the date upon which the amendment introducing this demise was filed, and, relatively to the plaintiff's right to recover, the statutes of prescription would run in favor of the defendant until that date." *Burbage v. Fitzgerald*, 98 Ga. 582, 25 S. E. 554. Does this rule apply in any save suits in ejectment? Does it apply in the present case? The uniform procedure act of 1837 conferred upon the superior court jurisdiction to hear and determine any cause of action, whether legal or equitable or both. If the cause of action is purely legal, it is tried upon legal principles. If it is purely equitable, equitable principles are applied in the trial. If it is partly legal and partly equitable, both legal and equitable principles are applied. *De Lacy v. Hurst*, 83 Ga. 229, 9 S. E. 1052. The present proceeding was partly equitable, for it sought an injunction, and prayed that certain deeds be canceled. It was also partly legal, for it sought damages and prayed for the recovery of land. Its legal features should be governed by legal principles. One of these features amounted practically to a suit in ejectment, and in its trial the court should apply the legal principles applicable to suits in ejectment. That the plaintiffs, instead of filing several suits, have seen fit to combine their suit for land with certain equitable proceedings, and bring all in one action, is no reason for changing the rules and principles applicable to each branch of the cause of action. On the contrary, each should be controlled as far as possible by the principles which would have been applicable, had it been made the basis of a separate proceeding. We think that the rule above stated as applicable to suits in ejectment should be none the less applied when the action is not only for the recovery of land, but also for other relief which is of an equitable nature. The amendment setting up a new demise should be treated, as to the ejectment feature of the case, as not relating back to the filing of the original petition, but, relatively to the plaintiffs' right to recover on the new demise set up in such amendment, as though the suit had been filed at the time the amendment was allowed. In the present case, therefore, relatively to the petitioners' claim as heirs at law of Rachel H. Bentley, prescription ran in favor of the

defendants until the date of the allowance of the amendment. As this was more than seven years after the filing of the original petition, when the pleadings showed the defendants to be in possession under a claim of right, the defendants' title by prescription under color of title had ripened, and the verdict as to lots 10, 11, and 12 was fully authorized by the evidence.

2. Inasmuch as lot 13 was not embraced in the deed to Rachel H. Bentley, the petitioners inherited an undivided interest in it directly from M. A. Bentley. This interest they were entitled to recover under the original petition, unless the defendants could show a title which would prevail against that set up in the petition. As to this lot the action was tried as of the time of the filing of the original petition, and a prescriptive title could not ripen subsequently to that time. We have carefully examined the brief of evidence, and find no evidence whatever upon which to base a finding that the defendants had acquired such a prescriptive title prior to the filing of the petition. It was argued, however, that the defendants had showed a deed from M. A. Bentley, and that, while this deed had been attacked as a forgery, the jury had decided it to be genuine. The deed was dated in 1846, and was upon a printed form or blank. It was shown that the style of type used had never been made until 1875—long after the death of the alleged grantor in the deed. Copies of the letters patent for this design of type were also introduced, and showed that they had been granted in 1875. The only other evidence relative to this issue was that of a witness who swore that the signature appearing on the deed as that of one of the witnesses was not genuine. To rebut this formidable showing there was not one word of evidence. The defendants relied upon the deed itself, and upon that alone, and now urge that this was an issue of fact which should be left to the jury. To this we cannot agree. Whether or not a deed is a forgery is a question of fact which should usually be left to the jury. But here the jury could not lawfully find that the deed was genuine. Such a finding was absolutely without evidence to sustain it, and must be set aside. It was established by uncontradicted evidence—by witnesses in positions to know—that the printed form or blank could not be older than the year 1875. This being established, the jury could not properly or lawfully find that the deed filled out thereon was executed in 1846, or at any other time prior to the death of the grantor in 1854. This is especially true where the only other evidence bearing on the issue was against the genuineness of the deed. This deed being a forgery, and the defendants having failed to show any prescriptive title to lot 13, the petitioners' title, as to their undivided interests, should have prevailed. We accordingly affirm the judgment below as to

lots 10, 11, and 12, but reverse it as to the petitioners' interests in lot 13.

Judgment affirmed in part, and reversed in part. All the Justices concurring, except FISH, P. J., disqualified.

(119 Ga. 908)

VALDOSTA GUANO CO. v. HART et al.

(Supreme Court of Georgia. March 31, 1904.)

CLAIM CASES—MERGER—WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS.

1. Where an execution is levied upon two separate tracts of land, and two different claims are filed—one person claiming one of the tracts levied upon, and another person the other tract—the trial of the two claim cases together by consent of all the parties does not merge the two cases into one.

2. Where in such cases the judge below, on motion of the claimants, dismisses the levy as excessive, passing but one order of dismissal, this order is in effect equivalent to a similar order in each case (*Western Assurance Co. v. Way*, 27 S. E. 167, 98 Ga. 746), and the plaintiff has the right to sue out a separate bill of exceptions in each case. Where, however, the plaintiff seeks by a single bill of exceptions to review the ruling in both cases, the writ of error must be dismissed for want of jurisdiction in this court to entertain it. *Brown v. Railroad Co.*, 43 S. E. 498, 117 Ga. 222, and *Center v. Paper Co.*, *Id.*, and citations.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Claim case between the Valdosta Guano Company and Mattie Hart and others. From a judgment for claimants, plaintiff brings error. Dismissed.

Bennet & Bennet, for plaintiff in error. A. T. Woodward and L. W. Branch, for defendants in error.

SIMMONS, C. J. Writ of error dismissed. All the Justices concurring.

(119 Ga. 947)

DU VALL v. NORRIS et al.

(Supreme Court of Georgia. March 31, 1904.)

VOLUNTARY PAYMENTS—RECOVERY BACK.

1. Voluntary payments, though illegally demanded, cannot be recovered back. But a payment made for the purpose of recovering possession of personal property wrongfully detained is not voluntary, and may be recovered back. Especially is this true when the owner does not know and cannot ascertain who has possession of the property, but makes the payment to a third person, to be used in securing the release of the goods.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by Mamie Du Vall against M. J. Norris and another. Judgment for plaintiff before a justice was reversed on certiorari, and she brings error. Reversed.

J. J. Zachry, for plaintiff in error. C. Henry Cohen, for defendants in error.

COBB, J. This was an action to recover back money alleged to have been paid in consequence of an illegal demand therefor. The case originated in a justice's court, where a judgment was rendered in favor of the plaintiff. This judgment was set aside by the superior court on the hearing of a certiorari sued out by the defendants. The undisputed facts of the case, as shown by the answer of the magistrate, were, in substance, as follows: Plaintiff lost a diamond ring, and, supposing that the ring had been stolen, reported the matter to the chief of police, telling him whom she suspected. The chief put a detective to work on the case, and in a short time the ring was located in a pawnbroker's shop. Some days after reporting the loss of the ring, plaintiff met the chief of police, when he stated to her, in effect, that he knew where her ring was, and would get it for her if she would pay him \$38. Plaintiff at this time refused to pay the sum demanded, and requested the chief to furnish her with the name of the person who had the ring. This the chief declined to do, asking plaintiff if she desired to prosecute the person whom she suspected to be the thief. Plaintiff afterwards saw the chief, when he again refused to give the name of the person who had the ring; again stating that he would not get the ring for plaintiff unless she would pay him \$38. Thereafter plaintiff received information from an attorney at law that a pawnbroker had the ring, and that it would be necessary for her to pay the \$38. Plaintiff again refused to make the payment, and again demanded from the chief of police the name of person who had the ring. This time the chief told her that "a railroad man" had the ring. She thereupon had a possessory warrant issued for a railroad man whom she suspected, but afterwards had the warrant dismissed; being unable to procure any evidence that this person had the ring. She then employed an attorney to look after the matter for her, and she and her attorney called upon the chief of police and requested him to give them what information he had as to the whereabouts of and as to the person who had the ring. The chief stated that he would have nothing to do with the matter, but would get the ring if they would pay him \$38. The attorney then demanded the information of the chief, and he refused to give it. A similar conversation between the chief and the attorney took place again; and finally plaintiff, on the statement of her attorney that it was the only way to get the ring, drew a check for \$38.50, payable to her attorney. On the next day after this, plaintiff and her counsel called on the chief, with the money, when he produced the ring. The chief paid the money to the defendant Schaul, a pawnbroker, to whom the ring had been hypothecated by some one—it does not appear whom. Taking the evidence as a whole, it demanded a finding that the ring was pawned without the knowledge or consent of

the plaintiff. No errors of law are complained of, and the sole question is whether, under the facts above stated, the plaintiff was entitled to recover the amount of money paid the chief of police.

The judge of the superior court rendered his judgment against the plaintiff on the idea that the payment was voluntary. We have been unable to take this view of the evidence. No one will, of course, dispute the right to the plaintiff, under the evidence, to recover her ring without the payment of any sum whatever; and therefore the demand of the pawnbroker, which came through the chief of police, was illegal. Voluntary payments cannot be recovered, but "it is well settled that a payment under protest, made to secure the delivery of the possession of personal property wrongfully withheld from the payor, may be recovered back, on the ground that the payment was compulsory." 22 Am. & Eng. Enc. L. (2d Ed.) 617. Numerous English and American decisions are cited in support of this text. This was the rule at common law, and has been adopted and followed by many of the American states. Thus in *Ashley v. Reynolds*, 2 Strange, 916, a person pawned plate, and, in order to recover possession thereof, paid to the pawnbroker a sum in excess of that which he had a right to demand for the redemption of the plate. It was held that the excess might be recovered. See, also, *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178, and citations; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. Many other cases to the same effect might be cited. Our own court has applied the rule. In *Barnett v. Central Line of Boats*, 51 Ga. 489, it was held that if a carrier who has made a contract of carriage with an owner of goods pays to another carrier, who has wrongfully obtained possession of the goods, the amount of freight which the owner was required to pay under his contract, in order to obtain possession of the goods for the purpose of complying with his contract, he could recover the amount so paid. This decision is very close in point, if not controlling, in the present case. Indeed, the present case seems to be much stronger, for here the plaintiff did not know where her property was, and so could not avail herself of any of the remedies afforded by law for its recovery. See, also, in this connection, *First National Bank v. Mayor of Americus*, 68 Ga. 123, 45 Am. Rep. 476. Prior to 1895 we had no code provision on this subject, but in that year the general law was embodied in a section which is as follows: "Payments of taxes or other claims made through ignorance of the law, or where the facts are all known, and there is no misplaced confidence and no artifice, deception or fraudulent practice used by the other party, are deemed voluntary, and can not be recovered back unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or prop-

erty. Filing a protest at the time of payment does not change the rule." Civ. Code 1895, § 3723. It will be observed that, under the express terms of this section, money paid to release property from illegal detention may be recovered back. We are of opinion that the judgment of the justice of the peace was right, and that it was error to sustain the certiorari and render a judgment for the defendants. The chief of police and the pawnbroker were sued together as joint wrongdoers; and, while there might have been some difficulty in holding the chief liable, inasmuch as the plaintiff, in effect, instructed him to pay the money to the pawnbroker, and knew that he did so, no question of this character was raised. The chief of police was content to rest his case upon the same defense as the pawnbroker, and to stand or fall with him.

Judgment reversed. All the Justices concurring.

(119 Ga. 833)

ATLANTA RY. & POWER CO. v. OWENS.

(Supreme Court of Georgia. March 30, 1904.)

ATTORNEY'S LIEN—ENFORCEMENT OF SUIT—EVIDENCE—STREET RAILWAYS.

1. While attorneys at law have the same right and power over suits brought in behalf of their clients to enforce their lien for fees as their clients have, and such suits may be prosecuted for the benefit of the attorney having a lien notwithstanding a settlement between the parties to the suit, made without the knowledge or consent of the attorney, still there can be no recovery in behalf of the attorney, unless the evidence is of such a character as would have authorized a recovery by the client if the suit were still proceeding for his benefit.

2. The evidence being of such a character that a recovery in behalf of the plaintiff would not have been authorized, a finding in favor of the attorneys, who were prosecuting the suit to enforce their lien for fees, was unauthorized, and the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by W. J. Owens against the Atlanta Railway & Power Company. Judgment for plaintiff, and defendant brings error. Reversed.

Rosser & Brandon, Walter T. Colquitt, and B. J. Conyers, for plaintiff in error. Waites & Howard and Westmoreland Bros., for defendant in error.

COBB, J. The plaintiff sued the street railway company for damages. While the suit was pending, the defendant paid to the plaintiff a sum of money in full satisfaction of her demand, and she signed a paper releasing the company from all liability to her. This settlement was made without the knowledge or consent of her attorneys, and they are prosecuting the suit to enforce their lien for fees. The law authorizes an attorney who

¶ 1. See *Attorney and Client*, vol. 5, Cent. Dig. § 614.

has a lien upon the suit to prosecute it for the purpose of enforcing the payment of his fees. Civ. Code 1895, § 2814 (2). When the suit is so prosecuted, there can be no recovery for fees, unless the evidence is of such a character as that a recovery in behalf of the client would have been authorized if the suit were still proceeding for his benefit. The injuries to the plaintiff were the result of a collision between a carriage in which the plaintiff was being driven and one of the cars of the defendant company. The collision occurred on the 2d day of September, 1901, about 7 o'clock in the evening, and at a point not at a street crossing. The circumstances under which the collision occurred are best told in the language of the plaintiff herself, in the following extracts from her testimony: "I was coming back along Grant street. The city lights had been lighted. I was coming in from Grant Park down Grant street, and before I got to Glenn street I saw a large covered wagon ahead of me, so I could not pass. Of course, I had to turn, and I just drove diagonally across the track, and after I got on the track I saw the car was coming so close, and I whipped my horse up, and before I got off the car struck me." "The character of that covered wagon, as to obstructing my view up the street in front of me, was such that I could see the light of the car, but could not see the car itself. I saw the light of the car before I drove upon the track. I knew the car was coming and saw the light." "I saw the light of the car coming down there, and heard the car before I turned on the track. Before I turned on the track I saw the light of the car, and heard it too. I saw the light of the car, and heard it, before I turned onto the tracks. I didn't know how close it was on me until I drove on the track. I knew the car was coming, however. I heard the car coming, and saw the light of the car itself. The car was lit up. It had a headlight on it. After I drove on the track, everything happened so quickly I don't remember much what happened." "When I first knew the car was coming I was between Glenn and Georgia avenue. The car was beyond Glenn street. What called my attention to it was I saw the reflection of the light. I didn't see the car until I drove upon the track—not until I drove on the track. I did see it then. I didn't see it until I drove on the track. I didn't look for it before I drove on the track. I couldn't see it at all, if I had. The wagon obstructed the view. After I got on the track, the wagon was not in my way. I drove diagonally across from behind the wagon. I didn't see the car until I got on the track. I heard the car, and I saw the reflection of the car. I attempted to cross the track, because I thought I had time to get across. The car, when I first saw it after I got on the track, was beyond Glenn street. I was at the corner of Glenn almost, I couldn't tell exactly. I couldn't tell you how

far from the crossing I was. I was right at Mrs. Burns' house; that is all I can say. It was not 50 feet, though." "Q. You say when you first saw this car it was beyond Glenn street? A. Yes, sir. Q. Have you any idea, when you first drove up there, how far the car was from you? A. No, sir; it was right on me. It ran up on me before I could get across. Q. When you went to drive across, have you any idea how far it was from you? A. The only thing I know is it was beyond Glenn street." "Q. You say you heard this car coming? A. Yes, sir. Q. Did you see the car? A. I saw the reflection of the light up the car track."

An ordinance of the city prohibited the company from running its cars at the place where the collision occurred at a greater rate of speed than 15 miles per hour, and there was evidence from which the jury could find that the car was being run at a greater rate of speed than the ordinance authorized. In other words, there was evidence authorizing the jury to find that the company was negligent. The question to be determined, therefore, is whether the plaintiff, notwithstanding the defendant's negligence, has been guilty of such negligence as to preclude a recovery. In determining this question we must look to her testimony. If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf. The rule just referred to was first laid down in the case of *Western & Atlantic R. Co. v. Evans*, 96 Ga. 481, 23 S. E. 494. It was recognized and approved in *Freyermuth v. Railroad Co.*, 107 Ga. 82, 32 S. E. 668, and *Southern Bank v. Goette*, 108 Ga. 796 (2), 33 S. E. 974. Applying this rule to the plaintiff's testimony, the case presented shows that at the time she drove upon the track she knew the car was approaching, both from the noise and the light, though her view of the track was obstructed by the wagon. Under such circumstances, any prudent person would have taken some precaution to ascertain how near the car was from the point where the attempt to cross was to be made, and to attempt to cross under the circumstances indicated by the plaintiff's testimony, where she had full knowledge that the car was approaching, and did not know how near or how far it was, or at what rate of speed it was running, was such an act of negligence on her part as would preclude a recovery by her. She should at least have taken the precaution to ascertain how near the car was before attempting to cross the track, when she was on notice, both by the noise and the light of the car, that it was approaching. This seems to be a case where the plaintiff, knowing the danger, deliberately took the risk of being able to cross before the car

could reach the point where she intended to cross, and made an error of judgment as to the time that would elapse before the crossing could be made or before the car could reach that point. Such an attempt, under such circumstances, was an act of gross negligence on her part, and evidenced such a lack of prudence as to entirely defeat a recovery by her. In her testimony she says, "I attempted to cross the track because I thought I had time to get across." And in another part of her testimony she says that she did not see the car until she drove upon the track. This case is very much like that of *Southern Railway Company v. Blake*, 101 Ga. 217, 29 S. E. 288, and is to be distinguished from the case of *Western & Atlantic Railroad Company v. Ferguson*, 113 Ga. 706, 39 S. E. 306, 54 L. R. A. 802, by reason of the fact that in the latter case the plaintiff took the precaution to look down the track before attempting to cross, and at the time he looked the train was not in sight, nor could it have reached the point where he desired to cross before he had time to cross if it had been run at a lawful rate of speed.

The plaintiff having, in our opinion, failed to take such precautions for her safety as, under the circumstances, an ordinarily prudent person would have taken, she would not be entitled to recover, notwithstanding the car may have been run at an unlawful rate of speed at the time of the collision. As the plaintiff would not have been entitled to recover for her own benefit, the attorneys had nothing upon which their lien could operate, and the court erred in not setting aside the verdict in favor of their lien.

Judgment reversed. All the Justices concurring.

(119 Ga. 924)

OWENS v. ATLANTA TRUST & BANKING CO.

(Supreme Court of Georgia. March 31, 1904.)

ATTACHMENT—LIEN—BANKS—LIEN ON STOCK—FORECLOSURE.

1. In attachment proceedings against a non-resident, who is not served, the only lien created or foreclosed is that arising by virtue of the seizure of the property levied on.

2. If the plaintiff has a lien on said property by virtue of a contract, or under its charter and by-laws, such lien cannot be foreclosed by judicial proceedings unless the defendant is duly served by an officer or by publication.

3. In the present case the only lien foreclosed was that created by the attachment, which was inferior to the title asserted by the claimant, holding under a purchase older than the attachment; and a verdict finding the property subject was contrary to law.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Atlanta Trust & Banking Company against one Runnette. Judgment for plaintiff. On levy of execution J. S. Owens filed a claim. Judgment for plaintiff, and claimant brings error. Reversed.

W. D. Thompson, for plaintiff in error.
Dorsey, Brewster & Howell, for defendant in error.

SIMMONS, C. J. Twenty-eight shares of the capital stock of the Atlanta Trust & Banking Company, standing in the name of Runnette, were levied on and sold at the sheriff's sale of March 6, 1901, and purchased by Owens. On April 8, 1902, this bank sued out an attachment, which was levied on the same stock. The declaration in attachment alleged that Runnette was indebted to the bank \$2,875.98 on a note dated February 25, 1897, and that under the charter and by-laws of the company it had a lien on the stock for its indebtedness, and prayed for a judgment against Runnette, and that the judgment be declared to be a first lien upon the property levied on under the attachment by virtue of the charter and by-laws. The judgment rendered in the attachment suit is not incorporated in the brief of the evidence, but the execution issued thereon commands the sheriff to make the sum of \$2,875.98 out of 28 shares of the capital stock standing in the name of Runnette. A levy was made, and a claim to the 28 shares was filed by Owens, who insisted that at the sale in March, 1901, he had purchased the same. The bank insisted that he had only purchased the equity of redemption. The jury found for the plaintiff in *fi. fa.*, and Owens excepted.

We do not find it necessary or proper to determine the extent of the interest acquired by Owens when he purchased the stock at the sheriff's sale on March 6, 1901. Whatever interest he acquired was older than the lien created by the levy of the attachment in April, 1902, and that was the only lien which was or could be foreclosed in the present proceeding. It is true that tax liens, liens for rent, and possibly other statutory liens, may be foreclosed by a seizure, and without notice to the defendant whose property has been attached. But in a proceeding under Civ. Code 1895, § 4510, against a nonresident, the only lien foreclosed is that created by the seizure of the property. No contract or by-law lien held by the plaintiff can be foreclosed without making the defendant a party. Nor does the nonresidence of Runnette alter the case, since Civ. Code 1895, § 4976, par. 3, provides for service by publication where the suit is instituted "to establish, enforce, or foreclose liens" against property in this state belonging to a nonresident or unknown owner. If the person claiming the by-law lien desires to enforce the same by retaining possession, by refusal to transfer, by the exercise of a power to sell, or by a sale under Civ. Code 1895, § 2819, the nonresidence of the lienor would probably make no difference. When, however, an action is brought for that purpose, service upon the defendant in some of the methods prescribed by the Code is necessary. None such

having been given in the present case, the lien under the by-law was not properly foreclosed. A sale under an attachment may give as much notice as that required under Civ. Code 1895, § 2819, but it certainly cannot be claimed that a sale so conducted is "one usual in the locality where the incorporated company is located." Had the sale taken place, the bank, of course, would have been estopped to complain, but Runnette would not have been bound, and this fact may have affected the selling price to the injury of Owens, who, the bank claims, was only the owner of the equity of redemption. The judgment of foreclosure was void. The stock was not subject to the execution issued thereon. The lien of the attachment was inferior to the rights acquired by Owens at the previous sale, and the judgment in favor of the plaintiff and against the claimant was contrary to law.

Judgment reversed. All the Justices concurring.

(119 Ga. 934)

WATERS v. DURRENCE et ux.

(Supreme Court of Georgia. March 31, 1904.)

EJECTMENT—EVIDENCE OF TITLE—ADVERSE POSSESSION—OUTSTANDING TITLE.

1. The plaintiff failed to show paper title to the land sued for.

2. While there was evidence that plaintiff's ancestor had been in possession under color for a short time prior to 1861, it was not such possession as had ripened into a prescriptive title.

3. There was evidence that the land sued for had been in the adverse possession of others for more than 20 years before the bringing of the suit.

4. The defendants could avail themselves of paramount outstanding title in third persons without connecting themselves therewith.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. D. Evans, Judge.

Action by John W. Waters against F. W. Durrence and wife. Judgment for defendants, and plaintiff brings error. Affirmed.

John W. Waters, as administrator de bonis non of his father, John W. Waters, brought complaint for land against F. W. Durrence and his wife; alleging that William Grice, the original administrator, had disposed of all the estate of John W. Waters, except the land sued for, which had been in the possession of Nancy Waters from the death of John W. Waters, in 1860, as her dower, until her death, in 1898. From the evidence it appeared that the land sued for was a part of a tract of 200 acres granted by the state to Brazell in 1802. There was no evidence that he ever sold this land to Groom, but the plaintiff introduced a deed from Thomas Groom to John Waters, dated December 26, 1848, and recorded April 19, 1899, conveying "200 acres lying on Beard's creek, granted to Jacob Brazell, and having such shape and bounded as represent-

ed in a plat of the same." There was some evidence that John Waters had been in possession of a few acres of this land for a short time prior to his death, and that 51 acres of property immediately adjoining the same had been set apart as a dower. There was also evidence that Mrs. Waters had been in possession of the 100 acres sued for from the time of her husband's death, claiming the same as her own. There was other evidence that Mrs. Durrence had been the widow of Simon Waters, a son of John Waters, and, as such, one of his heirs at law; that Simon Waters had been in possession of the land sued for for quite a long period before his death; and that he claimed title by virtue of some contract under which he was to support his mother during her lifetime. There was no order from the ordinary authorizing the sale of this land by the administrator of John Waters. The plaintiff struck his representative capacity, and allowed the suit to proceed for the recovery of his interest as heir at law of John Waters, Sr. He moved to have certain persons, all heirs at law of John Waters, made parties plaintiff, which the court refused. At the conclusion of the evidence, the court granted a nonsuit, and the plaintiff excepted.

W. T. Burkhalter and Twigg & Oliver, for plaintiff in error. James K. Hines, for defendants in error.

LAMAR, J. The outstanding paper title was shown to be in Jacob Brazell. There is no explanation as to the circumstances under which Groom acquired title or was authorized to make the deed to John Waters, nor was there evidence of such possession thereunder as to create a prescriptive title in Waters. There was evidence that his widow had been in possession of the land sued for more than 20 years, claiming it as her own. Nor could this be referred to the dower estate, because the only evidence on that subject showed that this consisted of 51 acres adjoining. The plaintiff sued as heir at law of his father, and not as heir at law of his mother. He failed to show that his father had title to the land in dispute at the time of his death, or, if so, he showed that the widow's adverse possession had given her paramount title. The defendants were entitled to avail themselves of this paramount outstanding title in a third person without connecting themselves therewith. *Brumbalo v. Baxter*, 33 Ga. 81; *Jenkins v. Southern Railway Co.*, 109 Ga. 35, 41, 34 S. E. 355, and citations. This makes it unnecessary to consider whether there was such evidence of ouster as to warrant the plaintiff to recover in ejectment against his alleged cotenant, Mrs. Durrence, who, as an heir at law of Simon Waters, was entitled to possession of a part of any land belonging to the estate of John Waters.

Judgment affirmed. All the Justices concurring.

(119 Ga. 873)

WEIL v. CARSWELL.

(Supreme Court of Georgia. March 30, 1904.)

NEGOTIABLE NOTE—TRANSFER—BONA FIDE HOLDER—ASSIGNMENTS OF ERROR—COMPETENCY OF WITNESS.

1. The innocent holder of negotiable paper may transfer the same for value to one with notice of a defense, but the transferee will take the same free from the equity.

2. Where, in consideration of her husband's indebtedness, a wife gives her note to a firm, who transfers the same before due to an innocent purchaser as collateral security for the firm's debt, and on dissolution one of the members of the firm assumes such debt, and on the discharge thereof regains the wife's note, he does not stand in the shoes of the innocent purchaser, and is not protected against the wife's defense.

3. The witnesses were competent, there being no testimony as to transactions with a deceased partner.

4. The evidence was conflicting, but sufficient to sustain the verdict for the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Screven County: B. D. Evans, Judge.

Action by E. A. Weil, for use, etc., against M. V. Carswell. Judgment for defendant, and plaintiff brings error. Affirmed.

On June 22, 1893, Mrs. Carswell gave her note to Blitch & Newton, or bearer, due October 15th after date. She claimed that it represented a debt of her husband. On this issue the evidence was in direct conflict. Before the note became due, it was transferred by Blitch & Newton to John Flannery & Co., with other security, as collateral for a debt due them by Blitch & Newton. The firm of Blitch & Newton was dissolved under an arrangement by which Blitch assumed the debt to Flannery & Co. He satisfied this indebtedness by giving his individual note for \$10,600, with Weil as indorser thereon. At the request of Blitch all of the collateral held by Flannery & Co. was delivered to Weil to secure his indorsement in 1895, after the maturity of Mrs. Carswell's note. Subsequently Weil brought suit against her. She filed a plea setting up that the debt represented by the note was that of her husband, and that Weil was a purchaser after maturity. Before the case came on for trial, Blitch satisfied his indebtedness to Weil, and thereby came into possession of the note sued on, whereupon Mrs. Carswell amended her plea, setting up that Weil was not the owner of the note, but that it belonged to Blitch, one of the original payees, who stood in the position of the firm of Blitch & Newton. She again insisted upon her defense that the note was void because given for her husband's debt. The case was tried on that issue, and a verdict found for the defendant. In addition to the general grounds, the motion for a new trial assigns as error (1) that the court allowed the defendant and her husband to testify, it appearing that D. J. Newton, one of

the original payees, was dead; (2) that the court erred in allowing the pleas of defendant, it not appearing that Flannery & Co. took the same after the note was due; and (3) that the court erred in holding that Blitch did not occupy the same position of innocent holder for value as that occupied by Flannery & Co. and Weil, former holders.

J. A. Brannen, for plaintiff in error. J. W. Overstreet and White & Boykin, for defendant in error.

LAMAR, J. Flannery & Co., being bona fide purchasers for value before the note was due, could have transferred a good title to one with notice. Civ. Code 1895, § 3938; Hogan v. Moore, 48 Ga. 156. But under the evidence Weil was not a purchaser from them, but rather from Blitch, who had assumed and was occupying the position of Blitch & Newton. The transfer being by him to Weil after maturity, the latter took the paper subject to all defenses which could have been urged against the original payee; and so, too, when the note again came into possession of Blitch, one of the original payees. There was evidence sufficient to sustain the contention that the note represented the debt of her husband, and; there being no error assigned as to any ruling of the court on this branch of the case, the court did not err in refusing to grant a new trial. The assignments of error as to permitting Mr. and Mrs. Carswell to testify notwithstanding the fact that Newton was dead are incomplete, falling as they do to set out what testimony was given by the witnesses, or that it related to transactions with Newton. Even if the refusal to strike the plea can be made the ground of a motion for a new trial, there is nothing to show what motion was made, nor is any error assigned thereon which can be considered.

Judgment affirmed. All the Justices concurring.

(119 Ga. 900)

McCOWEN v. TRIPLETT.

(Supreme Court of Georgia. March 30, 1904.)

APPEAL—REVIEW—NEW TRIAL.

1. There being no complaint that any error of law was committed upon the trial, and the evidence being sufficient to authorize the verdict, the judgment refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action between B. B. McCowen and J. M. Triplett. From the judgment, McCowen brings error. Affirmed.

B. B. McCowen, in pro. per. J. J. Zachry, for defendant in error.

SIMMONS, C. J. Affirmed. All the Justices concurring.

(119 Ga. 904)

POUND v. WILLIAMS et al.

(Supreme Court of Georgia. March 31, 1904.)

SALE—RESCISSION—BREACH OF WARRANTY—DAMAGES—EQUITABLE RELIEF.

Suit was brought in a city court on a draft given for the purchase of personal property. The plea admitted the sale and delivery of the article bought. It did not allege that the property was worthless, or of value less than the draft given. There was no plea of total or partial failure of consideration, or one in abatement of the purchase money. The sole prayer of the defendant was for a cancellation and delivery of the draft, and rescission on the ground of deceit and misrepresentation as to the quality of the goods, and breach of the warranty. *Held:*

1. Breach of warranty does not annul an executed sale, but gives the purchaser a right to damages, where the contract price has been fully paid, or he may plead in abatement of the purchase money when sued therefor.

2. A city court cannot grant affirmative equitable relief.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by J. H. & W. W. Williams against B. B. Pound. Judgment for plaintiffs, and defendant brings error. Affirmed.

Orum & Jones, for plaintiff in error. Whipple & McKenzie and Steed & Ryals, for defendants in error.

SIMMONS, C. J. J. H. & W. W. Williams brought suit against B. B. Pound on a draft for \$310, alleged to have been given in payment of certain goods sold to the defendant. The defendant admitted these allegations, but set up by his plea that he owned two diamond rings, which he exhibited to the plaintiffs, with a statement that he desired to purchase two other diamonds, exactly matching in size, quality, weight, and whiteness those already owned; that the plaintiffs warranted those sold to be exact "matches"; that the comparison was made in the presence of plaintiffs, but in a store lighted by artificial light; that defendant was unskilled, and relied on the warranty and representation made by the plaintiffs. It does not appear how long the rings were retained before being re-examined, nor where this was done, but the defendant avers that, when they were examined in the natural light, it appeared that they were not of the same whiteness and brilliancy as those exhibited for comparison; that he immediately refused to "accept" the rings bought, and has since held the rings subject to the order of the plaintiffs, upon their delivery of the draft sued on; that he stands ready to tender to the plaintiffs the rings upon the delivery of the draft and the payment of the cost; that the consideration of the said draft has failed; that defendant had had little experience in the matter of buying diamonds, and was

unable to discover the defects, or to know the difference which really existed; that plaintiffs expressly warranted the rings to be exact counterparts of those in defendant's possession, and, relying upon such warranty, he gave the draft. Wherefore he prays that the suit be dismissed, that the draft be delivered and canceled, and that he have judgment for the attorney's fees, costs, and expenses incurred by him. On motion of plaintiffs, these pleas were stricken. There being no defense on file, judgment was rendered in favor of the plaintiffs, and the defendant excepted.

There is no allegation that the rings sold were wholly worthless, and no plea that their value was less than the amount of the draft. The defendant prayed, as his only relief, for a rescission of the contract, for cancellation and surrender of the draft, and for judgment for costs and expenses incurred in defending the suit. A city court cannot grant affirmative equitable relief. *English v. Thorn*, 96 Ga. 557, 23 S. E. 843. But this was an executed sale; possession of the rings had been surrendered to the purchaser; and, even if there had been a breach of the warranty, *Civ. Code* 1895, § 3556, expressly declares that the breach did not annul the sale as executed, though it might give the purchaser a right to damages, or it might be pleaded in abatement of the purchase money. There was no such plea here, and that setting up the equitable defense was properly stricken. It appeared that the defendant took the diamonds with him from the store—probably to his home in another city—and that when they were there examined, and found not to be of the quality represented, "he refused to accept the same, and they have been held subject to the order of petitioner upon their delivery of the draft now sued upon." This is no allegation that the rings were restored, or of an offer to restore, to the sellers, and of demand made for the return of the draft. Prompt restoration was one of the elements necessary to entitle the defendant to a rescission, or to the right of avoidance incident thereto. See *Smith v. Estey Co.*, 100 Ga. 628, 28 S. E. 392; *Clark v. Neufville*, 46 Ga. 266; *Martin v. Harwell*, 115 Ga. 150, 41 S. E. 686; *Barnett v. Spelr*, 96 Ga. 762, 21 S. E. 168; *Dawson v. Pennaman*, 65 Ga. 698.

Judgment affirmed. All the Justices concurring.

(119 Ga. 916)

TELFAIR COUNTY v. WEBB.

(Supreme Court of Georgia. March 31, 1904.)

TRIAL—INSTRUCTIONS—DEFECTIVE BRIDGE—DAMAGES.

1. The court should instruct the jury, even though not so requested, upon the general features of the law applicable to the material and substantial issues in a case, and leave to the jury the determination of all disputed issues of fact.

¶ 1. See *Sales*, vol. 43, Cent. Dig. § 1207.

2. Where a mare has been temporarily disabled for service, and also permanently injured, the measure of the owner's damage includes reasonable hire for the time during which the disability continued, as well as making good any diminution in market value occasioned by the permanent effects of the injury (the aggregate of these amounts being limited to the value of the mare, with interest thereon), and also any expenses incurred in keeping and treating the mare during the period of disability.

(Syllabus by the Court.)

Error from City Court of McRae; Max L. McRae, Judge.

Action by one Webb against the county of Telfair. Judgment for plaintiff. Defendant brings error. Reversed.

B. M. Frizzell, E. D. Graham, and Eschol Graham, for plaintiff in error. D. O. McLennan, for defendant in error.

SIMMONS, C. J. An action for damages was brought by Webb against the county of Telfair in the city court of McRae. The petition alleged that the damages resulted from injuries received by the petitioner's mare by reason of defects in a certain county bridge; that petitioner was leading her across such bridge, when, without any fault on his part, she stepped into a hole in the floor of said bridge and was damaged; that the flooring of the bridge was dilapidated, rotten, and full of holes; that this condition had existed for several months, and that the county authorities had actual notice of the unsafe and dangerous condition of the bridge; that the bridge had been constructed by the county of lumber of an inferior quality; and that the county was negligent in failing to repair the bridge. The petition also alleged that the mare was so badly crippled that, after attempting for nearly seven weeks, at great trouble and expense, to cure her, he had disposed of her as being practically worthless, and that he had been damaged in the sum of \$150. The defendant, by its answer, denied all the allegations of the petition as to the manner and extent of the injuries to the mare, and as to the condition of the bridge. Upon the trial the jury returned a verdict for the plaintiff for \$112.50. The defendant moved for a new trial, the motion was overruled, and the defendant excepted.

1. Under the evidence appearing in the record, there were three questions to be passed upon by the jury before reaching a determination as to whether the plaintiff was entitled to recover at all: (1) Whether the mare had been injured upon the county bridge; (2) whether this injury was caused by a defect in the bridge of which the county authorities had sufficient notice, and which they had negligently failed to repair; (3) whether the plaintiff could have avoided the injury by the exercise of ordinary care. The third of these questions was submitted to

the jury, the first was mentioned in stating the contentions of the parties, and the second was not referred to at all. Complaint was made in the motion for a new trial of instructions in which the court assumed that the mare was injured, and there was also complaint that the court failed to charge on the matters stated above as the first and second questions for the jury to determine. It was error to assume that the plaintiff's mare was injured, when there was sufficient evidence to the contrary to require a submission of the question to the jury. It was also error, even in the absence of any request, to fail to charge on the question of the defendant's negligence. That negligence is the gist of the action; and, unless it be established that the defendant was negligent in some respect, such negligence being the proximate cause of the injury, there can be no recovery, even though it be proved that the mare was injured by reason of a defect in the bridge. For these reasons, we think the court should have granted a new trial upon these grounds.

2. Under the ruling in *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679, approved in *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 150, 4 S. E. 759, 12 Am. St. Rep. 244, the plaintiff's measure of damages, if he recovered, would include reasonable hire of the animal for the time during which she was temporarily disabled for service, as well as making good any diminution in her market value occasioned by the permanent effects of the injury; such amounts, however, not to exceed, in the aggregate, the market value of the animal, with interest thereon. Plaintiff would also be entitled to recover for any expenses incurred, during the time the mare was disabled for service, in keeping her and treating her injuries. The judge below instructed the jury much in accordance with what is here laid down, but we are not sure that his charge was in all respects accurate. Certainly it is subject to the criticism that it allowed the jury to find for the plaintiff for medical attendance, when there was no evidence, so far as the record shows, of any expense on that account. As a new trial is ordered on other grounds, it is unnecessary for us to do more than state the correct measure of damages applicable to the case.

Judgment reversed. All the Justices concurring.

(119 Ga. 867)

TILLEY v. COX.

(Supreme Court of Georgia. March 30, 1904.)

PAROL EVIDENCE—BEST AND SECONDARY—DIRECTING VERDICT—CONSTITUTIONAL LAW—NEW TRIAL.

1. The writing itself is the best evidence of what a written instrument contains, and parol evidence as to its contents is not admissible in the absence of proof of its loss or destruction, or of its custody by a person beyond the limits of the state, who is not a party to the case.

¶ 2 See Damages, vol. 15, Cent. Dig. §§ 90, 91, 220.

2. Civ. Code 1895, § 5331, authorizing the court to direct the jury to find for the party entitled thereto where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict, is not repugnant to the Constitution of this state or that of the United States, as impairing the right of trial by jury, or as depriving a party of his property without due process of law.

3. There was no error in directing the verdict.

4. By the exercise of ordinary diligence the alleged newly discovered evidence could have been discovered in time for use upon the trial.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by S. A. Cox against H. P. Tilley. Judgment for plaintiff, and defendant brings error. Affirmed.

Eb. T. Williams and Alex. W. Stephens, for plaintiff in error. L. F. McClelland and J. D. Kilpatrick, for defendant in error.

FISH, P. J. S. A. Cox sued H. P. Tilley on two promissory notes. Defendant, in his answer, admitted the execution of the notes, that they were unpaid, and that the plaintiff was the holder and owner of them at the time the action was brought. He pleaded that the notes were given for the premiums on a life insurance policy for which he had applied to the New York Life Insurance Company, through Cox, its agent; that he intended to apply for a policy providing for a participation in dividends after the second year, which would "reduce the premiums each year with paid-up insurance for the face of the policy at the expiration of twenty years"; that he did not read the application, for the reason that he could not easily do so without his glasses, which he did not have at the time; that Cox represented to him that the application was for the kind of policy he desired to obtain, and he implicitly relied upon such representation; "that when the policy was delivered it was totally different from the one he had contracted for with said Cox, it being a 20-year policy, with no dividends until the expiration of 20 years; that defendant immediately returned said policy, and demanded the surrender of his notes by said Cox, but that he refused to take the policy tendered or to surrender his notes, whereupon he mailed it to him and remailed it, and is willing now, and has always been, to disclaim any benefits under it; that on account of the aforesaid misrepresentations by said Cox he was induced to sign said notes and application, being grossly misled by fraud; that the consideration of said notes had totally and wholly failed." On the trial the court directed a verdict for the plaintiff. The defendant made a motion for a new trial upon various grounds, which being overruled, he excepted.

1. One ground of the motion alleged that: "Movant offered to prove by his own parol

testimony the following material facts: That he did not get the kind of policy applied for by him or the insurance applied for by him, viz., a policy which would pay to him a dividend at the expiration of the second year and at stated periods thereafter, by which he could reduce his premiums." Another ground alleged: "The movant offered to prove by his own parol testimony the following material facts: That the policy which was sent him was not the kind of policy he applied for—a policy which would begin to pay dividends at the expiration of the second year, by which he could reduce his premiums—but was a policy which paid no dividends at the expiration of the second year." That the evidence last quoted was offered after the witness had testified as follows: "After he received said policy, he tendered it back to Holland, and he refused to accept it. Day or two later he tendered it to Mr. Cox, and he refused; and witness tendered it again to Mr. Cox, and he again refused. Witness then mailed it to the New York Life Insurance Company in Atlanta, and it came back. He then returned it to the company in Atlanta, and it came back to the post office again, and he refused to take it out the office, and has never seen it since. Does not know what became of it. After that witness called back at the post office, and called for the policy, and the postmaster said it was not there." The complaint was that the court erroneously rejected the evidence offered. We do not think that the court erred in ruling that this evidence was inadmissible. The plea of the defendant, as we have seen, was that the policy he received was a 20-year policy, which provided for no dividends until the expiration of 20 years, and that it was totally different from the one for which he had contracted. The policy itself was the highest and best evidence of what it contained, and as to whether or not it provided for a participation in dividends after the second year, which was the kind of policy the defendant claimed, in his plea, he had applied for. It is evident that the testimony of the witness did not show that the policy was either lost, destroyed, or inaccessible to the diligence of the defendant. The mere fact that the postmaster told him the policy was not in the post office did not show that it was lost or destroyed. The postmaster did not say that it was lost, or that he did not know what had become of it. He simply said it was not in the office. Owing to the failure of the defendant to take it out of the office, the postmaster might have returned it to the address whence it came. Some one other than the defendant might have called for his mail, and the policy might have been delivered to such person. So far as this testimony showed, the postmaster might have known exactly where the policy was, or, if it had left his possession, to whom it had been delivered, or where he had sent it. The

defendant simply traced the missing document to the possession of the postmaster, without introducing the evidence of the postmaster to show that it was lost, or what became of it. Indeed, so far as the evidence showed, the defendant might have been informed as to the whereabouts of the policy, and it might have been an easy matter for him to have procured its production. Such information on his part was not at all inconsistent with his statement that the postmaster told him it was not in the post office.

2. Another ground of the motion was that the court had no legal or constitutional right to direct a verdict for the plaintiff without the defendant's consent, and that in so doing the defendant was deprived of his constitutional right of a trial by jury, and was deprived of his property without due process of law, which was contrary to the Constitution of the United States, the provisions of the respective Constitutions in reference to these matters being set out in the motion. It is well settled that the provision of the seventh amendment to the Constitution of the United States that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," applies only to the courts of the United States. *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 280, 15 L. Ed. 372; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21, 31 L. Ed. 80; 6 Am. & Eng. Enc. L. 974, and cit., note 4. It is equally clear that the fourteenth amendment to the federal Constitution, providing that no state shall "deprive any person of life, liberty or property, without due process of law," does not require a jury. *Walker v. Sauvinet*, supra; *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; *Fant v. Buchanan* (Miss.) 17 South. 371. Civ. Code 1895, § 5331, provides: "Where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto." This section does not contravene the provision of our state Constitution that the right of trial by jury shall remain inviolate, nor the provision that no person shall be deprived of property except by due process of law. Under our procedure it is the province of the jury, in civil cases, to pass upon questions of fact, and a trial by jury in such cases presupposes an issue of fact; so, if there be no such issue, there is nothing for a jury to pass on. The jury, in such cases, has nothing to do with questions of law that may be involved, or with inferences of law from undisputed facts. A plaintiff might with as much reason contend that the court when granting a nonsuit deprived him of his right of trial by jury as a defendant could contend that he was deprived of such right by the direction of a verdict against him in a case falling within the provisions

of the above-cited section of the Civil Code. The right of the court to grant a nonsuit in a proper case has never been brought in question in this court, so far as we know. In *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Conn. 468, it was held: "The act of 1852 [Laws 1852, p. 7, c. 4], authorizing the granting of nonsuits in civil actions where the plaintiff, who has produced his evidence and rested his case, shall have failed to make out a prima facie case, is not repugnant to the Constitution of this state, as impairing the right of trial by jury." While the plaintiff in error relies upon both of the above-mentioned provisions of our state Constitution, they are each invoked for the same purpose; that is, to sustain his contention that he was entitled to a trial by a jury, the due process of law contended for being a trial by a jury. As there was no issue to submit to the jury, due process of law did not require that the case should be tried by a jury.

3. As the defendant, in his answer, admitted, in effect, that the plaintiff was entitled to recover, unless the plea of the defendant should be sustained, and as there was no evidence to sustain the plea, there was no error in directing a verdict for the plaintiff.

4. Another ground of the motion for a new trial was alleged newly discovered evidence, which evidence was, in substance, that after the trial, and on the same day thereof, movant's brother informed him that the package or letter from the New York Life Insurance Company which had been directed to movant at Decatur, Ga., and which he had requested his brother to return, had not been returned, because his brother had forgotten to do so, but had been placed by his brother under his buggy cushion, where it had remained for six months, and was subsequently placed in a drawer at his house; that movant immediately went to his brother's house, and procured the letter or package, which had not been opened; that when he opened it, some time before the hearing of the motion for a new trial, in the presence of certain named witnesses, the insurance policy in question was found therein; that movant did not know during the trial where the policy was, but believed that his brother had returned it by mail to the agent of the insurance company at Atlanta. Affidavits of the movant and his counsel, in the usual form, as to the want of knowledge of the alleged newly discovered evidence at the time of the trial, and that the same could not have been procured by the exercise of proper diligence, were also submitted upon the hearing of the motion. The policy, which provided for no participation in dividends until the expiration of 20 years, was also put in evidence upon the hearing of the motion as part of the alleged newly discovered evidence. The defendant had averred in his verified plea that he had twice returned the policy by mail to the agent of the company that issued it. On the hearing of the motion for a new trial the affidavit of counsel for plaintiff was

submitted, in which they deposed that some 10 days before the trial of the case they notified counsel for defendant that the policy was not in the possession, power, custody, or control of themselves, or of their client, or of the New York Life Insurance Company, but that, according to the information and belief of deponents it was in the possession, power, custody, and control of the defendant, and that deponents then notified counsel for defendant that they would demand strict proof of the policy, and defendant's counsel had better make some effort to procure it. As it appeared that the defendant had delivered the letter containing the policy to his brother, to be returned by mail to the agent of the company, and that his counsel had been notified that it was in the possession, power, custody, or control of the insurance company, the plaintiff, or his counsel, it seems that the slightest diligence on the part of the defendant would have required him to make inquiry of his brother as to whether or not he had mailed the letter containing the policy. As is well known, the granting of new trials on the ground of newly discovered evidence is not favored by the courts, and the discretion of a trial judge in refusing a new trial on such ground will not be controlled unless manifestly abused. We do not think there was any abuse of discretion in this instance.

Judgment affirmed. All the Justices concurring.

(119 Ga. 950)

COLUMBUS FERTILIZER CO. v. HANKS.
(Supreme Court of Georgia. March 31, 1904.)

JUSTICE JUDGMENT—DORMANCY—EXECUTION DOCKET.

1. A judgment rendered in a justice's court will not be kept in life and the running of the dormancy statute arrested by entries on the execution recorded upon the general execution docket, but not recorded upon the execution docket of the superior court of the county of the defendant's residence.

Candler and Turner, JJ., dissenting.
(Syllabus by the Court.)

Error from Superior Court, Muscogee County; J. H. Worrill, Judge pro hac vice.

Action by the Columbus Fertilizer Company against L. B. Hanks to determine evidence of illegality. Judgment for defendant, and plaintiff brings error. Affirmed.

T. L. Bowden and J. H. Martin, for plaintiff in error. T. T. Miller, for defendant in error.

SIMMONS, C. J. A fl. fa. from a justice's court was levied upon certain personal property. The defendant filed an affidavit of illegality, alleging that the execution was proceeding illegally, for the reason that more than seven years had elapsed from the time the execution was issued before either the execution or the entries thereon had been

placed upon the execution docket of the superior court, and that the judgment was therefore dormant, and could not be enforced by levy. The case thus made was returned to the justice's court, and thence appealed by consent to the superior court. Upon the trial the case was submitted to the judge, without the intervention of a jury, upon an agreed statement of facts. From this statement it appeared that the judgment upon which the execution was based was rendered in December, 1893; that the execution was issued March 12, 1894; that a proper return of nulla bona was made on the execution on October 12, 1894, by a proper officer; that the execution and this return of nulla bona were properly recorded on the general execution docket of the county on October 20, 1896; that a proper return of nulla bona was made on the execution on May 6, 1901; that the levy to which the affidavit of illegality was filed was made on June 5, 1901; that the execution and the entries of nulla bona were entered on the execution docket of the superior court on June 8, 1901, and that they had not been entered upon that docket prior to that time. The judge ruled that the entry of the execution upon the general execution docket "did not prevent it from being dormant when the levy was made," and therefore he sustained the illegality. To this judgment the plaintiff in execution excepted.

Under the acts of 1823 (Cobb's Dig. p. 498) and 1856 (Acts 1855-56, p. 234) no judgment obtained in the courts of this state could be enforced after the expiration of seven years from its rendition when no execution had been issued, or, if the execution had been issued, after the expiration of seven years from the time of the last entry upon the execution by an officer authorized to execute and return it. By the act of 1885 (Acts 1884-85, p. 95; Civ. Code 1895, § 3761) it was enacted that no judgment should be enforced "after the expiration of seven years from the time of its rendition, when no execution has been issued upon it and the same placed upon the execution docket as now provided by law, or when the execution has been issued and seven years have expired from the time of the record upon the execution docket of the court from which the same issued of the last entry upon the execution made by an officer authorized to execute and return the same." This made it necessary, in order to continue a judgment in life, not only to have the entries made upon the execution but to have them recorded in the execution docket of the court from which the execution issued. The act also provided "that, in case any execution issues from any court having no execution docket, then said record shall be made upon the execution docket of the superior court of the county where the defendant resides." Civ. Code 1895, § 3762. The justices' courts of this state have no execution

docket, and to them this last provision is applicable. In 1889 the General Assembly passed "an act to provide when transfers and liens shall take effect as against third parties." Acts 1889, p. 106. Under this act deeds, mortgages, and liens of all kinds, as against innocent third parties who have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record. The clerk of the superior court is required to keep a general execution docket, and, as against such third parties who have acquired a transfer or lien binding the defendant's property, no money judgment obtained within the county of the defendant's residence shall have a lien upon his property from the date of the rendition of the judgment, unless the execution is entered on the general execution docket within 10 days from the time the judgment is rendered. When the execution is entered after 10 days, the lien shall date from such entry. As against such third parties, no money judgment obtained in this state outside of the county of the defendant's residence shall have a lien upon his property in any other county than where obtained, unless the execution is entered upon the general execution docket of the county of his residence within 30 days from the time the judgment is rendered, and when the execution is entered upon this docket after the expiration of 30 days the lien dates from the entry. See Civ. Code 1895, §§ 2778-2780.

In the present case no record of the execution or of the entries thereon was made on the execution docket of the superior court until after the expiration of more than seven years from the time of the rendition of the judgment and the issuing of the execution. If the act of 1885 was not changed by the act of 1889, the judgment was clearly dormant. *Smith v. Bearden*, 117 Ga. 822, 45 S. E. 59. The sole question in the present case is whether the entries upon the general execution docket served to keep the judgment in life. Prior to the act of 1889 there was no general execution docket kept. When that act provided that one should be kept in each county, this docket was not substituted in lieu of any of those already kept, but was additional. The act did not contemplate one docket, which should contain all that had been entered previously in the several dockets of the county. Each court of record had kept an execution docket as part of its records, and the act of 1889 did not change this. A plaintiff might have his execution entered upon the general execution docket or not, as he preferred. Thus the general execution docket did not show all that was shown by the other and older dockets. Again, the act of 1889 provided for the record, upon the general execution docket, of executions based on judgments obtained in other counties, and thus the general execution docket might contain matters not shown by the other dockets. The fee of the clerk for making the

record upon the new docket was different from that for making entries upon the other docket. Thus we think it clear that the general execution docket was not intended as a substitute for all of the older dockets. Nor do we think that the act of 1885, as to the dormancy of judgments, was affected by it. The act of 1889 contained an express provision that "nothing in this act shall be construed to affect the validity or force of any deed, or mortgage, or judgment, or other lien of any kind, as between the parties thereto." Civ. Code 1895, § 2781. The dormancy of a judgment may be taken advantage of by the defendant as against the plaintiff or his assigns, and therefore affects the validity and force of the judgment. "An entry made by a proper officer upon an execution issued from a judgment, unless recorded upon the execution docket of the court from which the execution issued, will not, even as between the parties to the judgment, arrest the running of the dormancy statute." *Nowell v. Haire*, 116 Ga. 896, 42 S. E. 719. "A judgment is enforced against the defendant therein," and the act of 1885 provides that no dormant judgment "shall be enforced," and this is true without regard to whether the rights of third persons may be affected. *Id.* If the act of 1889 did not affect the validity or force of the judgment as between the parties, it could not affect the question as to whether the judgment was dormant, and that question must be determined without regard to it. The act of 1885 was therefore not changed or modified by the act of 1889. This view of the matter was taken by the codifiers of the Civil Code and by the General Assembly, for the provisions of both acts are embodied in that Code, evidencing a belief that both were of force. The act of 1889 merely made provision as to when transfers and liens should take effect as to third parties without notice. The general execution docket was made the means of giving notice of judgment liens by affecting third persons with notice of executions properly recorded therein. To this extent the act was well within the scope of its title. Had the act contained provisions affecting the validity or force of judgments as between the parties, it might well have been held that such provisions were unconstitutional as being beyond what was covered by the title. For these reasons we think that the act of 1889 must be held merely to fix the time when transfers and liens shall become effective as against third parties without notice, and to have no effect upon the validity and force of the judgment as between the parties thereto or upon the question of its dormancy.

It was argued, however, that the placing of the execution and the entries thereon upon the general execution docket was such a public act as would prevent the judgment from becoming dormant. This is not true. Under the ruling in *Holles v. Lamb*, 114 Ga. 740, 40 S. E. 751, a judgment may be pre-

vented from becoming dormant either by proper and timely entries on the execution, duly recorded on the execution docket of the court from which it issued, or by active and bona fide efforts on the part of the plaintiff to enforce his execution by appropriate legal proceedings duly taken. In the opinion it was said that "the dormancy of a judgment is prevented either by proper entries every seven years, duly recorded on the execution docket, or by a bona fide public effort on the part of the plaintiff in *fi. fa.* to enforce his execution in the courts of the country at such times and periods that seven years will not elapse between such attempts or between such an attempt and a proper entry." The mere record of an entry on the general execution docket is not an effort to enforce the execution, but a mistaken attempt to keep the judgment alive. Such a record is not such an active and public effort as was contemplated by that decision, and cannot be considered as sufficient to keep the judgment in life, especially as it is done under an act which, by its express terms, does not affect the validity or force of the judgment as between the parties thereto. The present case is clearly distinguishable for another reason. *Hollis v. Lamb* was put on the ground that the act of 1885 did not affect the question whether dormancy had been prevented by public efforts to enforce the execution in the courts of the country, but did make it necessary to properly record any entry which was relied upon to prevent dormancy. "That act," said Little, J., "made practically but one change in the law, * * * and that was that the entries made on an execution by the officer which were sufficient to prevent its dormancy should be entered upon the execution docket of the court from which it issued; and it is now declared * * * that when seven years have elapsed from the time of the record upon the execution docket of the last entry upon the execution, made by an officer authorized to execute and return the same, the judgment shall be dormant." In other words, the act of 1885 was held to apply to entries on the execution, and to make their record necessary to arrest the running of the dormancy statute, but not to apply to those other acts which by reason of their public character serve to keep the judgment alive. To hold now that the entries on the execution can be effective although not recorded in the manner prescribed would be to render the act of 1885 meaningless and nugatory. If that act means anything, it is that entries on an execution cannot serve to keep the judgment in life unless the entries are properly recorded. We hold that the record of the execution and the entries thereon upon the general execution docket was insufficient to prevent the judgment from becoming dormant, that the judgment was dormant when levied, and that the judge below was right in holding that the execution could not be enforced by levy.

Judgment affirmed. All the Justices concurring, except LAMAR, J., disqualified, and OANDLER and TURNER, JJ., who dissent.

TURNER, J. (dissenting). The act of 1822 was entitled "An act to amend the 26th section of the judiciary act, passed 16th day of December, 1789; and also to prevent the fraudulent enforcement of dormant judgments." Cobb's Dig. p. 496. The preamble recites that "dormant judgments, by being collusively kept open, are made the instruments of fraud on innocent purchasers; and often operate oppressively on vigilant and bona fide creditors." The third section of the act declared that "all judgments upon which no execution shall be issued, or on which no return shall be made on the execution, shall be void and of no effect." This section of the act was amended in 1823, by adding a proviso to the effect that judgments might be renewed or revived. This court, in an opinion from which the foregoing statement is taken, construing the acts according to their spirit and intention, held that "they contemplate no benefit to the defendant, but aim at the protection of innocent purchasers and vigilant and bona fide creditors from fraud." *Lockwood v. Barefield*, 7 Ga. 398; *Butt v. Maddox*, Id. 500; and subsequent cases to same effect. This view of the court, following the reason and spirit of the legislation, was reached, though the acts declared that "judgments upon which no execution shall be issued, or on which no return shall be made on the execution within seven years from the date of the judgment, shall be void and of no effect."

The eighth section of the limitation act of March 6, 1856, re-enacts the acts of 1822 and 1823 substantially, the provision that the judgments shall be null and void being changed into a provision that such judgments shall not be enforced. All the Codes prior to the present Code contained this section of the general limitation act of 1856: "No judgment hereafter obtained in the courts of this state shall be enforced after the expiration of seven years from the time of its rendition, when no execution has been issued upon it; or when execution has been issued, and seven years have expired from the time of the last entry upon the execution made by an officer authorized to execute and return the same." Code 1882, § 2914 (2863), (2855). And yet this court in 1888, considering the history of this law and its reason and purpose, held that a judgment could be enforced when there had not been within the period of seven years any entry upon it by an officer authorized to execute and return the same, but only a receipt by a notary public of his costs. *Gholston, Adm'r, v. O'Kelley, Adm'r*, 81 Ga. 19, 7 S. E. 107. The court said in that case: "It has always been held that section 2914 of the Code should receive an equitable construction; and it has also been held that any public act of the plaintiff going to show that

the execution was still in life would be sufficient to prevent its becoming dormant." And in the opinion many cases are cited by the learned justice rendering the decision of the court. *Wiley v. Kelsey*, 3 Kelly, 274; *Worthy v. Lowry*, 19 Ga. 517; *Ector v. Ector*, 25 Ga. 274; *Clark v. Feagan*, 42 Ga. 269; *Thrasher v. Foster*, Id. 212; *Water Lot Co. v. Bank of Brunswick*, 58 Ga. 30; *Nelson v. Gill*, 56 Ga. 536. A careful and discriminating statement of these cases was given in detail, and this review contained the following quotation from the case in 56 Ga. 536: "Jackson, J., in delivering the opinion of the court, says: 'If we should confine ourselves to the words of the statute, we should hold it dormant; but this court, in [Booth v. Williams] 2 Kelly [252] and [Wiley v. Kelsey] 3 Kelly [274], and many following cases, departed from the words, and have given the dormant acts an equitable construction. The principle arrived at seems to be that, as between the plaintiff and the defendant, any record facts which go to show that the judgment creditor was active, particularly if his want of activity during any of the time was caused by the act of the defendant, would operate to save the judgment from the operation of the act, such as claiming money in court in the case in 3 Kelly, and any official action upon the public dockets so as to notify the world that the plaintiff claimed that his judgment was subsisting, as in [Tanner v. Hollingsworth] 41 Ga. 133.'" And many other cases could be adduced of like tenor and effect.

The amendment of that section of the Code of 1882 by the act of 1885 (Acts 1884-85, p. 95) is embodied in section 3761 of our present Civil Code. "That act made practically but one change in the law as it then stood in relation to the dormancy of judgments, and that was that the entries made on an execution by the officer which were sufficient to prevent its dormancy should be entered upon the execution docket of the court from which it issued; and it is now declared in that section of the Code that, when seven years have elapsed from the time of the record upon the execution docket of the last entry upon the execution, made by an officer authorized to execute and return the same, the judgment shall be dormant. If the provisions of the previous law which required proper entries to be made upon the execution every seven years in order to prevent dormancy did not, under the construction of that statute by our court, render such judgment dormant in the absence of such entries when the plaintiff in *fi. fa.* was making public attempts to enforce his execution within the limitation, it would be inconsistent to now rule that the mere addition of a requirement that such entries should be placed upon the execution docket has abrogated the rule of equitable construction which has invariably been given to statutes in relation to the dormancy of judgments. In harmony with the spirit of the rulings heretofore made, and under the

unbroken precedent giving to these statutes an equitable construction, it must be again ruled that the dormancy of a judgment is prevented either by proper entries every seven years, duly recorded on the execution docket, or by a bona fide public effort on the part of the plaintiff in *fi. fa.* to enforce his execution in the courts of the country at such times and periods that seven years will not elapse between such attempts, or between such an attempt and a proper entry; and that a true construction of section 3761 of the Code is that either proper entries on the execution duly entered on the execution docket, or bona fide attempts to enforce the same against the property of the defendant within the stated period, will be sufficient to prevent dormancy." *Hollis v. Lamb*, 114 Ga. 740, 40 S. E. 751. And in the first headnote of the case it is held: "And in order to have this effect [to prevent dormancy] it is not necessary that any entry relating to such efforts, other than those otherwise required or authorized to be made on the execution, shall be entered either on the execution itself or the execution docket of the court in which the judgment was rendered." This was the unanimous decision of a full bench, as were the numerous other decisions of this court to the same effect heretofore cited. While the section of the Code under consideration on its face requires both an entry within time upon the execution, and upon the execution docket of the court, this equitable construction holds that a judgment may be saved from dormancy without either an entry upon the execution or upon the execution docket of the court from which it issued. It is true that this court, in the case of *Nowell v. Haire*, 116 Ga. 386, 42 S. E. 719, held that: "An entry made by a proper officer upon an execution issued from a judgment, unless recorded upon the execution docket of the court from which the execution issued, will not, even as between the parties to the judgment, arrest the running of the dormancy statute." And the case of *Smith, Barry & Co. v. Bearden*, 117 Ga. 822, 45 S. E. 69, follows the foregoing case, merely adopting the language just quoted. The case of *Nowell v. Haire* seems to be a new departure, and, without noticing the equitable rule of construction heretofore adopted by this court, is based strictly and literally on the very words of the statute. It does not seem that the former decisions of this court establishing a different rule were, by permission of the court, expressly questioned and reviewed; and it does not state whether it affirms, reverses, or changes the former decisions. *Van Epps' Code Supp.* § 6264. I therefore doubt the authority of these two decisions.

According to the precedents set by this court from the earliest times, which I think are unreversed, I venture with great deference to dissent from the opinion of the Chief Justice, and would hold that a proper entry upon an execution and the recording of such

entry upon the general execution docket are such public acts, if done within time, as would, between the parties, arrest the running of the dormancy statute.

(135 N. C. 95)

CHAFFIN et al. v. FRIES MFG. & POWER CO.

(Supreme Court of North Carolina. April 19, 1904.)

WATERS AND WATER COURSES—DAMS—DAMAGES—INSTRUCTIONS—NOMINAL DAMAGES.

1. It is not error to refuse instructions substantially embodied in the charge given by the court.

2. The language of an instruction exactly corresponding with the words of an issue submitted, to which no exception was taken, is not open to the criticism that it is misleading.

3. Where in an action for damages caused by the erection and maintenance of a dam across a stream the court made it clear to the jury that plaintiff was entitled to recover, if anything, the damage caused by both the erection and maintenance of the dam, an instruction as to damages referring only to those caused by the erection of the dam was not misleading.

4. An instruction, in an action for damages caused by a dam across a stream, that it was not sufficient for plaintiff to show that his land had been damaged, but he "must further prove to the satisfaction of the jury" that this damage was caused by the dam, was not objectionable as requiring a greater degree of proof than a preponderance of the evidence, where the court charged that the burden was on plaintiff, and defined preponderance of the evidence.

5. In an action for damages for the maintenance of a dam across a stream plaintiff is entitled to recover nominal damage, without showing an injury capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage; for the mere fact of ponding back the water on plaintiff's premises is sufficient to entitle him to nominal damages.

6. Where an instruction is erroneous, and is duly excepted to, the party excepting may avail himself of the error, though he asked no special instruction on the subject.

Appeal from Superior Court, Davie County; W. R. Allen, Judge.

Action by Julia Chaffin and others against the Fries Manufacturing & Power Company. From a judgment for defendant, plaintiffs appeal. Reversed.

E. L. Gaither, E. J. Justice, and Lindsay Patterson, for appellants. Watson, Buxton & Watson, for appellees.

WALKER, J. The plaintiffs are the owners of a farm on the west bank of the Yadkin river. They bring this action to recover damages, both permanent and annual, for injury to the land alleged to have been caused by the erection and maintenance of a dam by the defendant across the river, and below their tract of land. They allege that the dam raised the water in front of their land about 6 feet, and there was evidence on the part of the defendant that it had been raised 2 feet and 9 inches, but that the banks of the river at that place were 14 feet high.

The plaintiffs claimed that by this rise in the water along their farm the fall in a branch running from their land into the river had been destroyed, and the water in the branch had been ponded back further on their lands, and that by reason of this loss in fall their lands had become incapable of being ditched, and had been rendered unproductive. And they further claimed that by raising the water six feet their lands had become more subject to overflow, and that thereby their bottom lands had been washed and rendered worthless. The defendant denied all of said allegations. There was much testimony introduced by both parties, some tending to show that the plaintiffs had been injured and damaged by the erection and maintenance of the dam, and some tending to show that they had not, but that the damage to their land was due to other causes than the erection of the dam. The court submitted to the jury the following issue, "What damage, if any, have plaintiffs sustained by reason of the erection of the dam?" The jury answered this issue, "None." There was a judgment upon this verdict against the plaintiffs, and they excepted and appealed.

The plaintiffs' first exception is to the refusal of the court to give their first prayer for instructions. In this prayer they requested the court to instruct the jury as to the estoppel against the plaintiffs arising out of the verdict and judgment in this case, because the damages would be assessed by the jury for all time, they being past, present, and prospective. If the plaintiffs were entitled to have this instruction given in the form in which it was asked, we are of the opinion that the nature of the suit and of the damages that could be awarded were fully explained to the jury by the court, and that plaintiffs were not prejudiced by the refusal to give the specific instruction. The same may be said of the second and third prayers for instructions, which related to the kind of damages to which plaintiffs would be entitled should the jury find in their favor. The plaintiffs cannot insist that the court should have given these instructions in the very language employed in framing them. It is a sufficient response to prayers if the court, in its own words, chosen, perhaps, so as not to do any injustice to either side, gives the instructions substantially, provided that the party who asks for them will have the full benefit of the principles of law he seeks to have applied to the facts. This rule is too familiar to need further comment or the citation of authority to support it.

The plaintiffs also complain that the court, in charging the jury as to the damages, referred only to those which were caused by the "erection" of the dam, and that by failing to use the words "and maintenance," the jury were misled as to the kind of damages the plaintiffs were entitled to recover,

and the court thereby excluded from their consideration any damages which may have resulted from the maintenance of the same. It will be observed that, if this criticism of the charge were correct in itself, the language of the court corresponds exactly with that of the issue, and to this issue, when submitted by the court, there was no exception. But we do not think the plaintiffs have any ground of complaint because of any such defect in the charge, as, upon even a cursory examination of it, we think it will appear that the court made it perfectly clear to the jury that plaintiffs were entitled to recover, if anything, the damage caused both by the erection and maintenance of the dam; not only damages caused at or immediately after the time of its erection, but those which have been caused since that time by the dam as an obstruction in the stream. We approve the charge of the court as to the proper rule for assessing the damages. *Ridley v. Railroad*, 118 N. C. 1009, 24 S. E. 730, 32 L. R. A. 708; *Parker v. Railroad*, 119 N. C. 687, 25 S. E. 722.

No question is presented in this case as to the right of acquiring a perpetual easement by the payment of permanent damages. The defendant is not a public or quasi public corporation, and has not, therefore, the right to condemn private property for its uses, or, in other words, the right of eminent domain.

The plaintiffs' sixth exception was taken to the following instruction of the court to the jury: "It is not sufficient for the plaintiffs to show that their land has been damaged and their rental value decreased. They must further prove to the satisfaction of the jury that this damage was caused by the erection of the dam;" and the seventh exception was taken to this instruction: "If you find from the evidence that the erection of the dam caused water to be ponded on the lands of the plaintiffs to any appreciable extent, the plaintiffs would be entitled to recover nominal damages, although you might not be satisfied that the plaintiffs have suffered substantial damages." The plaintiffs contend that by the first of said instructions the court required a greater degree or intensity of proof to be adduced by the plaintiffs than the rules of evidence warranted, and that all that is required by those rules is that plaintiffs should prove their case by the greater weight of the testimony, and not to the satisfaction of the jury. The part of the charge selected for the exception is not all of the charge as to the degree of proof required. The court had already charged the jury as follows: "The burden is upon the plaintiffs," etc., "to satisfy you that the erection of the dam was the cause of the damage to them, and of the extent of the injury. What is a preponderance? It is not to be determined by the number of witnesses, but determining whether there is a preponderance you will consider the demeanor of

witnesses," etc. It will not do, in passing upon the correctness of a charge, to consider it in detached portions, but we must look at the context, and examine what follows in connection with that which precedes. In other words, the charge must be considered as a whole. *Elliot v. Jefferson*, 133 N. C. 211, 45 S. E. 558; *Everett v. Spencer*, 122 N. C. 1010, 30 S. E. 394. The same rule applies when deciding upon the admissibility of testimony. *State v. Ledford*, 133 N. C. 714, 45 S. E. 944. When the part of the charge of the court excepted to is considered and tested by this reasonable rule of the law, we think it sufficiently, and, indeed, clearly, appears that the jury were instructed, at least substantially, that the plaintiffs were required to make out their case by a preponderance of the evidence, and that the court explained to them with sufficient fullness and accuracy what is meant by the preponderance of the testimony, and how the jury should apply the rule to the facts and circumstances of the case in order to determine whether plaintiffs had met the requirement. The use of the word "satisfied" did not intensify the proof required to entitle the plaintiffs to the verdict. The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion, from the evidence, and in favor of the plaintiffs, which will be satisfactory to themselves. In order to produce this result, or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiffs' proof need not be more than a bare preponderance; but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence. In *Neal v. Fesperman*, 46 N. C. 446, the court (by Pearson, J.), in stating the true rule in civil cases, said that "the party affirming a fact must prove it to the satisfaction of the jury, because the 'onus probandi' is upon him. If he does prove it to the satisfaction of the jury, it is settled that in civil actions he is entitled to a verdict in his favor upon the issue." After referring to the rule in capital cases, the court proceeds: "Suffice it, in civil cases, if the jury are satisfied from the evidence that an allegation is true in fact, it is their duty so to find, and they should be so instructed." To the same effect is *Barfield v. Britt*, 47 N. C. 45, 62 Am. Dec. 190, where the court says "that the party upon whom lay the onus probandi must produce such a preponderance of testimony as must satisfy the jury of the truth of his allegation." The rule, it is further stated, applies to all civil cases. It is said in *Kincade v. Bradshaw*, 10 N. C. 65, that "in civil cases juries weigh the evidence, and decide accordingly as either scale preponderates." This means, of course, that they weigh the evidence, and decide—that is, satisfy them-

selves—as to where the preponderance is. An unsatisfactory decision could hardly be called a decision at all, and a jury, acting intelligently and honestly, certainly would not adopt a conclusion from the evidence with which they were not satisfied. Wood's Pr. Ev. § 197. In criminal cases, when the defendant relies on mitigating circumstances, or sets up an affirmative defense, such as legal provocation, insanity, or self-defense, it is incumbent on him to prove the matter in mitigation or excuse, not beyond a reasonable doubt, nor by a preponderance of evidence, but simply to the satisfaction of the jury. *State v. Willis*, 63 N. C. 26; *State v. Carland*, 90 N. C. 668; *State v. Barringer*, 114 N. C. 840, 19 S. E. 275; *State v. Barrett*, 132 N. C. 1006, 43 S. E. 832. Counsel for the plaintiffs argued that these cases are authority for the position that, if the jury must be satisfied, it required a greater degree of proof than if the plaintiff is allowed to make out his case by a mere preponderance of the evidence. We do not think this is a correct interpretation of the cases. The rule in criminal cases, as above stated, is supported by a long line of decisions, and is too well settled to admit of any change; but they do not sustain the contention of counsel. In criminal cases the jury decide upon the matters in mitigation or excuse without reference to any rule of law in regard to a reasonable doubt or the preponderance of the evidence. They are the sole judges upon the evidence of what is sufficient to satisfy them. In civil cases they must also be satisfied, but the party having the affirmative of the issue cannot entitle himself to their verdict unless the evidence preponderates in his favor.

The next instruction—which is the subject of the plaintiffs' seventh exception—it seems to us, is not as free from objection. The court charged the jury that the plaintiffs would be entitled to recover nominal damages if the water had been ponded on their lands "to any appreciable extent." Appreciable is defined as "capable of being estimated, or large enough to be estimated; perceptible, as an appreciable quantity." We do not think that, in order to recover nominal damages, it is necessary to show an injury that is capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage. Nominal damages are a small and trivial sum awarded for a technical injury due to a violation or invasion of some legal right, and as a consequence of which some damages must be awarded to determine the right. 1 *Joyce on Damages*, § 8; 1 *Sutherland on Damages*, § 9. These damages are not given as an equivalent for the wrong, but in recognition of the technical injury. It is not necessary that there should be any actual damage, however small. They are called nominal damages in contradistinction to actual, substantial, or compensatory damages. They are damages in name only, not

in fact. See, also, *Black's Law Dict.* p. 316, "Damages." They have been described as a "peg on which to hang costs," but they are still recognized as the subject of a substantial legal claim, and a party is entitled to them if he can show any injury to his right. If he establishes a cause of action that is an injury in its technical sense, and fails to show any damnnum or damage, he can recover nominal damages. *Osborn v. Leach*, 133 N. C. 427, 45 S. E. 783. We find the law stated in *Cooley on Torts* (2d Ed.) p. 74, as follows: "In the case of a distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence." In the case of *Little v. Stanback*, 63 N. C. 285, the rule as to nominal damages in cases of this kind seems to have been settled by this court. It is there said: "The defendant asked his honor to charge the jury that, if there was water backed by the defendant's dam on the plaintiff's wheel, and it produced no injury to the plaintiff, the plaintiff was entitled to no damages, and their verdict should be for the defendant. His honor declined to give the instruction, but charged the jury that, 'if they were satisfied that the water was ponded back by the defendant's dam on the plaintiff's wheel, but produced no substantial injury, the plaintiff would be entitled to nominal damages.' Giving to the exception and to his honor's charge a plain and just interpretation, we think that the point intended to be presented was, 'Is the mere fact of ponding back the water upon the plaintiff's premises sufficient to entitle him to nominal damages?' His honor thought it was, and we are of the same opinion. It is like a trespass on land, when the allegation is that the defendant broke the plaintiff's close and trod down his grass. It is clear that the mere entry upon the land, although there be not so much perceptible injury as the treading down a single sprig of grass, is a trespass, and entitles the plaintiff to nominal damages." It will be observed that the court, in describing the injury that will entitle the plaintiff to nominal damages, uses negatively the word "perceptible," which, as we have seen, is one of the synonyms of the word "appreciable." The case seems to be directly in point. If there is an infraction of the plaintiffs' legal right to the undisturbed possession of his property, the law absolutely gives at least nominal damages. A case which also seems to be directly in point is *Wood v. Wared*, 8 Exc. Wels., Hurl's & E. 746. The doctrine, as applicable to cases of this sort, is discussed and the authorities collected in *Joyce on Damages*, § 2140; 1 *Sutherland on Damages*, §§ 9, 10;

Ripka v. Sergeant, 7 Watts & S. 9, 42 Am. Dec. 214. The defendant contends that plaintiffs cannot avail themselves of this error of the court, as they asked no special instruction as to nominal damages. This was not necessary. The fault was in the charge, and was duly excepted to. It was an affirmative error.

The evidence as to the effect of the increased height of the water on the lands of N. A. Peebles we do not think was competent in order to show a corresponding effect upon the plaintiffs' lands. Comparisons such as this one cannot be made, as there was no evidence to show similarity of conditions. The proposed evidence would introduce irrelevant matters, and divert the minds of the jury from the true issue. *Bruner v. Threadgill*, 88 N. C. 361; *Warren v. Makely*, 85 N. C. 12. The competency of the testimony of the witness Reynolds depends upon a different principle. The evidence offered as to similar conditions of the banks of the stream above and below the dam with a view of showing that they had been washed out by freshets, and that their condition was not caused by the erection of the dam, was proper to be considered by the jury as a circumstance tending to sustain the defendant's contention. Its weight is for the jury to pass upon.

We have considered all of the plaintiffs' exceptions, as they, or some of them at least, may be presented at the next trial of the case, and for the further reason that they present important questions of practice and procedure of constant recurrence which should be settled. Because of the error in the charge as to nominal damages, there must be a new trial, and, as there was but one issue submitted to the jury, embracing both the cause of action and the damages, the new trial must extend to the whole case.

New trial.

DOUGLAS, J., concurs in result.

(135 N. C. 51)

STATE ex rel. NORTH CAROLINA CORPORATION COMMISSION v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 19, 1904.)

REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—ALLEGATION AS TO JURISDICTIONAL AMOUNT.

1. In a complaint to the corporation commission to compel a railroad company to deliver four cars of coal on a private siding, the complainant put no valuation either on the particular delivery or on the effect of a similar delivery of all cars in future. After an appeal to the superior court, the railroad company petitioned for removal to the federal Circuit Court, alleging that the proceeding was of a civil nature to assert the right of the complainant to have

the commission order the company to deliver interstate shipments to the complainant, and that "the matter actually in controversy, involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiffs, largely exceeds the sum or value of \$2,000." Held that, as the allegation as to value was a mere conclusion of law, unwarranted by the facts in the record or the petition, the petition was insufficient to oust the superior court of jurisdiction, and was properly denied.

Appeal from Superior Court, Guilford County; Cooke, Judge.

Proceedings by the state, on the relation of the North Carolina Corporation Commission, against the Southern Railway Company. From the denial of a petition for the removal of the cause to the federal Circuit Court, the railroad company appeals. Affirmed.

King & Kimball, F. H. Busbee, R. O. Strong, and O. B. Northrop, for appellant. Scales, Taylor & Scales and the Attorney General, for appellee.

MONTGOMERY, J. This case is before us upon the appeal of the defendant from an order made at the February term, 1904, of the superior court of Guilford county, and in which his honor, Judge Cooke, overruled a motion of the defendant for the removal of the action to the United States Circuit Court for the Western District of North Carolina. The matter involved in the proceeding was commenced before the North Carolina Corporation Commission upon complaint of the Greensboro Ice & Coal Company, and was instituted for the purpose of compelling the defendant to deliver to the plaintiff on its side track, at Greensboro, four cars of coal which had been consigned to the complainant, and brought by the defendant on its line of railway from the state of Virginia. It appears from the record in the case, and from the evidence as well, that the side track was built by the complainant at its own expense, with the exception of the iron rails, which the defendant furnished, and that it extended from the defendant's main line about 300 yards out to the complainant's coal and wood yard. It appeared, further, that while the side track was in process of construction a number of car loads of coal arrived in Greensboro consigned to the complainant, and that a contention afterwards arose between the parties on account of a charge against the complainant by the defendant in the nature of demurrage, the amount being \$146. Upon the refusal of the complainant to pay the amount, or any part of it, the defendant notified, by letter, the complainant, that it would on that account not thereafter switch any cars to the side track, but would place them on the public team tracks of the defendant in its yard at Greensboro. There was a further statement in the letter to the effect that defendant found it necessary for the protection of its equipment to tender to the complainant further deliveries of cars upon tracks where they might

1. See *Removal of Causes*, vol. 42, Cent. Dig. § 175.

be under defendant's immediate supervision and control. After a hearing of the matter before the corporation commission, an order was made by that body as follows:

"This cause coming on to be heard upon complaint, and after notice to the defendant and an appearance by them, and it being made to appear to the commission by the plaintiff that four cars of coal consigned to the complainant have been conveyed to Greensboro by the Southern Railway Company, and that said cars are now and have been on the yards of said railway company for several days, and that the agents of said company were requested by said consignees to place said cars for unloading, soon after their arrival, on a side track built at the expense of and by said complainant and said railway company to facilitate the loading and unloading of complainant's freights, and that said consignees offered to pay the freight charges due on said cars of coal if the railway company would indicate their willingness to place them as requested by consignees; and it further appearing that the said railway company have refused to place the said cars as requested, and insist that they will place said cars only on public team tracks; and it further appearing that said cars of coal can be unloaded by consignees in much less time and at much less expense on the track constructed for that purpose than on public team tracks, and at no greater expense to the railway company; and it further appearing that the cause assigned by the Southern Railway for its refusal to place cars as requested by consignees is insufficient, namely, that consignees refused to pay certain demurrage charges which the railway company claims accrued on other cars while on public team tracks of said railway company, and which charges the consignees dispute and allege to be unjust—it is therefore ordered that the Southern Railway Company, upon the payment of the freight due on said cars of coal, and within forty-eight hours after service of this order, place the four cars of coal consigned to the Greensboro Ice & Coal Company on tracks provided by complainant and defendant for the loading and unloading of the freights of the complainant, to the end that the same may be unloaded, and the complainant receive their freights. Franklin McNeill, Chairman N. C. Corporation Commission."

Exceptions were filed to that order by the defendant, and on the 12th of November, 1903, they were heard by the corporation commission at Greensboro. They were as follows:

"To the Honorable the North Carolina Corporation Commission, Raleigh, North Carolina: The Southern Railway Company, a corporation existing under and by virtue of the laws of the state of Virginia, filed with your honorable board its exceptions to the particulars that it objects to your order or judgment of date October 31, 1903, relative to the plac-

ing of the four cars of coal involved upon the private track of the Greensboro Ice & Coal Company in Greensboro, North Carolina, and states the grounds thereof, as follows:

"Exception No. 1. That the side track of the Greensboro Ice & Coal Company is the private property of that company, with the exception of the rails, and is under the control of that company and built by that company for its own use and convenience, and not for the use or convenience of the Southern Railway Company; that, to make the said side track more useful and profitable to said coal and ice company, that company caused the track to be gradually raised so that cars of coal could be dumped into bins made under said track with the least inconvenience to the said coal and ice company; that during the construction of this work, and with no default on the part of the Southern Railway Company, certain demurrage charges accrued, under order No. 36, rules of your honorable board, on five car loads of coal and on eight car loads of wood, amounting in all to \$146, and under promise to pay said amount, upon which the Southern Railway Company relied and acted, the said coal and ice company induced the Southern Railway Company to place the said car loads of coal and wood upon the said private side track, and said coal and ice company have since refused to pay said demurrage charges, though several times requested and demanded by the Southern Railway Company to do so; that the Southern Railway Company thereupon refused and still refuses to place any more cars of freight upon the private side track of the coal and ice company, and to extend them credit or part with their legal lien upon the four car loads of coal ordered placed by your honorable board, or with their legal lien upon any goods, wares, or merchandise, until all freight, demurrage, or other charges have been fully paid, which the said railway company submits it has the right to do.

"Exception 2. That the Southern Railway Company is ready and willing, and has repeatedly offered, to place said four cars of coal and other cars of merchandise accessible on its public team or delivery track in the city of Greensboro, N. C., and has placed said cars accessible as aforesaid, but the said coal and ice company refuses to so receive them. The Southern Railway Company contends and insists that the said coal and ice company has not any superior right to the delivery of their goods, wares, and merchandise, and that it is justified in refusing to place cars of coal and ice company upon its private siding or tracks, and thus part with their property.

"Exception 3. That the said order or judgment herein excepted to is contrary to the fourteenth amendment to the Constitution of the United States, in that it deprives the Southern Railway Company of its property without due process of law, and denies to it the equal protection of the law for that: (a) It requires the railway company to part with

the lien given it by law upon all goods, wares, and merchandise until the freight and demurrage and all other lawful charges are paid. (b) It requires the Southern Railway Company to give or extend credit to the said coal and ice company, which it is unwilling to do. (c) It is an adjudication of your honorable board without complaint and answer required by your own rules of practice, and without legal or any sufficient evidence before you necessary for the said judgment to be entered, and upon which these exceptions are based.

"Exception 4. That the said order or judgment herein excepted to is contrary and is repugnant to the Constitution of the United States as an attempted regulation of interstate commerce, and to a certain act of Congress known as the 'Interstate Commerce Act,' in that the four car loads of coal, the subject of said order or judgment, were shipped to said coal and ice company at Greensboro from points in the state of Tennessee and the state of Virginia, and is an interference by your honorable board with interstate shipments.

"Whereupon the Southern Railway Company prays that said order herein excepted to be reviewed and vacated.

"This Nov. 2, 1903."

From the overruling of the exceptions, the defendant appealed to the superior court of Guilford county. On the first day of the term of that court to which the appeal was taken, the defendant lodged its motion for the removal of the cause to the Circuit Court. The petition, duly verified and signed, was as follows:

"To the Honorable the Superior Court of the County of Guilford, State of North Carolina: Your petitioner, Southern Railway Company, respectfully sheweth that it is the defendant in the above-entitled suit or proceeding, which was begun against it before the North Carolina Corporation Commission, and was transferred by appeal to the superior court of Guilford County, North Carolina, and that an informal paper in the nature of a complaint has been filed in the said action, and that the defendant, your petitioner, files this petition at or before the time when it is obliged to answer or demur to the complaint in the said superior court, and at its first opportunity to make such motion; that the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of \$2,000; that the said suit or proceeding is of a civil nature, and is a proceeding to assert and enforce the right of the Greensboro Ice & Coal Company to have the North Carolina Corporation Commission order and direct your petitioner to deliver certain interstate shipments to the plaintiff, Greensboro Ice & Coal Company, and, the matter actually in controversy, involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiffs, largely ex-

ceeds the sum or value of \$2,000. Your petitioner further states that in the said above-mentioned suit or proceeding there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between your petitioner, which was at the commencement of this action, and still is, a citizen and resident of the state of Virginia, and is not, and was not at the time this action began, a citizen and resident of North Carolina, and that the defendant is a corporation originally created by and under the laws of the state of Virginia, and was at the commencement of this suit, and still is, such; and the said North Carolina Corporation Commissioners and the Greensboro Ice & Coal Company, who your petitioner avers were, at the commencement of this suit or proceeding, and still are, citizens of the state of North Carolina, some of whom, to wit, Franklin McNeill and Eugene C. Beddingfield, are residents of the Eastern District thereof, and Greensboro Ice & Coal Company and Samuel L. Rogers are citizens and residents of the Western District, and that the plaintiff, Greensboro Ice & Coal Company, is a corporation originally created by and under the laws of the state of North Carolina, and was at the commencement of this suit, and still is, such; and that all of the said defendants and your petitioner are actually interested in the said controversy. And your petitioner offers herewith a bond with good and sufficient surety in the sum of \$500 for its entering in the Circuit Court of the United States for the Western District of North Carolina, on the first day of its next session, a copy of the record in this action, and for paying all costs which may be awarded by the said Circuit Court if said court shall hold that this action was wrongfully or improperly removed thereto, and for entering a special bail if such be required. And your petitioner prays this court to proceed no further herein, except to make an order of removal and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of North Carolina."

It appears to us from the record in the cause, including the petition, that his honor was right in refusing a motion to remove the cause, although he gave a wrong reason for the judgment, as we shall hereafter point out. We are aware that there are decisions of the Supreme Court of the United States in which it is held that issues of fact cannot be made in the state courts upon the petition for removal, and that such issues must be tried in the Circuit Court; and we are not in the least disposed to question the correctness of those decisions. We know, however, that in those same decisions it was held that the state court could determine for itself, on the face of the record, whether a removal had been effected. In *Stone v.*

South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, the court said: "A state court is not bound to surrender its jurisdiction on a petition for removal until a case has been made, which on its face shows that the petitioner has a right to the transfer. *Yulee v. Vose*, 99 U. S. 539, 545, 25 L. Ed. 355; Removal Cases, 100 U. S. 457, 474, 25 L. Ed. 593. It is undoubtedly true as was said in *Steamship Co. v. Tugman*, 106 U. S. 118, 122, 1 Sup. Ct. 58, 27 L. Ed. 87, that upon the filing of the petition and bond—the suit being removable under the statute—the jurisdiction of the state court absolutely ceases, and that of the Circuit Court of the United States immediately attaches; but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the record that his is a case which comes within the provision of the statute. As was said in *Insurance Co. v. Pechner*, 95 U. S. 183, 185, 24 L. Ed. 427: 'His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot "proceed further with the suit." Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the case has been suspended.' The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand a removal." The record in this case, if we leave out for the present the petition, shows that the object of the proceeding, technically and literally, was to compel the defendant to place upon the side track leading to the complainant's coal yards the four car loads of coal which the defendant was refusing to deliver under an alleged contract with the complainant at the time the complaint was made before the corporation commission. But suppose we give a broader significance to the complaint and order made therein, as to the effect of the order upon the defendant in thereafter being compelled by repeated orders to deliver each and all car loads of coal that the defendant company might bring upon their line of railway into Greensboro, consigned to the complainant; is not the petition of the defendant for removal fatally defective in that it does not put a valuation upon the advantage which the plaintiff might derive from such a construction of its complaint and the order of the corporation commissioners? Suppose it be admitted that this proceeding, when begun before the corporation commissioners, was in the nature of a suit in equity, and that the amount in controversy should be measured by the value of the object to be gained by the plaintiff; is there anything in the petition going to show that such advantage or benefit to the plaintiff

was worth \$2,000? In such equity cases as we have referred to, "it is the value of the whole object of the suit to the complainant which determines the amount in controversy," as was said in *Railway Company v. McConnell* (C. C.) 82 Fed. 65. The plaintiff in its complaint put no valuation upon what might be the effect of the delivery to it on its side track, either of the four particular cars, or of the delivery of all cars that might in the future be consigned to him over the defendant's railroad; and the defendant in its petition makes no statement as to the "amount in controversy" in either aspect of the plaintiff's benefit and advantage.

It appears from a careful reading of the petition that the statement as to the amount in controversy was based, not upon the amount that the object of the action might be to the plaintiff, but to the inconvenience and loss of the defendant because of the interference of the corporation commission with the right of the defendant to manage its large interstate commerce. The exact language of the petition on this point is as follows: "That the said suit or proceeding is of a civil nature, and is a proceeding to assert and enforce the right of the Greensboro Ice & Coal Company, to have the North Carolina Corporation Commission order and direct your petitioner to deliver certain interstate shipments to the plaintiff, Greensboro Ice & Coal Company, and the matter actually in controversy, involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiff, largely exceeds the sum or value of \$2,000." That statement as to the matter in controversy is simply a conclusion of law, and an erroneous one in our opinion, from the facts as they appear in the record, and even in the petition. The matter in controversy was not an attempt on the part of the complainant to interfere with the general business of the defendant—the "large interstate commerce" of the defendant—but was only an order affecting the delivery of certain car loads of coal consigned to the complainant, and, as we have said, there was no valuation by the defendant of that benefit secured to the plaintiff by the order. We think the petition was filed in apt time, but that it ought to have been denied for the reasons we have given. **Affirmed.**

(136 N. C. 92)

BEAN v. BEAN.

(Supreme Court of North Carolina. April 19, 1904.)

EXECUTORS — ACCOUNTS — EFFECT — ESTOPPEL —
CREDITS — EXPENDITURES FOR LEGATEES
— IMPLIED PROMISE OF REPAYMENT.

1. Under Code, § 1399, requiring executors to file annual accounts with the clerk of the superior court, giving the clerk power to examine the executor or any other person concerning the

receipts and disbursements, and making his approval of the account prima facie evidence of its correctness, the account so filed and approved by the clerk, while prima facie correct, is no more conclusive than an account stated, and the executor is not estopped to impeach it in another proceeding.

2. An executor, whose wife is the residuary legatee under the will of the testator, is not entitled to credits for sums paid for taxes on his wife's land, or for money paid to defray his wife's expenses on a trip.

3. Where a husband, acting as executor under a will in which his wife was named as residuary legatee, paid taxes on his wife's land, and defrayed her expenses on a trip, as he was under no legal obligation to make such expenditures, the law would not imply a promise on the part of his wife to repay him.

Appeal from Superior Court, Rowan County; W. R. Allen, Judge.

Action by Mary A. Bean against M. L. Bean. From a judgment for plaintiff, defendant appeals. Affirmed.

John S. Henderson, for appellant. A. H. Price, Walter Murphy, and Theo. F. Klutz, for appellee.

WALKER, J. The plaintiff, who is the wife of the defendant, is the residuary legatee under the will of Nancy Smith, and the defendant is the executor of the latter, and qualified as such in March, 1889. On December 22, 1896, the plaintiff caused a citation to be issued by the clerk of the superior court to the defendant to appear at a time stated in the notice and file an account under sections 1390 and 1400 of the Code. The defendant appeared and filed the account, and insisted before the clerk that he was entitled to two credits, one for taxes paid by him "for the benefit of the plaintiff" on her land for the years 1892 to 1896, both inclusive, amounting to \$775, and the other for money paid by him to R. J. Holmes to defray the plaintiff's expenses to Baltimore. The clerk disallowed these claims, and, upon auditing the account, found that defendant owed the estate a clear balance of \$466.45. The plaintiff thereupon brought this action in the superior court to recover said balance.

There is some reference in the case to other legacies which had not been paid, and it does not appear, except by inference, whether the \$466.45 is due to the estate merely for distribution among the several legatees, or is due to plaintiff, after paying all claims and legacies and the costs and expenses of administration. The plaintiff, though, sues for this balance, and the defendant, in his answer, admits that it is due to the plaintiff, unless he is entitled to the said credits. The court ruled that the defendant could not successfully assert his claim, "because he was estopped to deny the adjudication of the clerk." The ruling of the court was correct—that is, its conclusion—but the reason given therefor was not. The defendant was

not estopped by the proceeding before the clerk. The account as filed and stated in response to the citation had no more force or effect against him than the account would have had if he had filed it voluntarily. The statute expressly provides that "it shall be deemed prima facie evidence of correctness," even when it is audited by the clerk by the examination of vouchers or witnesses, or of both. The auditing is an ex parte proceeding and has none of the features or characteristics of that kind of judicial proceeding the judgment in which works an estoppel upon the parties. This would seem to be so whether the account was filed under section 1390 or section 1402, as the language of the two sections in regard to the manner of compelling the filing of the account, whether annual or final, and of auditing the same, is substantially alike, although the words "shall be deemed prima facie evidence of correctness" are omitted in section 1402. Grant v. Hughes, 94 N. C. 231. In Allen v. Royster, 107 N. C., at page 282, 12 S. E. page 135, this court said: "But it [the account] was not conclusive against the plaintiff [next of kin], nor would it be against the creditors or any person interested adversely. It simply shifted the burden of proof as to the correctness of what it contained to him who alleged the contrary." Rowland v. Thompson, 64 N. C. 714. In Collins v. Smith, 109 N. C., at page 471, 14 S. E. page 90, the same principle is stated: "The record shows, and the fact is found, that at the instance of the plaintiffs the final account of the defendant was audited and filed, the plaintiffs being present and contesting various items therein. There is no allegation of any fraud or mistake in the final account so audited, nor is it attacked in any way by the plaintiff, and it is at least prima facie correct." While it is to be considered as prima facie correct, it has no more conclusive effect than an account stated, and is open to attack. The defendant could at least surcharge and falsify it, if he was able to do so.

But we do not think that the defendant was entitled to either of the two credits claimed by him. As executor he was not charged with the duty of paying the taxes on his wife's land, and this and the other item could in no way enter into or form a part of his transactions as the representative of his testator. Young v. Kennedy, 95 N. C. 265. If he was not himself under any legal obligation to make the advancements of money for his wife, the law will not, under the facts and circumstances of this case, imply any promise of his wife to repay him. Jenne v. Marble, 37 Mich. 322; Pittman v. Pittman, 4 Or. 298. We conclude, therefore, that in no view of the case was he entitled to the credits. This, of course, sustains the decision of the court below.

No error.

(135 N. C. 73)

PITTSBURG, J., E. & E. R. CO. v. WAKEFIELD HARDWARE CO.

(Supreme Court of North Carolina. April 19, 1904.)

ACTIONS—JOINDER OF ACTIONS—WRONGFUL ATTACHMENT—ACTION AGAINST PLAINTIFF—ACTION AGAINST SURETY—COURTS—JURISDICTION—AMOUNT INVOLVED.

1. Code, § 267 (1), provides that a plaintiff may unite in one complaint several causes of action where they arise out of the same transaction connected with the same subject of action; and section 267 (7) provides that each of them must affect all of the parties to the transaction. *Held*, that a plaintiff could not unite in one suit a cause of action for wrongful attachment and one against the surety on the attachment bond for a breach thereof.

2. An action against a surety on an attachment bond in the penal sum of \$200 is not within the jurisdiction of the superior court.

3. Code, § 272, provides that on misjoinder of causes of action the court shall order the action to be divided into as many actions as necessary. *Held*, that where two causes of action are improperly joined, but one of them because of the amount involved, is not within the jurisdiction of the court, it must be dismissed.

Appeal from Superior Court, Guilford County; O. H. Allen, Judge.

Action by the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company against the Wakefield Hardware Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

• Scales, Taylor & Scales and Robert D. Douglas, for appellant.

WALKER, J. This action was brought to recover damages for wrongfully suing out an attachment, and was tried below on a demurrer to the complaint. The plaintiff alleges substantially that the plaintiff, the defendant hardware company, and the North Carolina Coal & Coke Company are corporations, and that the coal and coke company being indebted to the hardware company for goods sold and delivered, the latter brought an action for the recovery of the debt against the railroad company and the coal and coke company, and caused a warrant of attachment to be issued, which in February, 1901, was levied on 10 cars then at the mine of the coal and coke company, and that said cars were seized and held until April, 1903; that at the time the warrant was issued the hardware company gave a bond in the sum of \$200, with the usual condition, upon which the defendant A. W. Vickory is surety; and that said attachment suit was dismissed as to the plaintiff, with costs, and judgment rendered against the coal and coke company for the amount of the debt in favor of the hardware company. Plaintiff then brought this action against the latter company and the surety on its attachment bond, A. W. Vickory, alleging that the attachment was wrongfully sued out, and praying for the recovery of compensatory and punitive dam-

ages. The defendant demurred to the complaint upon the following grounds: (1) That there is a misjoinder of parties, the defendant Vickory not being a necessary or proper party to the cause of action at common law for wrongfully and maliciously suing out the attachment, but being liable, if at all, only on the bond; (2) that two causes of action are improperly joined—one for wrongfully and maliciously causing the attachment to be issued, and the other for a breach of the condition of the attachment bond. The court overruled the demurrer, and the defendant excepted and appealed.

The demurrer should have been sustained on both grounds. The plaintiff has alleged in his complaint two causes of action, though he has not stated them separately, as he should have done. Code, § 267 (7). Causes of action may be united in a complaint when they arise out of the same transaction or transactions connected with the same subject of action, whether they be in contract or in tort (Code, § 267 [1]; *Cook v. Smith*, 119 N. C. 350, 25 S. E. 958), but each of them must affect all the parties to the transaction (section 267 [7]). "It is not sufficient that some of the defendants be affected by each of them. All of the defendants must be affected by each of them to warrant the union of them in one suit." *Howse v. Moody*, 14 Fla. 65. In this case the plaintiff has sued the hardware company for wrongfully and maliciously causing to be issued the attachment for which the said company alone is liable in damages, and has joined as a defendant A. W. Vickory, the surety on the attachment bond, who is liable solely by reason of his suretyship on his contract of indemnity, and to the amount only of the penalty of the bond, \$200. One cause of action, therefore, is for the wrongful and malicious injury to the plaintiff (using the word "injury" in its technical sense), and the other is for the breach of the condition of the attachment bond, and the defendant Vickory can in no way be "affected" by the former. He is not liable generally to the plaintiff for damages simply because he signed the bond as surety, but his liability arises entirely out of contract, and is quite different in its nature from that of his codefendant for the tort it is alleged to have committed in maliciously suing out the attachment. *Fell v. Porter*, 69 N. C., at page 142. The defendant Vickory is liable by reason of his undertaking, according to the statute, to the effect that, if the defendants recover judgment, or the attachment is set aside by order of the court, the plaintiff in the attachment suit "will pay all costs awarded against it, and all damages sustained by reason of the attachment." As said by Pearson, C. J., for the court, in *Fell v. Porter*, *supra*, a sheriff may be liable on an implied contract upon a principle of the common law, while as to his surety there is no such implied undertaking.

and no other liability save that which is set out in his bond, it being an obligation to pay to a certain amount subject to conditions. The liability of the surety is said to be *strictissimi juris*, which means no more than that he shall not be held to answer beyond the precise terms of his contract, and only to the extent that the particular liability which is alleged to exist is covered by his written obligation. *Pingrey on S. & G. § 112*. When he is called upon to answer for any liability based on his suretyship, he has a right always to ask, "Is it so nominated in the bond?" or other instrument which is the evidence of his undertaking. Whether, if Vickory had been liable jointly with his codefendant for the tort alleged to have been committed in wrongfully and maliciously suing out the attachment, he could properly have been joined with the latter in an action upon that liability and also upon the bond, is a question we need not decide, as it is not presented upon this record. *Fell v. Porter*, *supra*. In the case of *Cook v. Smith*, 119 N. C., at page 356, 25 S. E. 958, this court, speaking by the present chief justice, said: "Always, when the sheriff is sued for official liability, he is responsible personally, and his surety should be sued on the relation of the state; but it has never been held a defect to join them." This was said with reference to the separate liability of the sheriff for an official act, which at the same time constituted a breach of his bond, so that while the sheriff in such a case is personally liable, as if he had not signed the bond, his surety is liable for the act of the sheriff because it is also a breach of his bond. The two liabilities are, in legal effect, the same. They are identical and coextensive in principle, though not in amount. But when the officer or principal, in addition to the liability on his bond, is independently liable by reason of some act for which the surety is not liable, or which, in other words, does not come within the scope of the latter's undertaking, it is manifest that the surety is not affected by the cause of action upon the separate liability of the officer or principal, and the two causes of action—the one against the officer on his separate liability and the other against the surety on the bond—cannot be joined. *Hoye v. Raymond*, 25 Kan. 605; *Howse v. Moody*, *supra*. There must be at least substantial identity between the causes of action before they can be united in one suit, because, if there is not, the several causes of action may, for their decision, depend upon very different facts and principles of law, which would tend to confusion and uncertainty in the trial of the case, and result in great prejudice to some, if not all, of the parties.

As the two causes of action cannot be united in one and the same complaint, there is another fatal defect to be found in the plaintiff's present suit so far as the defendant Vickory is concerned. The liability on

the attachment bond is one growing out of contract, and any action thereon against the surety is, of course, *ex contractu*. 1 Shinn on Attachment, § 182, p. 807; Kneeland on Attachment, § 453. As the penalty is only \$200, the superior court has no jurisdiction of an action upon the bond. *Katzenstein v. Railroad*, 84 N. C. 688; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917.

While the two causes of action stated in the complaint could not be joined for the reasons we have given, the misjoinder does not require the action to be dismissed, as, under the provisions of section 272 of the Code, the court, in the case of a misjoinder of causes of action, "shall order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned." This cannot be done in the present case, for the court would not have jurisdiction of the separate cause of action against Vickory on the attachment bond, the amount of the penalty being only \$200; but the provision of the statute will be followed to the extent that it can be by dismissing the action as to Vickory.

The case of *McCall v. Zachary*, 131 N. C. 466, 42 S. E. 903, is not at all at variance with anything said in this opinion, but is, we think, in perfect harmony with the principle we have stated. In that case, the plaintiff sued the defendant to recover the fees of the office of solicitor, which had been collected by him during his incumbency of that office; the plaintiff having previously been adjudged to be entitled to it. The plaintiff alleged that the defendant had received \$500 as fees, and he declared against defendant for the recovery of that amount, and also against his sureties for the recovery of \$200, the penalty of the bond given by them for the defendant in the *quo warranto* action to secure the payment to the plaintiff of the fees to that amount in the event of the latter's success in that action. It will be observed that the nonpayment of the fees by Zachary to the plaintiff was the gravamen of the action—the cause of action—and in itself was a breach of the bond. It was not a separate and distinct cause, but the same cause as the one upon the bond; the only difference being that the defendant Zachary was liable for a greater amount than his sureties. In the opinion of the court, delivered by Furches, C. J., it is said that the bond for \$200 is not the cause of action, but the failure to pay the \$500 collected by the defendant, and the bond is only a security for the plaintiff of that amount *pro tanto*, or to the extent of its penalty. There was but one cause of action, which was on contract. The recovery against Zachary and his sureties was upon a single default, and was founded upon one and the same principle throughout. In our case, on the contrary, there is a cause of action for the malicious

injury, which is different in its nature and scope from that on the bond. An act of the principal, which would merely constitute a breach of the bond, would not be sufficient to warrant a recovery upon the other cause of action. Drake in his work on Attachments, says: "It has been uniformly held in this country that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiff having at the institution of the suit given bond with security to pay all damages the defendant may sustain by reason of the attachment having been wrongfully sued out."

The line of distinction between the two causes of action is clearly "run and marked" in the following cases: *Burnap v. Wight*, 14 Ill. 301; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674. See, also, *Cooley on Torts* (2d Ed.) p. 218. In the first case cited it is said: "The direct pecuniary injury to the defendant may be as great in the one case as in the other. This direct pecuniary loss is all that can be recovered in an action on the bond. If the writ is sued out maliciously and without probable cause, the defendant may maintain an action for malicious prosecution; and in such an action he may recover damages for every injury to his credit, business, or feelings. Such matters are peculiarly the proper subjects of inquiry, and the jury may give damages commensurate with the injuries sustained; but such injuries as may be redressed only where malice exists and probable cause is wanting ought not to be taken into consideration in an action on the bond." The action for the malicious wrong is one which exists independently of any statutory provision as to a bond. In *Newark Coal Co. v. Upson*, 40 Ohio St. 25, the doctrine is thus tersely stated: "It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment of property of value. The name or form of the writ or process is immaterial. It may be an order of arrest, or of attachment, or of injunction." See, also, *Tomlinson v. Warner*, 9 Ohio, 104; *Fortman v. Rottier*, 8 Ohio St. 548, 70 Am. Dec. 606. A strong authority in support of the distinction we have made is *Pettit v. Mercer*, 8 B. Mon. 51.

It follows from what we have said that the demurrer should have been sustained as to the cause of action against Vickory on the attachment bond. This ruling eliminates that cause of action, and the suit may proceed against the hardware company if the plaintiff desires to further prosecute the same. *Ashe v. Gray*, 90 N. C. 137; *Singer Manufacturing Co. v. Barrett*, 95 N. C. 36; *Finch v.*

Baskerville, 85 N. C. 205. The case is remanded for further proceedings not inconsistent with the opinion of this court.

Error.

(102 Va. 145)

**BROWN'S GUARDIAN v. STROTHER'S
ADM'R.**

(Supreme Court of Appeals of Virginia. Dec. 8, 1903.)

**WILLS—CONSTRUCTION—ESTATE DEVISED—REPUGNANT PROVISIONS—LIMITATION
AFTER ABSOLUTE ESTATE.**

1. Where a will provided, "I give to my brother and sister all I possess on earth for their support, to be used in no other way," the brother and sister took an absolute equitable estate, with full power to consume the same in their support; and a further provision that, if there was anything left at the death of the brother and sister, it should go to certain persons, was void for repugnancy and uncertainty.

Appeal from Circuit Court, Loudoun County.

Proceedings for the construction of the will of James B. Strother, deceased, between Ruth Brown's guardian and William and Effie Strother's administrator. From a decree for the latter, the former appeals. Affirmed.

N. C. Nichols and Christian & Christian, for appellant. Cecil Connor, for appellee.

HARRISON, J. This proceeding calls for a construction of the last will and testament of James B. Strother, deceased, which is in the words following:

"I, James B. Strother, do hereby make this my last will and testament. I give to William and Effie, my brother and sister all I possess on earth for their support, to be used in no other way, and I hereby appoint Thadens Hatcher my trustee, without security, to see that it is judiciously used. On no occasion are they to have any part of while they remain on this farm, and if there is any left after their death I give to J. Homer Mock and Lucy V. Mock fifty dollars apiece (\$50.00), and I give all that is over to the youngest child of the late Edward Brown, at Beans Mill, and I direct my trustee to pay my just debts and funeral expenses. I want my trustee to be paid for his services."

From the facts agreed, it appears that the testator, William, and Effie Strother were two bachelor brothers and an unmarried sister, who lived together as one family until they successively died. Each lived to be over 75 years of age. For the 15 years next preceding the death of the testator, they lived together upon a farm. The testator made his will February 16, 1899, and died about the last of November, 1899. In the early part of the following spring (1900) William and Effie broke up housekeeping and left the farm, and never returned thereto. Effie died in July, 1900, and William in August, 1901. The estate left by the testator consisted of money and choses in action, amount-

ing, after paying debts, funeral expenses, and costs of administration, etc., to \$1,252.98, as shown by settlement made and filed with the record. Effie at the time of testator's death owned virtually no property; and William, after the payment of his debts, not more than two or three hundred dollars. The youngest child of Edward Brown, mentioned in the will, was Ruth Brown, about seven years of age. She was remotely related to the testator, and he was very fond of her. The two Mock children named in the will resided on a farm adjacent to that upon which the testator lived during the last years of his life.

William and Effie Strother having performed the condition precedent mentioned in the will, by leaving the farm therein alluded to, we are of opinion that they took under the will of their brother, James, a joint and equal equitable estate in all that the testator possessed, with full power to consume the same in their support, and that the limitations over in favor of the two Mocks and the child of Edward Brown are void for repugnancy and uncertainty. This case is controlled by a long line of decisions of this court, running from an early day to the present time, which hold that whenever in any devise or conveyance a life estate is given, and there is afterwards given the life tenant, or first taker, power to dispose of or consume the corpus of the estate, the first taker is vested with a fee-simple estate, and all limitations over are void on the ground of repugnancy and uncertainty. Among the numerous cases in support of this doctrine may be cited *May v. Joynes*, 20 Grat. 692; *Missionary Society v. Calvert*, 32 Grat. 357; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251; *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 633; *Bowen v. Bowen*, 87 Va. 428, 12 S. E. 885, 24 Am. St. Rep. 664; *Farish v. Wayman*, 91 Va. 480, 21 S. E. 810; *Davis v. Hepert*, 98 Va. 775, 32 S. E. 467.

In the case at bar the first takers are given an absolute equitable estate in all that the testator "possessed on earth," with the implied power incident to such an estate to consume the same, as well as the expressed power to consume it in their support. Such a gift comprehends everything, and the limitations over are, under the authorities cited, void for repugnancy and uncertainty.

The decree complained of, in favor of the administrator of William and Effie Strother, is free from error, and must be affirmed.

(55 W. Va. 126)

C. P. MORRISON & CO. et al. v. LEACH
et al.*

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

DECREE—MOTION TO REVERSE—APPEAL.

1. Section 5, c. 134, Code 1899, in requiring "reasonable notice to the opposite party" of a

*Rehearing denied.

‡1. See Equity, vol. 12, Cent. Dig. § 1046.

motion to reverse a decree upon a bill taken for confessed, demands such notice to any party who has an interest in the maintenance of the decree, whether plaintiff or defendant.

2. An appeal lies from a decree reversing a decree upon a motion under Code 1899, c. 134, without any motion to reverse being first made in the circuit court.

3. There can be no appeal from a decree against a party on a bill taken for confessed as to him until a motion to reverse shall be first made in the circuit court. If such an appeal is taken without such motion, it will be dismissed, as improvidently granted, without considering the merits of the appeal.

Dent, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; M. H. Willis, Judge.

Bill by C. P. Morrison & Co. and another against Minerva Leach and others. Decree for plaintiffs, and defendants appeal. Reversed.

V. B. Archer and William Beard, for appellants. Van Winkle & Ambler, Merrick & Smith, and W. W. Jackson, for appellees.

BRANNON, J. A bill in equity filed in the circuit court of Wood county by C. P. Morrison & Co. and John A. Page, suing for themselves and all other creditors of Thompson Leach, deceased, against Minerva Leach, executrix of Thomas Leach, and others, stated that the plaintiffs were creditors of Thompson Leach, and that said executrix had before that filed a bill to convene the creditors of Leach, fix their debts, sell his real estate, and apply the assets to the payment of such debts, and that a decree had been made fixing debts against the estate—among them, those of Morrison & Co. and Page—and also a large debt in favor of the Parkersburg National Bank, and directing Leach's real estate to be sold by the executrix, and that she had sold the real estate, and that the sales were confirmed, and that the assets were not sufficient to pay the debts in full. The bill further stated that Minerva Leach, as executrix, gave bond, with Dave D. Johnson and J. L. Buckley as sureties; that she had failed to comply with the decree by applying the assets coming to her hands as directed by it, and had wasted the assets; that notes given by purchasers of the realty to the executrix had been turned over to J. L. Buckley, or the Parkersburg National Bank, to be held by them as collateral security for their debts; and that there had been paid to Buckley and Johnson and the Parkersburg National Bank, out of the assets, money in excess of the ratable portion going to them. The bill prayed that the executrix and her bondsmen be held liable for such assets, and that the Parkersburg National Bank and other creditors who had received more than their proper pro rata shares of the assets be held liable therefor. The said Johnson and Buckley were sureties in the executorial bond of the executrix. Upon the bill of Morrison & Co. and Page, taken for confessed as to the Parkersburg National Bank, a decree was pronounced against MI-

nerva Leach, Dave D. Johnson, and J. S. Buckley, by reason of the executorial bond, for \$3,878.72, to be paid to Levi Lewis as a special commissioner constituted by the decree to make distribution of the funds as directed by the decree; and the decree further required that the Parkersburg National Bank pay into the hands of said Lewis, on account of money received from the estate of Leach in excess of its pro rata share of the assets, \$2,122.38, which, when paid, should be a credit on the \$3,878.72 decreed against Leach, Johnson, and Buckley. After this decree the bank moved the circuit court to reverse the decree for certain causes, giving notice of the motion only to the plaintiffs, Morrison & Co. and Page, and giving no notice to Minerva Leach or Lewis, and upon such motion a decree was entered reversing the above-mentioned decree so far as it required said bank to pay said sum of \$2,122.30. Later still a decree was entered dismissing the bill so far as it sought to make said bank liable to Leach's estate or its creditors. From the two last mentioned decrees Minerva Leach appeals, and Levin Smith cross-assigns error therein.

Section 5, c. 134, Code 1899, provides that a decree entered upon a bill taken for confessed may be reversed on motion, but that "reasonable notice to the opposite party, his agent or attorney," of such motion must be given. "Opposite party," under this statute, does not mean only the plaintiff, but any party to the suit who has an interest in upholding the decree sought to be reversed, whose pecuniary or property interest would be prejudiced by reversal. The word "opposite," as used in the statute, means opposite in interest. The statute as to depositions requires notice to the "adverse party." I do not think a deposition can be read against any party without notice to him, no matter whether he is plaintiff or defendant. It cannot possibly be thought that a decree can be reversed without notice to a person interested in its maintenance. He has no day in court. It would take his property without due process of law. We cannot give the statute a construction which would militate against the Constitution and inflict gross injustice. Minerva Leach had a deep, actual interest in having the decree against the bank maintained, because the sum decreed against it operated as a partial payment on the sum decreed against her, and increased the assets of the estate in which she was distributee, to say nothing of her right as executrix to represent the estate. The decree of reversal as to her was void—a simple nullity. Though that decree is a nullity, an appeal lies from it, because a null decree may be assailed collaterally, or directly by appeal, or by bill of review, where such bill of review suits the case. *McCoy v. Allen*, 16 W. Va. 724. It cannot be said that Minerva Leach must first herself move the circuit court to reverse the decree of reversal; since it was rendered in

absence of appearance by her to the motion. Any one has a right to appeal from an erroneous decree, as a general principle, whether on a bill taken for confessed or on appearance; but chapter 134 curtails this right of appeal in case of a decree on a bill taken for confessed to the extent that it requires first an unsuccessful motion in the circuit court. But this applies only to cases upon a bill taken for confessed. It is so limited. It does not apply to an erroneous decree upon a motion to reverse under chapter 134. From such decree an appeal at once lies. That chapter gives it, as well as chapter 135. *Midkiff v. Lusher*, 27 W. Va. 439. The circuit court could not, for want of notice to Minerva Leach, decide upon anything assigned as ground to reverse the decree, because it had no jurisdiction; nor can we do so.

We cannot say whether the decree dismissing the bill as to the bank is right or wrong, because Minerva Leach has made no motion to reverse it in the circuit court, it being a decree in the absence of her appearance. *Bock v. Bock*, 24 W. Va. 586; *Forest v. Stephens*, 21 W. Va. 316. Whether by reason of this decision the decree dismissing the case as to the bank is made null and void, because of the finality of the first decree ending the case, which decree is reinstated by this decision, or merely erroneous, we do not say. Whatever its status, we cannot pass on it, for want of such motion.

The decree of the 21st day of June, 1900, is reversed so far as it sustains the motion of the Parkersburg National Bank to reverse the decree pronounced in this cause on the 23d day of February, 1899, and reverses so much of the latter decree as ordered said bank to pay \$2,122.30 to Special Commissioner Levin Smith, and said motion is overruled, which is ordered to be certified to said circuit court. No remand.

DENT, J. I must dissent in this case. The bill was taken for confessed as to Minerva Leach. She never appeared in the cause, except to make an exception to a commissioner's report, which was sustained in her favor. So the cause in all other respects stands on bill taken for confessed. On the 21st day of February, 1899, a decree was entered against the Parkersburg National Bank for the sum of \$2,965.42, to be paid to Levin Smith, special receiver, to be distributed in certain proportions among a large number of creditors of Thompson Leach, deceased; and, if collected and so distributed, Minerva Leach was to have credit therefor on a large debt decreed against her. There was no decree in her favor against the Parkersburg National Bank, and she was only collaterally interested in such decree, while the plaintiff and all the other creditors of Thomas Leach, deceased, were directly interested therein. On the 29th day of April, 1899, another order was entered in the cause award-

ing execution against the Parkersburg National Bank for the sum aforesaid. The cause was continued on the docket for a final distribution of the funds, and for the future report of the special receiver. On the 5th day of March, 1900, the Parkersburg National Bank filed its notice of error in the decree of the cause, which it had given to the plaintiffs, the parties at whose instance the decree was entered against it. The motion to correct the decree was then submitted to the court, who took it under advisement. On the 21st day of June, 1900, the court entered another decree, reciting that "this cause came on again this the 21st day of June, 1900, to be further heard upon the papers formerly read and proceedings herein before had, the notice duly executed on the plaintiff that the Parkersburg National Bank would move the court to set aside the decree of February 23, 1899, the motion in accordance with said notice, and was argued by counsel." Then the court proceeded, among other things, to set aside the former decree in so far as the Parkersburg National Bank was concerned, and recommitted the cause to a commissioner, with instructions as to the extent of his inquiry. Is this such a final decree as is appealable? The court still had jurisdiction of the cause, and it now merely enters an order setting aside a former decree, without adjudicating the principles of the cause, and refers the same to a commissioner. This order neither settles the principles of the cause, nor is it final, but is purely interlocutory. *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Laidley v. Kline's Adm'r*, 21 W. Va. 21; *Kanawha Lodge v. Swann*, 37 W. Va. 178, 16 S. E. 462. An order setting aside a former decree in a cause is not appealable unless it settles the principles of the cause or is final. The decree set aside may be reinstated by the court on further hearing, and thus any necessity for an appeal be obviated. This order being interlocutory, and not appealable, and *Minerva Leach* having made no motion to set aside the final decree dismissing the bill, as stated in Judge BRANNON'S opinion, she cannot appeal therefrom. Hence her appeal should be dismissed as improvidently awarded. But admitting such decree to be appealable as to this appellant, it is on a bill taken for confessed. The decree was entered in a pending cause in which appellant was summoned, but never appeared. There have been no litigated questions between her and any other party to the suit. So far as she is concerned, all decrees have been entered on bills taken for confessed. It is said, however, that there was a notice given in this cause. Not by her nor to her. Nor is she in any way a party to the notice or bound thereby. She cannot appeal from the notice, because she is in no sense a party to it. Only parties to a suit or motion can appeal therefrom. *Miller v. Rose*, 21 W. Va. 291; *Supervisors v. Gorrell*, 20 Gratt. 484. In *Midkiff v. Lush-*

er, 27 W. Va. 439, parties to the notice appealed. *Bock v. Bock*, 24 W. Va. 586; *Forrest v. Stephens*, 21 W. Va. 816. *Minerva Leach*, not being a party to the notice, is not in position to appeal, but the decree stands, so far as she is concerned, as though no notice had been given, and that is on bill taken for confessed; and, if it were a final decree, instead of being interlocutory, she could not appeal therefrom until she has given notice to set the decree aside, and has such motion overruled, under chapter 134, Code, 1899. *Watson v. Wigginton*, 28 W. Va. 533; *Steenrod's Adm'r v. Railroad*, 25 W. Va. 183. Nor was she entitled to be made a party to the notice given by the bank. She was a codefendant, has never appeared in the case, has no decree against the bank, and is only collaterally interested in such decree. Nor does the pleading—being the bill alone—justify any decree or litigation between codefendants. Where the bill does not entitle the plaintiff to relief, no relief can be granted to one defendant against another. *Worthington v. Staunton*, 16 W. Va. 208; *Vance v. Evans et al.*, 11 W. Va. 342. If she had been served with notice, she could not have resisted the motion of the bank without filing an answer in the nature of a cross-bill, or an original bill seeking affirmative relief against the bank. Therefore she could neither resist the setting aside of the decree, nor the dismissal of the bill as to the bank, for she had no such legal interest in the contest between the plaintiff and her codefendant as entitled her, under the pleadings as they existed at the time the decree was entered, to set up any claim against her codefendant, or to object to the dismissal of the bill as to such defendant. If she had filed a cross-bill, or an answer in the nature of a cross-bill, uniting in the prayer of the bill, and the decree against the bank had been in her favor, her position would have been entirely different. She did neither. She did not even appear in the suit, and she is not in position to object to the setting aside of the erroneous decree against the bank, or to resist the dismissal of the bill as to the bank. Such being her legal position, she is not entitled to notice of the bank's motion, under section 5, c. 134, Code 1899. It may be she may have some interest adverse to the bank, but it has not been presented by the pleadings in such manner as to make her an "opposite party" to the bank, within the just and legal signification of the terms as used in such section. To make her such opposite party, she must not only have a claim against the bank, but such claim must have been presented by her, and be litigated and adjudicated between her and the bank by such decree. Persons collaterally interested are not even entitled to be made parties to a suit. *Mitchell v. Chancellor*, 14 W. Va. 22. So the interest of a party in a decree must be direct, and not collateral, before such party is entitled to attack it. The language of

section 5 shows the purpose of its enactment, and plainly makes evident that the interest of a party in a decree must be direct, before such party is entitled to a notice of a motion to correct such decree. It is as follows: "The court in which there is a judgment by default, or a decree on a bill taken for confessed, or the judge of said court in the vacation thereof, may on motion reverse such judgment or decree for any error for which an appellate court might reverse it, if the following section was not enacted, and give such judgment or decree as ought to be given. * * * Every motion under this chapter shall be after reasonable notice to the opposite party, his agent or attorney in fact, or at law, and shall be within five years from the date of the judgment or decree." By "opposite party" is meant the party who would have occupied the position of appellee in case of an appeal by the party aggrieved prior to the enactment of this section. In this case, it would have been the plaintiff at whose instance and suit the decree was entered, and not a codefendant who has not appeared, made any defense, or sought any relief. This is so plain, from the evident purpose, object, and language of the statute, that it seems a useless waste of words to exemplify or explain the meaning thereof, and it does not justify an appeal to the Constitution to augment or expound such meaning beyond the plain expression of its terms. To throw down the bars in this manner is to destroy the evident intention of the statute to supply a mere substitute for an appeal, and open wide the field for endless litigation to parties not legally interested in the decree. Suppose the bank had appeared before the original decree, demurred to the bill, and it had been dismissed as to the bank; could this codefendant, who had never appeared in the cause, have afterwards moved to set aside the decree dismissing the bill as to the bank, and, on her motion being overruled, have appealed to this court? Would not this court have promptly held that she had no such legal interest in the decree as entitled her to appeal, and that such decree did not injure her, or preclude her right to the assertion of any just claim or remedy. she might have against the bank? Is not this precisely the same condition she is in now? She has lost no legal right or remedy by the decree of which she complains. Nor is the adjudication between her and the bank, for she has had no litigation with the bank. How different is it with the illegal decree this day made by this court! For, with the aid of limitation, five years from the date of the erroneous decree entered against the bank, ending on this day, it forever precludes the bank from getting rid of a decree, except by payment, which the circuit court that entered it has determined to be erroneous and unjust. As between the plaintiffs who had notice and the defendant bank, the decree is not void, but it is valid,

for it was not a joint decree either against or in favor of Mrs. Leach. Hence it is improper to avoid such decree in so far as the plaintiffs are concerned, for they, having notice thereof, are bound by it. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553. Plaintiffs have no grounds of appeal, and do not appeal. Mrs. Leach claims the right of appeal solely from the want of notice. Her interest and the plaintiffs' are not identical, and she is in no wise injured by setting aside of a decree erroneously entered at the instance of the plaintiffs, for she is not thereby deprived of any legal right or claim she may have against the bank. I look upon the decree entered by this court against the bank as a great, grievous, and irremediable wrong in an appeal case in which a codefendant with whom the bank has had no litigation is the appellant, and the plaintiffs are the appellees.

The appeal should be dismissed as improvidently awarded.

(55 W. Va. 56)

RUTHERFORD et al. v. RUTHERFORD.*
(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

RELEASE—JOINT CONTRACTORS—COMPROMISE—CONSIDERATION—IMPEACHMENT—INSTRUMENT—PROOF OF EXECUTION.

1. A release of one of two joint contractors releases both.
2. A compromise of a controversy is a valuable consideration to sustain a contract.
3. Consideration of a contract. What is valuable.
4. A person who at the time of the execution of a release knows, or by inquiry might know, the exact nature of the writing, cannot invoke his own neglect to ascertain its nature to impeach it, unless imposed on and misled by fraud.
5. A release of a mere personal obligation is not required to be recorded.
6. The certificate of acknowledgment of a writing not required by law to be recorded is no evidence of its execution, and is not admissible as such.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by John E. Rutherford against Wade H. Rutherford and others. Decree for plaintiff, and defendants appeal. Reversed.

W. B. Maxwell, for appellants. Harding & Harding, for appellee.

BRANNON, J. John E. Rutherford, by two separate deeds, 15th March, 1887, conveyed two tracts of land in Randolph county, one of 75 acres and one of 95 acres, to his two sons, Samuel W. Rutherford and Wade Hampton Rutherford, in consideration, as provided in the deeds, that the sons would support and bury John E. Rutherford and his wife. The wife of John E. Rutherford did not join in the deeds. She died in 1897.

*Rehearing denied.

¶ 1. See Release, vol. 42, Cent. Dig. § 52.

It is said by counsel on both sides that John E. Rutherford was killed by a train of cars near Grafton since the decree in this case. At the date of said deeds, Samuel W. Rutherford was 19, and Wade H. Rutherford 5, years of age. Samuel W. Rutherford married, and brought his wife to the home. Trouble, in ways not necessary to be detailed, here arose between the father and the son's wife, which engendered bad feeling between father and son. Samuel lent little or no help to his parents. Wade H. Rutherford still lived with his father and lent him help for some years, when he left home—driven away, as he says, by his father. Amid these troubles, on 5th January, 1894, a writing was made, which is so very badly drawn as to be almost unconstruable. John E. Rutherford says in his bill that, finding it impossible to get along with Samuel W. Rutherford, he (the father) "attempted to enter into" this contract. So he moved it as a compromise. His bill says so. It names S. W. and W. H. Rutherford as its formal parties, but they and their father and mother all signed it. It imports that Samuel W. Rutherford was to deed W. H. Rutherford 40 out of the 95 acres, and keep the balance, and he was to relinquish to W. H. Rutherford the 75 acres. It declares that it was a final settlement, and released all responsibilities between the parties. The parties never conveyed under this contract. Samuel W. Rutherford and his father still differed. Later, April 3, 1896, a written contract appears, signed by John E. Rutherford and Samuel Rutherford, acknowledged before a notary and recorded, which recites that J. E. Rutherford had before that bound S. W. Rutherford to care for him and see him decently buried; and it released S. W. Rutherford from "all said incumbrance and maintenance," and S. W. Rutherford was to turn over to W. H. Rutherford one black mare; and the writing declared, "and this is a final settlement to this date between said parties of J. E. Rutherford, W. H. Rutherford & S. W. Rutherford." On the date of this contract, Samuel W. Rutherford and wife made a deed to Wade H. Rutherford releasing his interest in the 75 acres, retaining a lien to require Wade H. Rutherford to convey to Samuel the 95 acres; Wade H. being then an infant and unable to convey. On 16th December, 1896, Samuel W. Rutherford conveyed the 95 acres to R. V. Shreve, and by deed 12th January, 1897, Shreve conveyed to David C. Simmons. On 27th March, 1897, John E. Rutherford brought an equity suit in Randolph against Wade H. Rutherford, Samuel W. Rutherford, Shreve, and Simmons, alleging that his two sons had wholly failed to support him and his wife as stipulated in the conveyances of said two tracts by him to his sons, and charging that the conveyances by Samuel W. Rutherford to Shreve, and by Shreve to Simmons, were made with fraudulent intent to defeat his rights, and

asking the cancellation of the two deeds from himself to his sons, and the deed from Samuel W. Rutherford to Shreve, and that from Shreve to Simmons, and that said land be restored to him. In October, 1901, an amended bill was filed. The original charged default of support and abuse by Samuel W. Rutherford, but did not as to Wade H. Rutherford, but, on the contrary, admitted that Wade H. Rutherford had, to some extent, complied with his obligation. The amended bill charges that both sons had failed to support their father or mother, and had cruelly neglected both. This bill states the death of the mother. John E. Rutherford, in his bill, introduces the contract of release into the case, but denies that he signed, agreed to, or acknowledged it. The answer of Samuel W. Rutherford relies upon it as a release. Wade H. Rutherford, being an infant, filed an answer by guardian ad litem. Shreve and Simmons filed answers denying all fraud on their part, and denying any right in John E. Rutherford as still subsisting in the lands. Depositions were taken. The 95 acres was in woods. Samuel cleared 5 acres. The other tract poor. The rental value only \$15 or \$20. On the hearing a decree was made canceling the two deeds from John E. Rutherford to his sons, and the deed from Samuel W. Rutherford to Shreve, and the deed from Shreve to Simmons. Samuel W. Rutherford appealed, and Wade H. Rutherford, having reached majority after the appeal, unites in it.

Concede that the sons did not comply with their obligation to support their father and mother. Did not John E. Rutherford release their obligation to do so? The parties had contention and difference about it, and they made the contract of compromise of 5th January, 1894. John E. Rutherford signed it. For what reason? His elder son was married and living to himself, but the younger was still with his father. The father now depended on him, and he wanted him to have the 75 acres free from all claims on the part of Samuel W. The father lived on it—did so all the while—and from it he and the younger son could have a living. By this contract the younger son got the sole title to the 75 acres, and 40 acres out of the 95-acre tract. The father and son could look to both for bread. The father assented to this arrangement, because his bill says he moved the contract and he signed it. The writing says that it was a final settlement, and released all responsibilities between both parties. It was drawn by a very illiterate, incompetent hand; but it declares that it is a final settlement of all responsibilities, and, the father signing it, it could allude to nothing else, as to him, but the release of the obligation of Samuel W. Rutherford to support him. By it the 75 acres was freed from claim by Samuel in favor of Wade, and Wade got 40 acres of the other tract, and in consideration thereof the father forewent his demand for support. The release of Samuel

operated to release Wade, because the release of one of two joint contractors releases both. 3 Minor's Inst. 213. Strife went on, and later comes the compromise contract of 3d April, 1895, releasing Samuel from all obligation of support; and its language further released Wade, in addition to the release by operation of law. But John E. Rutherford denies that he ever executed it, or that he thereby agreed to release. This denial is repelled by the fact that he did by this second compromise only what he did by the first—released support. I use that first contract to corroborate the probability that he did make the second compromise, because it only does, as to him, what the first did. We need not discuss how far the second abrogates the first, because, as to John E. Rutherford, they both do the same thing; that is, release the obligation of maintenance or support. What are the rights of the two sons under them, as between themselves, is not involved. It is said that this second contract is based on no consideration. In the first place, it was a compromise. That it had this character, the bill shows, for it says that amid the difficulty the plaintiff attempted to make it. The evidence plainly shows it to be a compromise. If made, it surely was made, as bill and evidence show, as a compromise. That makes the consideration sufficient and favored in law. *Zane v. Zane*, 6 Munf. 406. Compromise of a colorable claim is a valuable consideration. 3 Minor's Inst. 123. But in addition, the same page shows that a valuable consideration is "a benefit to the party promising, or to a third person at his request, or an injury, loss, charge, or inconvenience, or the risk thereof to the party promised." Now, applying this law, John E. Rutherford got the benefit, and his son the loss, of a mare which by the contract was conveyed to W. H. Rutherford at John E. Rutherford's request, as shown by the fact that he himself signed the contract; and, when he was told by his son to come out of the house where the contract was written and get the mare, he told Samuel to deliver her to Wade. In further addition, at that same time Samuel made a deed to Wade for his interest in the 75 acres. John E. Rutherford was present and knew this. It was the same transaction. This was a consideration, as Samuel suffered a loss thereby. And this was to the expected benefit of the father, because he wanted Wade to have sole ownership of the 75 acres and the mare, that they both might have support from them. It is said that Samuel did not own the mare. He claimed her; had her in his sole possession; the evidence proves his right to her; and, if not, it is sufficient to say that the contract treated the mare as his, and compromised conflicting claim to her.

But John E. Rutherford says he did not execute the contract. Facts above stated render it highly probable that he did. The oral evidence added makes it clear that he

did. It greatly preponderates to this conclusion. George L. Shreve says that, a few days before the contract was made, he met John E. Rutherford on the road, and the trouble between him and his son Samuel was talked about, and Rutherford said he would release his life maintenance to Sam if he would give Hampton a certain black mare he had, and that he (Shreve) told Rutherford he knew Samuel would do so, if Hampton would take the lower tracts and give Samuel the upper, and Rutherford said he would do that. Shreve said that from this the contract and deed originated. So they did. The contract was but its result. When we know of this conversation, it is unreasonable to say that John E. Rutherford did not sign the contract. But by no means is this all. The parties all met soon after at a store. Ira Shockey drafted contract and deed, and, as notary, took and certified the acknowledgment of the parties to them—among them, John E. Rutherford. He swears that John E. Rutherford, after the contract had been read to him, said his hand was so stiff that he could not sign it, and requested Shreve to sign it for him, which he did. Shockey says the paper was read to him both before and after Rutherford signed it, and that he acknowledged it before him as notary. Shreve swears that he, at Rutherford's request, signed it for him. When asked if he was present when Rutherford acknowledged the paper he said he was not sure, but thinks he was. Albert Skinner swears that he was present, and heard the contract read and acknowledged before the notary, and Rutherford made no objection to it. R. O. Zirkle swears that after the contract he asked Rutherford why he gave up his maintenance for the mare, and he replied that he would rather have the mare than nothing, thus admitting the contract. Against all this evidence alone stands Rutherford's oath denying that he signed or authorized the signing of the contract, by general language. True, there is a George W. Skinner, who says he was present when the contract was drawn, and that Rutherford did not agree to it, and that he did not in his presence ask any one to sign for him. This can be plausibly explained in this way: Wade H. Rutherford was an infant, and, in the deed to him from Samuel for the latter's interest in the 75 acres, Samuel retained a lien to secure the conveyance to him by Wade, when 21, of the 95 acres. Against this lien Shockey says that John E. Rutherford raised objection, and John E. himself states so; and, according to both Shockey and Rutherford, that was his only objection. That was not an objection to the contract, but to the deed. The lien was reasonable, and Shockey says that, when fully explained to Rutherford, he was satisfied. It lends aid to all the above when Rutherford admits that he did tell Samuel that he would yield the 40 acres, which by the first contract Samuel

notes for even \$35,000, and credited himself on the books with the supposed difference. Some of these claims plaintiff admits that he was legally liable for, and others he only assumed and expected at some time the bank would make a proper adjustment thereof with him. Among the latter plaintiff places the Steel bills and the certificates of deposit. Plaintiff paid six of the \$5,000 notes, and the other he declines to pay, and asks to be canceled, for the reason that it has been since discovered by the examination of an expert that one of the \$5,000 notes assumed by him for the Park City Street Railway Company was a renewal of a similar note of such company, and that, instead of there being four of such notes, there were only three, one of them being duplicated by renewal.

The defendant bank answered the bill, and denied plaintiff's right to the relief sought, and further filed as a claim for affirmative relief, and as an offset against the plaintiff's demand, the following list of adverse demands, to wit:

1. Draft West Virginia Transportation Co..	\$1,700 00
Interest from Dec. 29, 1888.	
2. Amount erroneously credited to account of W. H. Wolfe.....	365 96
Interest from Feb. 13, 1897.	
3. Interest on bonds city of Parkersburg, collected and unaccounted for.....	530 00
Interest from Aug. 14, 1896.	
4. Stock Parkersburg Chair Company.....	7,300 00
5. Interest on bonds Parkersburg Chair Company, collected and unaccounted for	625 00
6. Item charged to "E."	1,000 00
7. Interest on shortage in certificates of deposit from Jan. 1, 1894, to Feb. 3, 1897	502 41
Interest from Feb. 13, 1897.	
8. Interest on overdrafts Park City Street Railway	633 35
Interest from Feb. 1, 1897.	
9. On note \$2,700, and renewals, indorsed by L. B. McFarland:	
(1) Note July 30, 1896.....	\$300 00
Int. from July 30, 1896.	
(2) Int. on \$2,500 from July 30, 1896, to Dec. 3, 1896.....	50 00
Interest from Dec. 3, 1896.	
(3) Int. on \$2,500 note Dec. 3, 1896, to April 6, 1896.....	50 00
Interest from April 6, 1896.	
(4) Interest on \$2,390 note April 6, 1896, to Aug. 9, 1896..	44 25
Interest from Aug. 9, 1896.	
(5) Charged against profits April 6, 1896.....	200 00
(6) Int. \$2,000 note Aug. 9, 1896, to Nov. 9, 1896.....	30 00
Interest from Nov. 9, 1896.	
(7) Charged against profits Aug. 9, 1896	300 00
Interest from Aug. 9, 1896.	
(8) Int. on \$1,900 note for 3 months	22 50
Int. from Feb. 13, 1897.	
(9) Charged against profits Nov. 9, 1896	100 00
Int. from Nov. 9, 1896.	
10. Charged against profits July 7, 1896.....	100 00
Interest from July 7, 1896.	
11. Park City Street Railway note of Dec. 16, 1891	5,000 00
Interest from Dec. 16, 1891.	

Plaintiff filed a special reply, claiming that the first item of defendant's statement, \$1,700, was his private property; that the second item, \$365.96, was for the overcharge of interest included in the \$35,000 of notes; that the third item, of \$520, the bank received the benefit of, and the plaintiff did not;

that the fourth item, of \$7,200, was his individual property, and the bank had no interest therein; that the fifth item, \$525, the bank received, and he did not; that the sixth was for a bad debt of one Richardson, for which he was not liable; that the seventh item, \$502.41, was for interest on the shortage of \$2,791.17, which he made good to aid the bank, but for which he was not legally liable, either as to principal or interest; that the eighth item, of \$638.55, is not an individual liability of the plaintiff, and that the Park City Street Railway Company had settled with the bank, and paid all that it owed; that the ninth item, being the \$2,700 note, and the interest sought to be collected, was a note, with all its renewals, given in the interest of the bank, to temporarily cover up some bad bills held by the bank, and the interest thereon should be really a charge against the bank, instead of against him individually (the same answer is given as to the tenth item, of \$100); that the eleventh item, of \$5,000, is for a note of the Park City Railway Company, which was paid, and of which the plaintiff received no advantage in any manner; and that the whole account is a mere trumped-up affair to prevent plaintiff from getting the just relief which he is entitled to in this case.

The court, on the bill, answer, special replication, and proofs, after having overruled the plaintiff's motion to strike out the matters of affirmative relief prayed for in the answer, decided that the defendant was not entitled to such affirmative relief, and referred the case to a commissioner to ascertain and report whether the plaintiff was entitled to the relief sought by him, and whether the defendant was entitled to any offsets against such demand, and any other matter deemed pertinent by himself, or required by any of the parties in interest. The commissioner reported that the plaintiff was entitled to have the \$5,000 note canceled, and that the bank had no just offsets or defense against the same. The defendant filed three general exceptions to, and which covered, the whole report. The court overruled the exceptions, confirmed the report, and granted plaintiff the relief sought. From this decree, the defendant appeals.

This court has firmly established the doctrine that "the finding of the circuit court as to facts in issue, unless against the plain preponderance of the evidence, is conclusive upon this court." *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. 600; *Poling, Trustee, v. Condon-Lane Boom & Lumber Co.* (decided at this term) 47 S. E. 279. In short, the appellant places himself in the position of a demurrant to the evidence on which the facts are founded, and, unless he can show that the determination of the circuit court is plainly contrary to the preponderance of evidence, the decree of the circuit court will be affirmed. To establish any other rule would be simply to place this court in the position of

making a last guess to overthrow the decision of the circuit court. If this court can see that the circuit court has decided contrary to the plain preponderance of the evidence, it can act advisedly and with justice in reversing the action of the circuit court; but, if the matter is left in doubt from an examination of the evidence, this court has no justification in taking any other course than to remain inactive and permit the decree of the circuit court to prevail.

There are only two questions presented to this court by this record:

First. Was the circuit court justified in refusing to allow the defendant bank the affirmative relief sought by it? All the claims arose prior to the compromise made between the directors and the plaintiff, and it must be presumed that the directors had full knowledge of the same at that time. 3 Am. & En. En. Law (2d Ed.) 843. Nor will the law permit them to plead ignorance thereof, when their duty required them to have full knowledge of all of the affairs of the bank, and such a plea would necessarily imply a neglect to discharge such duty. It was in their power to know, all about them before the compromise and adjustment, and, if they did not know, it was their own fault. They had access to, and control of, all the books of the bank. They had the right to employ expert assistants, and if these claims, or any of them, were justly chargeable against their cashier, it was their neglect not to bring them forward before the adjustment was made. Their excuse that they permitted themselves to be deceived by their cashier is not sufficient, for he was under their control and subject to their orders, and their duties required them to superintend his work. He was their servant to do their bidding, and losses occurring by reason of the mutual negligence of both should not be charged up to him entirely. But passing this by, there is not a single item charged that this court can say, from the evidence, should be allowed contrary to the finding of the circuit court. The most that can be said about them is that some few of them appear to be doubtful. The defendant did not assert them until this suit was instituted, and they were becoming decidedly stale. If the defendant had a just demand for any items of its claim, its remedy at law was adequate and complete, but may now be barred by the statute of limitations. The execution of the notes and trust must be regarded as received in accord and satisfaction of all plaintiff's liabilities to the bank. In the absence of satisfactory evidence showing mistake, fraud, or unconscionable advantage, such a settlement or compromise cannot be disturbed. Where, however, it is clear a mutual mistake has been made, equity will intervene to correct it. 1 Am. & En. En. Law (2d Ed.) 428.

The evidence, which is bulky, and to some extent conflicting, satisfied the circuit court and commissioner that a mutual mistake had

been made, and that the plaintiff had assumed to pay \$5,000 more than he should pay. The directors admit that there is a discrepancy in favor of the domestic bills account of \$4,262.42. The special examiner found and reported that this was caused by charging the plaintiff with one more note, of \$5,000, of the Park City Street Railway Company, than he was liable for, on account of one of the notes being duplicated or renewed. He was not only charged with the old note, but with the renewal thereof. The difference between \$5,000 and \$4,262.42, being the sum of \$737.58, is not accounted for; but this furnishes no good reason why the plaintiff should make it good out of the overcharge against him, as he is not shown to be in fault in regard thereto. In view of the great default of the teller right under the very noses of the directors, it is not right that they should charge to the plaintiff all losses that they have not yet been able to trace home to the defaulter. If they would hold the plaintiff responsible, they should have long since shown his responsibility. Failing to do that, they should do justice by him, and not attempt to make him the scapegoat for not only his own, but the delinquencies of others.

According to the evidence as it appears in the record, it is impossible for this court to say that the commissioner and the circuit court erred against the decided preponderance and weight thereof, and hence the decree must be affirmed.

(55 W. Va. 601)

STANTON v. O'KANE, Mayor et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

MANDAMUS—APPLICATION—NOTICE—CAN-
VASSING BOARD—COUNTING BALLOTS.

1. Where, in the first instance, under section 89, c. 3, Code 1899, a peremptory mandamus is sought, dispensing with a rule or conditional mandamus, notice of the application must be first given, and the adverse party allowed to defend.

2. Under a mandamus awarded under section 89, c. 3, Code 1899, a canvassing board may be directed and compelled to count a particular ballot in a particular way or for a particular candidate.

(Syllabus by the Court.)

Application of George J. Stanton for writ of mandamus to James O'Kane, mayor of the town of Wolmesdorff, and others. Writ awarded.

W. B. Maxwell and D. H. Hill Arnold, for petitioner. C. H. Scott, for respondents.

BRANNON, J. An election was held 7th January, 1904, for mayor, recorder, and five councilmen for the town of Wolmesdorff, Randolph county. The ballots were separate—not on ballot sheets—under the law as it was prior to Act 1891, c. 89, found in Code 1899, c. 3. There were two tickets. The

name of George J. Stanton was printed, along with four others, for councilman, on only one of the tickets, and the names of John B. King and P. F. Joyce were printed for councilmen on the other ticket only. The returns of the election and the canvass by the council showed that each of said candidates for council received 54 votes. The election officers solved the tie vote by choosing King by lot, and the council declared him elected. There is no dispute as to the 54 votes, but there is a ballot claimed by Stanton as a good vote for him which was rejected. Then Stanton asked of the circuit court a mandamus to the council to compel it to reassemble and count that ballot for him, and declare him elected, and, being refused, has come to this court for a mandamus to compel the council to count that ballot for him and declare him elected, and compel the council to admit him to his office, and dispense with a preliminary rule; he having given notice of the application to the proper parties.

King presented to this court a paper styling itself "Answer and Return." The petition seeking, in the first instance, a peremptory mandamus, thus dispensing with a mandamus nisi or rule, as allowed in election cases by Code, c. 3, § 89, Stanton excepted to it because a return is not admissible to a peremptory mandamus. There being no alternative mandamus or rule, no return, properly so called, can be made; but we are sure that the Code does not contemplate the award of a final writ without a right to defend against its award. Though the Code does not mention notice, we must apply the rule that, though it does not call for notice, yet, where judicial action is to be had to a man's prejudice, the statute is construed to intend notice, as without it such action would be void, and would not be due process of law. *Evans v. Johnson*, 39 W. Va. 299, 302, 19 S. E. 623, 23 L. R. A. 787, 45 Am. St. Rep. 912; 7 Rob. (New) Prac. 22. Where such peremptory writ is asked in the first instance, notice of the application for it must be given preliminary to such application, or in its absence the court must give notice by rule, or cause the party to give it before action, and allow defense. This return can be treated as an answer to the petition, and no objection can be made to it on the ground stated.

King resists the application for mandamus on the ground that, as asked, it would require the council to count the contested ballot for a particular candidate, contrary to the rule stated in *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296, that mandamus will not compel an act judicial in nature, but only ministerial; it will compel action, but not any particular action that savors of the judicial function; that in this case whether that ballot is, in law, a good ballot, and how it should be counted, is such a question, and mandamus will not lie. True, such is the general rule, as stated in that case; but it was also stated that the

writ, as allowed in the election statute, is an exception, and has wider function. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187, is cited as antagonistic to the *Marcum* Case, and as holding that the writ can go no further than to compel action, not to direct particular action; but that case pointedly makes the writ, when used under the election law, applicable to election matters, "whether ministerial or judicial; in other words, giving it the appellate function of certiorari." In order not to be misunderstood, the general rule of the function of mandamus was stated, but the peculiar function in election cases was also stated. This distinction is stated in point 2 in *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470.

The contested ballot: It is quite plain that it ought to have been counted for Stanton. On it stands intact his name as one of the five persons voted for under the words "For Councilmen." How can anybody say that the voter using this ballot did not intend to vote for him? A ballot is a paper to express intent, and, where its language is plain, we must take it, and not go to guessing that the voter meant something else. John Shannon's name was printed on the ballot under the words "For Recorder," and the voter erased his name and wrote in below it the name of P. F. Joyce, and so voted for Joyce for recorder, not for councilman, by plain language and legal import. The fact that Joyce was on another ticket for councilman was perhaps taken as the ground for mere guess that the voter intended to vote for him for councilman, thinking Shannon's name was Stanton, against plain language and expression—surmise against expression. It is unwarranted assumption and inexcusable action against a man's just right. It can hardly be called error of judgment. The old election law (Code 1887, c. 3, § 13), if it applied, would justify no such action. It says, "The ballot shall contain the names of the persons for whom he wishes to vote, and designate the office he desires them to fill." Does not this ballot do that? It could not more plainly say that the voter intended to vote for Joyce for recorder, and not Shannon, because Shannon's name is erased; and it could not more plainly say that he intended to vote for Stanton for council, because his name is left on under that office. But as Code 1899, c. 3, § 85, says that, whether a municipal election is held according to it or the prior law, the election "shall be counted and certified, and the result declared under the provisions of this chapter," the new law tells how to count a ballot. It says, in section 34, that a voter desiring to erase the name of any candidate from the ballot he intends to vote, or to vote for any one else, may strike out the name so printed on said ballot, and write in the blank space next following the name of the candidate or person for whom he desires so to vote. But if he fails to strike from said ballot the name printed thereon, the

name written in said ballot shall alone be counted as to said office. This tells us that the written name controls for the office under which it is written, even if Shannon's name had been left; but, to make it plainer, it is erased. We might raise a question, if Stanton's name had been erased, but it was not.

Giving the writ of mandamus the force of certiorari, we hold that said ballot is a good ballot for Stanton, and we award a peremptory mandamus commanding the mayor, recorder, and councilmen of said town to meet as a canvassing board and declare the result of said election between Stanton, King, and Joyce for councilmen, counting said ballot for Stanton.

(55 W. Va. 642)

SLAUGHTER v. THACKER COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

CONTRACTS—ILLEGALITY—RESTRAINT OF TRADE.

1. Three coal mining companies operating in the same vein or seam in close proximity to one another, and just having commenced the development of that particular kind of coal, organize indirectly and nominally in the names of individuals a third corporation to act as their general sales agent, and each gives it by contract the exclusive right to sell its entire output of coal at prices uniform as to all three companies, and not to be departed from without the consent of all the companies, and said agent company is to advertise and introduce the coal in the markets, establish and control all agencies and sub-agencies, and make all sales and collections, and deduct for its compensation 10 cents per ton out of the proceeds of sales. *Held*, that the contract is illegal and void, its tendency being to suppress competition and restrain trade, contrary to public policy.

(Syllabus by the Court.)

Error from Circuit Court, Mingo County;
E. S. Doolittle, Judge.

Action by W. P. Slaughter, receiver, against the Thacker Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Simms & Enslow, for plaintiff in error.
Campbell, Holt & Duncan and Rucker, Anderson & Hughes, for defendant in error.

POFFENBARGER, J. On the 1st day of May, 1895, there were four coal companies, corporations, operating in what is known as the Thacker Coal Vein in Mingo county. They were the Thacker Coal & Coke Company, the Lynn Coal & Coke Company, the Logan Consolidated Coal Company, and the Maritime Coal Company. On said date another corporation was organized, called the Thacker Coal Company. Its capital stock paid in was \$640, and the principal stockholders were the presidents of the Thacker Coal & Coke Company, the Lynn Coal & Coke Company, and the Logan Consolidated Coal Company. Small amounts of stock were taken by two other persons simply for

the purpose, as is supposed, of making up the required number of persons. A. Moore, president of the Thacker Coal & Coke Company, was elected president of the new company. Said new company was organized, not for the purpose of mining coal, nor of selling coal generally, but for the sole purpose of acting as sales agent of the companies operating in said Thacker vein, but the Maritime Company refused to take part in its organization and also to contract with it. On said 1st day of May, 1895, said agent corporation entered into a contract with the Thacker Coal & Coke Company whereby it agreed to sell for said company, for the period of five years, not less than 20,000 tons of coal each year, or, in default thereof, to pay the Thacker Coal & Coke Company 20 cents per ton for so much coal as it should fail to sell, in case it did fail to sell the amount stipulated. From the proceeds the agent company was to deduct and retain as compensation 10 cents per ton. The Thacker Coal & Coke Company covenanted to deliver to the agent company as much coal as it could sell, not exceeding, however, 84,000 tons each year. It was further agreed that, if the mining company should fail to deliver coal according to the agreement, it should pay the agent company 10 cents per ton for coal not delivered, as compensation or liquidated damages. It was further provided that either party might terminate the agreement at the end of any year by giving 60 days' notice prior thereto, April 1st being the beginning of the year fixed in the contract. The prices at which the coal was to be sold were fixed in the agreement, and it was further provided that they should be adhered to by the agent company unless departure therefrom should be authorized by a minute signed by all parties producing coal from said vein for whom the said agent company should act as agent. The agent company was required to account for and pay over the proceeds of sales on or before the 15th day of each month. The general nature of the agent company's business, as set forth in the contract, was the selling, advertising, and introducing of Thacker coal, and it had authority to adjust and settle complaints made by consumers, and to select and appoint all subagents for the sale of said coal.

Under this contract the agent company sold for the three producing companies with which it had contracts, up to the 1st of May, 1896, 124,087 tons. In the meantime, there had been paid in on the capital stock of the agent company, by deduction from the proceeds of coal sold for the three operating companies, \$5,360, which, with the amount originally paid in, \$640, made the total sum paid in \$6,000. Practically all of this money and the commissions, amounting to about \$12,400, had been expended in the business of the agent company, advertising the coal, establishing agencies and subagencies, and

providing facilities for handling and disposing of the coal. During this time Moore, president of the Thacker Coal & Coke Company, was president and had the management of the Thacker Coal Company. About the 1st of May, 1896, he retired from the presidency of the agent company, and Walter Graham, president of the Logan Consolidated Coal Company, succeeded him. On May 22, 1896, Moore, acting as president of the Thacker Coal & Coke Company, notified the agent company by letter that his company would not deliver any more coal under the contract, assigning as ground for its refusal that the agent company had, in the month of April, 1896, sold the coal of his company at prices less than the minimum prices stipulated in the agreement, without any authority so to do, and that the agent company had further violated the agreement by not accounting for and paying the proceeds of the sales made in April, 1896, on or before the 15th day of May, 1896. The payment complained of was by checks sent from Bluefield to Thacker under date of May 18, 1896. In reply to this letter, Graham, president of the agent company, wrote Moore, and called his attention to the fact that all parties interested had, at a certain meeting, upon the recommendation of Moore himself, unanimously agreed that the president of the Thacker Coal Company should have discretion to make concessions in price when he should deem it expedient, and that Moore himself, as president of the agent company, had directed the sales complained of to be made as they were made. He further reminded him that it had been the practice, as established by himself, to remit for the proceeds as the money was received from the sale of the coal, without regard to the day of payment stipulated in the agreement. The letter further notified the Thacker Coal & Coke Company that it would be expected to adhere to the agreement and accord to the agent company the exclusive right to sell all coal which the mining company should produce. Moore, as president, replied that it would withdraw from the agent company. He was then notified that the agent company would demand of his company a sum equal to 10 cents per ton for 84,000 tons of coal, less the amount which had been furnished since April 1, 1896, as damages for the breach of the contract. The agent company continued until the 31st day of July, 1896, to handle the coal of the other two companies. On that date the Thacker Coal & Coke Company, or Moore, with the aid of parties representing the Lynn Coal & Coke Company interest, or having purchased that interest, at a meeting, after due notice, passed a resolution dissolving the agent corporation and appointing a trustee to wind up the business. This was followed by a chancery suit in which the assets of the defunct corporation were collected by W. P. Slaughter, special receiver, and paid

out pro rata on its indebtedness, the amount realized by the corporations being 54 cents on the dollar. The heavy creditors were the three producing coal companies, the amounts due them having been as follows: The Thacker Coal & Coke Company, \$2,702.34, for coal sold prior to May 22d; the Lynn Coal & Coke Company, \$977.38, for coal sold probably in June and July; the Logan Consolidated Coal Company, \$1,166.89, for coal probably sold in July. The other indebtedness consisted of small amounts due to various persons, making the total indebtedness \$5,164.14, while the total assets amounted to \$3,951.71. In said chancery suit, upon petition of the Logan Company, an order was made directing Slaughter, special receiver, to sue the Thacker Coal & Coke Company for the damages claimed on account of the breach of the contract. In pursuance thereof this action of assumpsit was brought. In addition to the common counts the declaration contains a special count on the contract. A demurrer was interposed and overruled, and there was a verdict and judgment for the defendant, and the plaintiff complains of that judgment.

Under rule 10 of this court (45 S. E. xi) the defendant cross-assigns error in the overruling of the demurrer. I am of the opinion that this assignment is well taken. But for section 10 of chapter 99 of the Code of 1899, an action of assumpsit would not lie upon any sealed instrument. Under it such action does lie upon a promise, undertaking, or obligation in such instrument for the payment of money. The covenant which forms the basis of this action is to deliver coal. It is true that there is a clause by which the defendant company agrees to pay 10 cents per ton as liquidated damages, but that only becomes effective upon the breach of the covenant to deliver coal. In the absence of such breach there is no agreement to pay money. The condition upon which this promise to pay money arises is one of the class the determination of which is peculiarly the subject of an action of covenant. The demand sued for here is materially different from those involved in *Kern v. Zeigler*, 13 W. Va. 707, and *Jones v. Sewing Machine Co.*, 38 W. Va. 147, 18 S. E. 478. However, the majority are of a different opinion, and on this point the judgment of the court below must stand.

For the plaintiff in error it is said there is no evidence against his right to recover, but it is insisted for the defendant in error that the judgment cannot be disturbed for two reasons. The first is that the contract was entered into by the parties for the purpose of destroying competition, and is in restraint of trade, and therefore void, as against public policy. In this connection it is shown that, while the stock of the agent corporation stood in the name of Graham, Moore, and Kirk, presidents of the three producing companies, it was taken in their names for convenience, and paid for by the

coal companies; and, further, that an effort was made by these companies to get the Maritime Coal Company to join them. Unless this contract is within the inhibition of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], declaring illegal every contract and combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, it is not necessarily illegal. Although on its face it carries an apparent tendency to stifle competition, and is, in that sense, in restraint of trade, it is not illegal by reason of that act unless it affects commerce among the several states or with foreign nations. *United States v. Freight Association*, 166 U. S. 290, 325, 17 Sup. Ct. 540, 41 L. Ed. 1007. This contract relates simply to the sale of the output of one mine, but it appears from the evidence in the case that the agent corporation was organized for the purpose of handling the output of all the companies operating in a certain vein or seam of coal, and that two other companies had contracts with it like or similar to the contract with the defendant company. But it does not appear that this coal was to be sold in any particular place, nor that under this contract it must necessarily go beyond the state lines. An examination of the decisions of the United States Supreme Court construing the act makes it certain that, to be illegal thereunder, it must fall clearly within the terms of the act. *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 846; *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *United States v. Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. As this contract does not do so, it must be held valid so far as that act is concerned. Is it void at common law? The modern rule on that subject is that, although a contract may be in restraint of trade, if it is not unreasonably so, it is enforceable. "Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade, and still be valid at common law." Mr. Justice Peckham in *United States v. Freight Association*. "The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable." *Chemical Co. v. Provident Co.* (C. C.) 64 Fed. 946. In that case one company sold out its competing business to another, agreeing not to engage in the business any more during the term of the lease. There is ample ground for applying this principle here. These companies were developing a new coal field. Their product was unknown in the markets, and it was necessary, in order to find sale for it, to spend large amounts of money in advertising it and establishing agencies. As they all pro-

duced the same kind of coal, this could be done more advantageously and economically through one agency than by separate action. In accomplishing this purpose it was necessary that a uniform price as to the product of each company should be maintained; otherwise the common agent, by discriminating between them, could have sold the coal of one company to the exclusion of that of the others, and the enterprise would have become impracticable, and defeated its own purpose. The agreement to maintain uniformity of price seems, therefore, to have been rather an incident to the main purpose than a design to stifle competition. "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced. They do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England." *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 961, 82 Am. St. Rep. 741. In *Skrainka v. Scharringhausen*, 8 Mo. App. 522, the contract under consideration—very much like this one—was held good. The owners of certain stone quarries entered into an agreement to secure "a fair, proportionate sale of the product of all quarries at uniform prices and living rates," the terms of the agreement restricting the production of stone within certain territory, putting the sales in the hands of an agent for the interest of all parties, appointing a committee of five persons to modify prices and settle complaints, and imposing a penalty for every sale made in violation of the agreement.

It is not intended here to affirm the correctness of the decision, but it illustrates the view taken by certain courts, and shows that much latitude is allowed to manufacturers and producers of commodities in arrangements for facilitating production and sale. In *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 18 N. E. 419, 60 Am. Rep. 464, Andrews, J., said: "In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed." Another interesting case is that of *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629. In that case the contract was one made by three manufacturers of a certain kind of curtain fixtures under different letters patent, owned by them severally, for the purpose of avoiding competi-

tion. It was held valid. In *Cohen v. Berlin-Jones Envelope Co.* (Sup.) 41 N. Y. Supp. 345, manufacturers of envelopes made a contract with another envelope manufacturer by which they agreed to purchase from him, at prices to be fixed from time to time by the former, a stated quantity of goods manufactured by him during a stated period, and he agreed that during such time he would not sell to others at a less price. Nineteen other concerns throughout the country engaged in manufacturing envelopes were not parties to the agreement, and their goods were in competition with those of the contracting parties. The contract was held valid, and the court recognized, as facts to be considered, that the agreement included but a small number of the manufacturers of envelopes, and that at the time it was made the business of manufacturing envelopes was demoralized through excessive competition. This case well illustrates the nature of the facts and circumstances to be considered in the present state of the law in determining whether a contract such as we have here is void as being in restraint of trade. In *Horner v. Graves*, 7 Bing. 735, Tindal, C. J., said: "We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy." Applying here this test, and the general principles recognized in *Cohen v. Berlin-Jones Envelope Co.*, it is impossible to see how the public was, or could have been, injured by this contract. Three small companies out of the vast number of coal producing companies in this state entered into it. The quantity of coal put upon the market by them is an utterly insignificant portion of the vast quantities thrown upon the market by the numerous competing producers. In the absence of some great combination virtually controlling the production and price of a commodity in the country, the price is regulated and determined by the law of supply and demand. It is manifest that by this agreement the production of these three mines was facilitated and increased, rather than stifled or curtailed. If their operation can be said to have affected the price of coal to the consumer, it is perfectly clear that the tendency was to reduce, instead of increase, it, because that advantageous arrangement for the sale of their output enabled them to put upon the market increased quantities of coal. The validity of this contract must be determined by its practical effect, rather than by ascertaining whether it falls within the terms of a legal definition.

Contracts in restraint of trade and contracts eliminating competition, as a general proposition, are illegal and void on the ground of public policy. But it is nevertheless true that there are numerous contracts, which all the courts hold good, and which at the same time tend, in some degree, to restrain trade and stifle competition. As the sole and true test is whether the contract is injurious to the public—and it is impossible to see how, in any practical sense, this contract could have injured the public—there is no reason why it should be held invalid. Under different circumstances, given more extended application, one or more of the principles embodied in the contract would become injurious to the public, and therefore vicious. So strychnine, arsenic, and other drugs are deadly poisons, but great blessings to humanity in the hands of physicians, who, by means of them, alleviate suffering and save life. Competition is said to be the life of trade, but undue or excessive competition has been judicially declared hurtful and injurious to the public. We must look at the facts, as well as at the definition of restraint of trade, to reach a correct and just conclusion.

Upon this view of the contract, my inclination is to hold it legal, but my associates are of a different opinion. Applying the principles hereinafter stated, they consider it void, as against public policy. "By the weight of recent authority the character of the article or legitimate trade sought to be monopolized is immaterial, the true test of the illegality of the combination being the injury to the public, and whether its necessary consequence is to control prices, limit production, or suppress competition in such a way as to restrain trade and create a monopoly. To render the combination illegal on this ground, it is not necessary that evil intent or actual injury be shown, but it is sufficient to know that the inevitable tendency of the act is injurious to the public. The fact that the immediate result of the combination has been temporarily to reduce prices, or that it may reduce them, is immaterial in determining the legality of the combination, the court not being governed by the temporary effect upon the prices, but by the power of the combination to control them." 20 Am. & Eng. Ency. Law (2d Ed.) 849, 850. "In some way several corporations competing in production merge into one, and cease competitive production. By means of large capital this new corporation can produce largely, or limit production, lessen supply, enhance prices, and lower the prices of materials used in production. It may be said that, no matter what the form adopted may be, if the end is to curtail production, enhance prices, restrain trade and competition, control the market in commodities, it is condemned by common law, and by many statutes in the different states." Brannon, Fourteenth Amend. 373. Discussing the rule stated by Tindal, C. J., in *Horner v. Graves*,

7 Bing. 735, and hereinbefore quoted, Judge Taft said in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122: "This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract, as expressed therein, is merely to restrain competition and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." The contract being, in the opinion of the majority of the court, illegal, and so held, no recovery can be had on it. This action, being for the liquidated damages covenanted to be paid, is based directly and solely upon the contract. Hence, whatever errors the court may have committed during the progress of the trial, its final judgment of *nisi capiat* is right, and must be affirmed, and it is useless to discuss further assignments of error.

(55 W. Va. 507)

MOORE et al. v. HOLT, Judge, et al.
(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

CIRCUIT COURT—JURISDICTION—ELECTION CONTEST—PROHIBITION.

1. Circuit courts have no original jurisdiction of election contests or recounts, nor authority to prevent by writ of prohibition a person who claims to have been elected to an office from taking the same and assuming and exercising its powers and duties, on the ground of invalidity of the election or ineligibility of the party claiming the office, and by awarding such writ in such case a judge of such court subjects him-

self to a writ of prohibition from the Supreme Court of Appeals.

2. The writ of prohibition lies only to inferior courts, boards, officers, or tribunals having judicial or quasi judicial powers, to confine them within their respective jurisdictions. It cannot be invoked against individuals in respect to rights claimed by or asserted against them.

3. By its writ of prohibition a court acquires no jurisdiction of a controversy concerning the title to an office.

4. Besides having jurisdiction of the class of causes to which a given cause of action belongs, a court must obtain cognizance of the particular cause by requisite process before it can hear and determine it.

(Syllabus by the Court.)

Application by J. H. Moore and others for a writ of prohibition to Moses Ferguson and others. Writ awarded.

W. B. Maxwell and D. H. Hill Arnold, for petitioners. Jerad L. Wamsley, for respondents.

POFFENBARGER, P. J. H. Moore and others pray for a writ of prohibition to prevent the Honorable John Homer Holt, Judge of the circuit court of Randolph county, from further proceeding upon a petition and rule in prohibition pending in his court. Upon the petition of Moses Ferguson, O. W. Wilmoth, J. G. Coberly, and L. J. Hyre, members of the council of the town of Montrose, in said county, Elihu Wilmoth, recorder of said town, and others, representing that the annual election of municipal officers of said town held on the 7th day of January, 1904, at which it was claimed and pretended J. H. Moore had been elected mayor, C. B. Hyre recorder, and O. B. Hyre, E. H. Moore, N. A. Moore, W. Hoffman, and W. H. Sidwell councilmen, was void because illegally conducted, only five or six persons having voted, and two of the commissioners who conducted the election having been candidates for whom votes were received and counted in said election, said judge awarded a rule, returnable on the 1st day of February, 1904, requiring the said J. H. Moore, C. B. Hyre, O. B. Hyre, E. H. Moore, and N. A. Moore to show cause why a writ of prohibition should not be awarded prohibiting and restraining them from assuming and exercising the powers and duties of the offices to which they claim to have been elected. On the 2d day of February, 1904, the defendants appeared, and filed a demurrer to the petition, in which the plaintiffs joined, and the court took time to consider of its demurrer. Thereupon the defendants Moore and others made the application aforesaid to this court.

The case is substantially the same as that of *Board of Education v. Holt et al.* (W. Va.) 46 S. E. 134. They differ only in this: that in *Board of Education v. Holt* it was sought to prohibit persons in office from further exercise of official powers, while here the object is to prevent certain persons from taking offices. In the case above referred

to this court decided that prohibition is not a remedy by which the title to an office may be determined, nor one by which a person can be ousted from, or prevented from entering upon, an office. In the opinion Judge Dent says: "Such use of prohibition is plain usurpation of and abuse of judicial functions." Prohibition lies from a superior to an inferior court or an inferior board or tribunal having judicial or quasi judicial powers, to prevent any act on its part in excess of its jurisdiction. Its office is to supervise the action of such inferior tribunals by confining them within their respective jurisdictions. Hence it must always be awarded against such court and the parties unlawfully proceeding in it, and not against private individuals only, as in this case, where it could perform no function other than the determination of controversies between adverse claimants to an office or to property, or enforce performance of a duty, vindicate a right, or redress a wrong. In contests between individuals other remedies which the law affords must be resorted to. They cannot claim the benefit of one which has been provided for the sole purpose of preventing courts from acting without, or in excess of, jurisdiction; nor can a superior court, having power to award the writ, properly use it for any purpose other than that of supervising inferior courts as aforesaid. Whether a circuit court, by awarding it when it does not lie merely because not a proper remedy, acts without jurisdiction, or in excess of its jurisdiction, need not be decided here, for in entertaining the petition and issuing the rule the judge of the circuit court acted upon and interfered with a matter over which he had no jurisdiction, and could not obtain jurisdiction by means of the petition filed. The election and qualification of municipal officers are matters of which, in the first instance, the council of the city, town, or village has sole and exclusive cognizance, within the limitations prescribed by law. Code 1899, c. 47, §§ 19-23. Should it decide erroneously, there is appellate, but not original, jurisdiction in the circuit court; and if that court, by means of an injunction or writ of prohibition, attempts to assert its original jurisdiction in respect to such matter while it is pending in the council, or after the council has declared the result, it acts without jurisdiction for three reasons: First. The subject-matter has not been brought within its cognizance by any process which the law has appointed for the purpose. Second. It is attempting to assert its original jurisdiction in respect to a matter of which another court has already taken jurisdiction. Third. The law has not conferred upon circuit courts original jurisdiction of election contests and recounts of election returns, but only appellate jurisdiction by means of certiorari in the former, and certiorari or mandamus in the latter. The principles announced and applied in *Swinburn v. Smith*,

15 W. Va. 483, *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747, and *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488, seem to fully support the views here expressed.

In deciding that the circuit court is acting without jurisdiction, the law conferring original jurisdiction by mandamus and quo warranto in respect to claimants of offices has not been overlooked. Mandamus lies to restore to office one who has been illegally ousted. *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639; *Lewis v. Whittle*, 77 Va. 415. Quo warranto lies to try and determine the right to an office; but it goes against one who is in office, not to prevent a person from taking an office. *State v. Shank*, 36 W. Va. 223, 14 S. E. 1001; *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994; *Kilpatrick v. Smith*, 77 Va. 347. But in these cases the process by which the subject-matter is brought within the jurisdiction of the court is authorized and given by law for that purpose. To sustain its action a court must have not only capacity to hear and determine causes of the class to which a given cause belongs, but actual cognizance of it, obtained by requisite process and pleadings. *Penna. R. R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; *Railway Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147; *Ensign Co. v. Carroll*, 30 W. Va. 533, 4 S. E. 782. In its very nature prohibition is an improper proceeding by which to determine the title to an office. If it could go against a person in office, the writ would ipso facto stop the exercise of the functions of the office before an adjudication of the right of the defendant to hold it. If awarded against a person out of office to prevent him from assuming its duties, its effect would be, in some instances, to leave the office vacant pending the controversy. Thus the efficiency of the public service would be impaired, and the state left without officers to execute the laws. Everything would be within the power of the courts. *Board of Education v. Holt* (W. Va.) 46 S. E. 134. A mandamus to restore a person to an office from which he has been illegally ousted works no interruption of the exercise of the functions of the office. It puts the ousted officer in, and thereby incidentally ousts the intruder, who has not been prevented from performing the duties of the office until the very moment of the reinstatement of the rightful incumbent. Upon a quo warranto calling upon the occupant of the office to show by what right he exercises its powers he continues to discharge its duties until the question of his right to the office has been determined. *High, Ex. Leg. Rem. § 594*. The law has wisely withheld from the courts any writ by which to vacate offices in advance of judicial determination of cause of removal coupled with the power of removal, and the use of the writ of prohibition in such cases as this clearly contravenes this great principle

of public policy and natural right. Hence the courts, by using it, obtain no jurisdiction of controversies of the kind presented, because the inevitable effect of its use is to do that which the court has no power to do.

For the foregoing reasons the writ of prohibition applied for will be granted.

(55 W. Va. 466)

TURK v. SHEIN.

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

SET-OFF—WHEN ALLOWED—NONSUIT—REINSTATEMENT—APPEARANCE—EFFECT.

1. On the 28th day of March, 1898, S. brought his action against T., before a justice, on a store account for \$2.60. On the same day T. paid to the justice the \$2.60 and costs, and the action was dismissed, and at the same time T. commenced his action against S. for \$100 loaned money. S. answered the action of T. that, as the claim of plaintiff existed at the time the action of S. was brought, and plaintiff failed to assert same in said action as a set-off or otherwise, he was precluded under section 55, c. 50, Code 1899, from maintaining his action for its recovery.

Held, neither of the claims having been litigated to final judgment, the claim of T. is not affected by said section 55.

2. When a plaintiff has suffered a nonsuit, with leave to reinstate his action "within the time prescribed by law, by payment of all costs," etc. On payment of all costs by and on motion of plaintiff, the nonsuit was set aside and the cause reinstated, without notice to defendant, who appeared generally and moved to dismiss the action for want of such notice.

Held, not error to refuse to dismiss, as by general appearance defendant waived notice.

(Syllabus by the Court.)

Error to Circuit Court, Mingo County; E. B. Doolittle, Judge.

Action by John Turk against S. Shein. Judgment for plaintiff, and defendant brings error. Reversed.

Sheppard & Goodykoontz, for plaintiff in error. H. K. Shumate, for defendant in error.

McWHORTER, J. John Turk brought his action before Justice White, of Mingo county, for \$100, the money due on contract, against S. Shein. The case was tried on April 2, 1898, and judgment rendered in favor of plaintiff for \$100 and costs. Shein obtained a writ of certiorari removing the cause to the circuit court of Mingo county. On May 5, 1898, plaintiff moved to dismiss the certiorari as having been improvidently awarded, which motion was overruled, but no exception taken. The court then set aside the verdict of the jury and judgment of the justice, and retained the case for trial. On the 6th of September, 1898, the plaintiff failing to prosecute his suit, nonsuit was entered, with leave to reinstate within the time required by law. On the 9th of January, 1899, Turk had the case reinstated by paying the costs of the nonsuit. The court set aside the nonsuit. On the 18th of May, 1900, Shein appeared by counsel and moved to dismiss

the action because the case was reinstated without notice having been given as required by section 12, c. 127, Code. The motion was overruled by the court, to which ruling defendant excepted. Shein then objected to any further proceedings being taken in the action, which objection was overruled by the court, to which ruling the defendant excepted. A jury was impaneled, and returned a verdict of \$112.50 for plaintiff. The defendant moved to set aside the verdict, which motion was overruled, and judgment entered thereon. The defendant took three bills of exceptions to the rulings of the court, which were signed, sealed, and saved to him, and made a part of the record.

Bill of exceptions No. 1 relates to certain evidence admitted on the part of the plaintiff, and objected and excepted to by the defendant. The first mentioned and pointed out in the bill of exceptions is a question propounded to plaintiff, with answer thereto, "Have you ever been sued before Shein sued you?" His answer was, "No, sir." And the further testimony excepted to was that of witness Sarah Tackett, where the question is asked, "Do you know of him [meaning Turk] coming up there in 1896—I mean about Christmas of that year—to get any money out of his trunk? A. Yes, sir; he came up there and took out of his trunk a right smart roll of money; I don't know how much, and someone asked him what he was— Q. Mrs. Tackett, at the time Mr. Turk took out this money out of his trunk, did you hear him make any statement as to what he intended to do with it—what his intentions were for getting it? A. Yes, sir; he said he was going to take it to Mr. Shein." To which questions and answers defendant objected and excepted. It is claimed by counsel for Turk that these questions and answers of Mrs. Tackett were a part of the *res gestae*. The question asked of plaintiff, whether he had ever been sued before Shein sued him, was immaterial and irrelevant, and should not have been asked or answered, but we cannot see how it could have influenced the jury or prejudiced the defendant, and, while it was error, it is not reversible error. The testimony of witness Tackett is calculated to influence the jury, and, being incompetent, should not have been admitted. Counsel for defendant in error contends that what Turk said, as related by Mrs. Tackett, on taking the money out of his trunk, was a part of the *res gestae*, and properly admitted, and cites the case of *Mayes v. Power* (Ga.) 4 S. E. 681, in support of his contention. In that case the defendant called to plaintiff's intestate across the river; he went across the river to the defendant; they had some conversation together; he returned to his house, and got his wife to count him out a sum of money; stated that he was going to lend it to the defendant; he took the money with him, went back across the river, and was seen to hand something to the defendant, and

on his return bade his family remember that defendant had got said sum of money, and to get the book and he would charge it. This transaction seems to have taken place in view of the family, and all in a very short time; was really one single transaction; while in the case at bar there is no immediate connection, indeed no connection at all; it might have been days before or days after, according to the evidence, between the act of getting the money from the trunk by the plaintiff and passing the same over to the defendant. The witness Mrs. Tackett saw nothing further than the taking of the money from the trunk, as she said, "a right smart roll of money." She did not know how much. It does not appear whether or not this was on the same day that he claims to have given the money to Shein. Indeed, he does not pretend to fix the day on which he let Shein have the money. If he had gone, directly after taking the money from his trunk, and had been seen by Mrs. Tackett to hand something to Shein, even though he did not return and say anything further to her or in her presence about it, the case cited would perhaps have been applicable. Several other cases are cited by the defendant in error, but that of *Mayes v. Power* is their main reliance, and, while it is a much stronger case than the case at bar, yet it was evidently regarded by the court as by no means conclusive of the fact of the loaning of money, but as a circumstance tending to prove it, to be considered by the jury. The court says: "We think that what Power said at the time was admissible as a part of the *res gestæ*, and these statements of Power, coupled with the fact that he was seen to return across the river and hand something to Mayes, were sufficient to authorize the jury to conclude he had let Mayes have the money." It is there further said: "Bishop swore that Power had before dealt with Mayes in the same way, taking no notes for the money; and this, we think, was competent evidence." The evidence of Mrs. Tackett, of the plaintiff taking the money from the trunk and making the statement that he was going to let Shein have it, is not coupled with any fact related with the act of Turk turning the money over to Shein, so as to make it a part of the *res gestæ*, and it was improperly admitted as evidence.

Bill of exceptions No. 2 is to the refusal of the court to give to the jury the following instruction: "The court instructs the jury that if they believe from the evidence in this case that the defendant, Shein, borrowed the \$100 in controversy from the plaintiff, Turk, and that afterwards a suit was brought by the defendant, Shein, against the plaintiff, Turk, upon a store account of \$2.60, and the plaintiff was personally served with process, or appeared and answered the action, and if they further find that the \$100 in controversy was due the plaintiff, Turk, at the time the action was brought by Shein against Turk,

then the jury should find for the defendant, Shein, in this action." This instruction is based upon section 55, c. 50, Code 1899, where it is provided that: "If the defendant, at the time the plaintiff's action is commenced, has any credit or set-off or claim to allege in defense or reduction of the plaintiff's demand, and be personally served with process in the suit, or appear and answer the action he shall produce the same with his evidence in support thereof in the cause or be forever precluded from maintaining any action for the recovery thereof." The defendant proved by the justice, M. Z. White, the bringing of the suit by Shein against Turk for the \$2.60, and introduced the papers in the cause; but it was shown by White's testimony that the defendant in the cause, Turk, paid him the amount of the claim and the costs on the same day the writ in the case was issued, so the case was ended the day it was brought, the 28th day of March, 1898, the summons beginning the suit was issued on that day, returnable on the 2d day of April, 1898, so that the matters were not litigated at all. In *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366, (Syl., point 6), "A plea of *res judicata* must show that the former judgment was on the merits." At page 47, 43 W. Va., and page 367, 26 S. E., it is said in the opinion of the court: "Appellants complain of the rejection of two pleas. One was a plea of *res judicata*, based on a judgment of a justice for some cause in favor of defendants. It is faulty, because it does not in any way show that the dismissal of the suit before the justice was on the merits, so as to be a bar to a second suit; for, if it was a nonsuit or any other of many causes not precluding another suit, it would not bar. 1 Bart. Law Prac. 534, 535; 7 Rob. Prac. 221; 1 Greenl. Ev. § 530; Burgess v. Sugg, 2 Stew. & P. 341. A plea should aver that the decision was on the merits, or it should at least appear by the record vouched." It appears from the record that there was no litigation between the parties on this claim of \$2.60, and section 55 can only apply after matters between the parties have been litigated. The court did not err in refusing to give the instruction.

The third bill of exceptions claims that the court erred in not setting aside the verdict and granting the defendant a new trial, first, because the said verdict was contrary to the law and the evidence, and, second, third, and fifth, because of the matters set out in the first and second bills of exceptions, and, fourth, "because the court erred in failing to strike this cause from the docket and proceeding to trial herein." The plaintiff suffered a nonsuit on the 6th day of September, 1898, for failure to prosecute his suit. In the order of the nonsuit leave was granted to the defendant to reinstate within the time prescribed by law upon payment of all costs. The cause was reinstated on motion of plaintiff, and the payment of all costs by him on the 9th day of January, 1899. On the 18th

day of May, 1900, the defendant appeared and moved to dismiss the action, which motion being overruled, the defendant objected to any further proceedings being taken in the action, which objection was also overruled, and the cause proceeded to trial, a jury being impaneled. The reinstatement of the case without notice entitled the defendant to a continuance, if asked for, and, not having asked it, he was presumed to have waived his right to continuance. The general appearance of defendant in the case after reinstatement is a waiver of the notice.

Quere: Whether a special appearance of defendant for the purpose, only, of moving the dismissal of the case because reinstated without the notice provided by statute, would have required its dismissal.

For the reasons stated, the judgment of the court is reversed, the verdict set aside, and the cause remanded to the circuit court of Mingo county for a new trial to be had therein.

(55 W. Va. 442)

STARR et al. v. SAMPSELLE et al.

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

FORFEITED LANDS—SALE—SCHOOL FUND—PROCEEDING IN EQUITY—DECREE—SALE FOR TAXES—REDEMPTION.

1. A proceeding instituted and prosecuted by a commissioner of school lands, under chapter 105 of the Code of 1899, for the sale of forfeited lands for the benefit of the school fund, is a judicial proceeding—a suit in chancery—and must be commenced as provided in chapter 124 of the Code, and proceeded in, heard, and determined in the same manner and in all respects as other suits in chancery are brought, prosecuted, and proceeded in, and is subject to the same rules of chancery practice as other suits in chancery, except as otherwise provided by said chapter.

2. Such suit is in the nature of a proceeding against the land itself, and a sale thereunder, when completed, is prima facie evidence of the forfeiture of the land, against all persons whomsoever.

3. If a final decree be made and entered by the circuit court in such proceeding, it having at the time jurisdiction to make and enter such decree, no error in its proceedings which does not affect its jurisdiction will render the proceeding void; nor can such error be considered when the decree is collaterally brought in question.

4. Section 80 of chapter 81 of the Code of 1899, providing for the redemption by persons under disability of lands sold by the sheriff for delinquent taxes charged thereon, applies to sales made to individuals, and not to sales made to the state.

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County;
E. S. Doolittle, Judge.

Action by Samuel Starr and others against L. A. Sampselle and others. Decree for defendants. Plaintiffs appeal. Affirmed.

H. K. Shumate, for appellants. J. B. Wilkinson and L. A. Sampselle, for appellees.

MILLER, J. On the 18th day of January, 1887, James Starr, Sr., by his deed of that

date, conveyed to his grandsons, Charles Starr, Samuel Starr, Allen Starr, and John H. Starr, who were the sons of James Starr, Jr., a certain tract of land, situate in Mingo county, described in the deed as containing 250 acres, but which in fact contains 419 acres. At the date of the conveyance each of the said grantees was a minor. In 1892 Charles Starr died intestate, without issue; leaving said James Starr, Jr., his father, his only heir at law. By his deed, bearing date on the 16th day of February, 1894, said James Starr, Jr., conveyed to his wife, Harriett Starr, a tract of 250 acres of land, which the bill alleges to be a conveyance of the interest of said James Starr, Jr., in and to the tract of land first above mentioned. Said James Starr, Jr., died intestate in the year 1895, leaving as his only heirs at law his sons, Samuel Starr, Allen Starr, and John H. Starr, surviving grantees in the first-named deed. The land was returned delinquent for the nonpayment of the taxes charged thereon for the year 1890 in the name of Charles Starr and others; and at a sale thereof made by the sheriff of said county in December, 1891, for said delinquent taxes, A. J. Sheppard became the purchaser of the land, which was afterwards, to wit, on the 3d day of April, 1893, conveyed to him by deed executed by the clerk of the county court of Mingo county. On the 24th day of April, 1893, said Sheppard, and his wife, by their deed, conveyed an undivided half interest in the land to J. B. Ellison; and on the 8th day of August, 1893, Sheppard and wife conveyed the other half undivided interest therein to C. M. Turley, trustee, for the benefit of certain creditors of Sheppard. By another deed, bearing date on the 18th day of September, 1897, Sheppard and wife conveyed an undivided interest in the tract of land to L. A. Sampselle and Robert Hoyle. It does not appear that the land was ever entered on the landbook or charged with the taxes thereon in the name of A. J. Sheppard, the purchaser at the tax sale, or that he ever paid any of the taxes charged or chargeable thereon in any name for any year. For the years 1891 and 1892 said land was again returned delinquent for the nonpayment of the taxes charged thereon in the name of Charles Starr and others, and at a sale thereof made by the sheriff of said county in the month of November, 1893, was sold to the state for said last-mentioned delinquent taxes. For the taxes charged thereon for the year 1893 in the name of Charles Starr and others, the sheriff, in the month of December, 1895, again sold the land to the state. It does not appear that the lands were charged with the taxes thereon for any of the years mentioned, otherwise than in the name of Charles Starr and others. The land not having been redeemed from the sale thereof to Sheppard, or the first sale to the state, in May, 1895, it was certified to the commissioner of school lands of said county as being liable to be

sold for the benefit of the school fund. Afterwards the said commissioner caused a suit to be commenced and prosecuted in the circuit court of said county, in the name of the state of West Virginia, for the sale of that and other tracts of land in said county for the benefit of the school fund. To the bill filed in said cause, and the proceedings had thereon, "the unknown heirs of James Starr, Jr., deceased," were made parties defendant. At the May term, 1896, of said court, said A. J. Sheppard filed his petition in said cause, setting up title to and claiming an interest in said land by reason of his purchase thereof at the sheriff's tax sale, and the conveyance to him by the clerk of the county court as aforesaid, and praying to be allowed to redeem the same. To this petition, said Samuel Starr, Allen Starr, and John H. Starr, and also Roxie Runyon, Samuel, Allen J., John H., Jr., Julia, Florence, and Dicey, alleged children, and Edna Yoke, grandchild, of said James Starr, Jr. (they being his only heirs at law), were made parties defendant, and answered the said petition by Wells Goodykoontz, their guardian ad litem, duly appointed by the court. Said Harriett Starr also appeared and filed her answer to the said petition, as appears by the record. Afterwards such proceedings were had in the cause, upon said petition and answers thereto, and upon the report of the commissioner, to whom the cause was referred, that a decree was made permitting said Sheppard and Harriett Starr to redeem the said land from the sales to the state upon the payment of the amount of taxes, damages, interest, and costs due upon said tract of land to the state, county, and districts within 30 days from the rising of the court, and in default of such payment the commissioner of school lands was authorized and directed to sell the land to the highest bidder. Sheppard and Harriett Starr, and each of them, failed to make the payment required of them as aforesaid for the redemption of said land. Afterwards a sale of the land was made under the decree, at which on the 9th day of January, 1899, said L. A. Sampselle became the purchaser at the price of \$400, and, there being no exceptions to the sale, the same was in all respects approved and confirmed by the court.

On the 21st day of March, 1899, said Samuel Starr, Allen Starr, and John H. Starr instituted their suit in equity in said circuit court against said L. A. Sampselle, A. J. Sheppard, J. B. Ellison, Harriett Starr, and others; the said Samuel Starr having, as he alleges, attained his majority within one year next before that date, and said cause, as to said Allen and John H. Starr, infants, being prosecuted in their names by Samuel Starr, as their next friend. The plaintiffs, in their bill, allege the facts substantially as hereinbefore stated, and further aver that Samuel Starr, Allen Starr, and John H. Starr are each the owners of

one undivided fourth of said tract of land; that said Harriett Starr owns the other undivided fourth thereof, and also claims, in addition thereto, a one-half interest in the land purchased by her of defendant J. B. Ellison. They then charge that the said tax sale and tax deed to A. J. Sheppard were and are void, and passed no title of the land to Sheppard, because of various alleged irregularities in the list of delinquent taxes for which the land was sold, and in the proceedings of the sheriff preceding said sale, all of which questions have been passed upon by this court in different causes, in which irregularities similar to those so pointed out have been held to be cured by the provisions of chapter 31 of the Code of 1899. The plaintiffs claim that, if the tax sale to Sheppard had been entirely regular, they would still have the right to redeem the land, because, at the time said land was returned delinquent, and at the time the deed therefor was made by the clerk to Sheppard, they were each under 21 years of age; that said Allen and John H. are still minors; and that Samuel has become 21 years of age within 1 year next preceding the institution of their suit. But they do not allege that they, or either of them, have taken any steps whatever under section 30 of chapter 31 of the Code of 1899 for the redemption of said land from the purchase thereof by Sheppard as aforesaid. They also point out irregularities in the delinquent list and proceedings relating to the taxes charged on said land and returned delinquent for the years 1891, 1892, and 1893, for which it was sold to the state as aforesaid, all of which alleged defects fall within the curative provisions of the statute, as is hereinafter shown. They then pray that the deed for said land made by the clerk of the county court of Mingo county to A. J. Sheppard be set aside and held for naught, as well as the deeds from Sheppard and wife to Ellison and Turley, trustee, respectively; that the proceedings had by the state for the sale of the land for the benefit of the school fund be declared irregular, void, and of no binding effect upon plaintiffs; that the sale to Sampselle thereunder be set aside and vacated; and that plaintiffs may be declared the owners of said land, and allowed to redeem the same from any forfeiture thereof; and for general relief. Defendant Sampselle filed his demurrer and answer to the bill. In his answer he admits many of the allegations of the bill, but avers therein that, at the time of the institution of the suit by the state for the sale of said tract of land for the benefit of the school fund as aforesaid, the state had a lien thereon paramount and superior to all others; that the court had jurisdiction to enforce the same in a proper suit for the purpose; that there is no error in said suit prejudicial to the rights of plaintiffs; that the title to said land vested in respondent by virtue of the sale to him and confirmation

thereof as aforesaid; that, immediately after the confirmation of said sale, respondent entered upon and took possession of said tract of land, and was at the time of the institution of said suit, and now is, in the actual, open, notorious, exclusive, and adverse possession thereof; and that plaintiffs did not pay any of the taxes on said land in any name for any of the years mentioned. Upon the final hearing of said cause, at its September term, 1902, the court dismissed the plaintiffs' bill at the costs of said Samuel Starr, and from this decree the plaintiffs, Samuel Starr (in his own right) and Allen Starr and John H. Starr (by Samuel Starr, their next friend), were allowed an appeal.

The bill, stripped of its unnecessary recitals and averments, may be treated as a bill by the plaintiffs therein for the redemption by them of the land sold by the state under the proceedings aforesaid to Sampselle for the benefit of the school fund. Appellants say that, should there not appear sufficient defects in the proceedings to avoid the tax sales made by the sheriff, as aforesaid, to Sheppard and to the state, the infant defendants would still have the right, by their guardian or next friend, to redeem the land, and cite section 30 of chapter 31 of the Code of 1899, which says: "Any infant, married woman, or insane person, whose real estate may have been so sold during such disability, may redeem the same by paying to the purchaser, his heirs or assigns, within one year after the removal of the disability, the amount for which the same was sold, with the necessary charges incurred by the purchaser, his heirs or assigns, in obtaining the title under the sale, and such additional taxes on the estate as may have been paid by the purchaser, his heirs or assigns, and interest on the said items at the rate of six per centum per annum from the time the same were paid. If any such person own an undivided interest in the real estate so sold, he may redeem such interest in like manner, and within the same time, by paying such proportion of the purchase money, charges, taxes and interest, as his interest in the premises is to the whole tract or part sold; but he shall not have the right to redeem more than his own undivided interest." This section refers to sales made to individuals, and not to sales made to the state. The sales made to the state, upon which the school-fund proceeding was and is predicated, were for the taxes charged upon said land for the years 1891, 1892, and 1893. In that proceeding, appellants filed no petition asking permission to redeem the land. Section 17 of chapter 105 of the Code of 1899 provides that "the former owner, his heirs, devisees or assigns, of any real estate forfeited for any cause to the state of West Virginia, may at any time during the pendency of the suit for the sale thereof, and before a decree for the confirmation thereof has been made and entered by

the court, file his petition therein in manner and form as provided in the next preceding section in relation to the excess of the proceeds of such sale, praying to be allowed to redeem so much only of such real estate as to which the title still remains in the state; and upon the filing of such petition, and upon such proof being made as would entitle the petitioner to the excess of the purchase money of said real estate if the same had been sold, the court may, by a proper decree, permit the petitioner upon the payment into court or to the commissioner of school lands, the costs, taxes and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in his petition." There is no saving in this statute as to persons under disability. Unless there is an express saving in the statute of limitations, no person will come within its exceptions, and the prescribed limitations will operate against persons under disabilities as well as others. *Jones v. Lemon*, 26 W. Va. (29); *Wood on Lim.* § 252; *Angell on Lim.* §§ 194, 476. It follows, therefore, that appellants had and have no right to redeem the land under the last-cited section upon the ground of infancy alone. Appellants' suit is a collateral attack upon the school-land proceeding. In *Wiant v. Hays*, Com'r, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82, it is held that a proceeding under chapter 105 of the Code of 1887 (now chapter 105 of the Code of 1899) by a commissioner of school lands for the sale of forfeited lands is a judicial proceeding, a suit, not simply an administrative proceeding. The court may in it allow one claiming a right to the surplus of its sale to file his petition asking such surplus to be paid to him. *Hays*, Com'r, v. *Camden's Heirs*, 38 W. Va. 109, 18 S. E. 461; *Lawson v. Hart*, 40 W. Va. 52, 20 S. E. 819; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *Yokum v. Snyder*, 42 W. Va. 357, 26 S. E. 181; *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214. Section 7 of chapter 105 of the Code of 1899 provides that "all suits brought and prosecuted under the provisions of this chapter, shall be commenced as provided in chapter one hundred and twenty-four of the Code, and proceeded in, heard and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the state courts of this state, except as herein otherwise provided." Section 10 authorizes the circuit court to decree a sale of such lands as are subject to sale for the benefit of the school fund. Section 18 declares that "in every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein, as well as any and all conflicting claims

whatever to the real estate in question arising therein." Section 20 reads thus: "Every final decree entered in any such suit shall be a bar to the claim of every person to the real estate, or any part of it or any lien thereon, or to the proceeds thereof, who has failed to appear and present his claim thereto as is provided in the sixth section of this chapter, except as to the excess of the proceeds of the sale thereof, as provided in section sixteen of this chapter. And except as provided by the last clause of section seventeen of this chapter." By these provisions the circuit court is given complete equitable jurisdiction of the land in controversy, and is required to determine what lands can be sold for the benefit of the school fund. *Lawson v. Hart*, 40 W. Va. 56, 20 S. E. 819. In *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214, it is held that "such proceeding is a judicial one, in the nature of a proceeding against the land itself, and, when completed by a sale, is prima facie evidence of such forfeiture against all persons. * * * The policy of these laws was to quiet titles as far as possible, and to convey a good title under these sales as far as the commonwealth had the means of doing." On page 501, 36 W. Va., page 218, 15 S. E., the court says: "It is manifest from the whole scope and tenor of the acts on the subject that the regularity of the sale of forfeited lands under the decree of the court was never intended to be drawn in question in any collateral proceeding."

From a final decree entered in such suit, parties may appeal as in other cases. In the school-land proceeding in question the court had jurisdiction of the subject-matter. All the parties in interest were before the court, "the unknown heirs of James Starr, Jr.," being defendants in the main suit; and to the said petition of A. J. Sheppard, filed therein, the said Samuel, Allen, and John H. Starr were made defendants, and filed their answer thereto by their guardian ad litem. Harriett Starr, as the record recites, appeared, and also filed her answer to said petition. Thus the court had jurisdiction not only of the subject-matter, but also of the parties in interest. The record shows that the cause was heard upon the answer of the infant defendants by their guardian ad litem. The decree of sale made therein, and under which Sampelle purchased the land, and claims title thereto, is not void. If erroneous, any party in interest has his remedy by bill of review or appeal, as in other causes in equity. In *Wandling v. Straw*, 25 W. Va. 692, it is held that the validity of a judgment of a court of record cannot be collaterally attacked on the ground that the court had no jurisdiction unless the want of jurisdiction appears on the face of the record. The court, on page 700, says: "If a court of general jurisdiction had jurisdiction to render the judgment which it did render, no error in its proceedings which did not affect its jurisdiction

will render the proceeding void, nor can such error be considered when the judgment is collaterally brought in question." See cases therein cited; 1 Black on Judg. § 270.

In one of the two causes of *State v. McEl-downey* (decided at the present term) 47 S. E. 653, it is held that no defect in a sheriff's affidavit to a list of sales of land for taxes will invalidate a tax deed made under chapter 31 of the Code of 1899. *Phillips v. Minnear*, 40 W. Va. 58, 20 S. E. 924, and *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509, so far as they hold to the contrary, are overruled. In the other (47 S. E. —) it is held that the failure to return a list of delinquent lands sold for taxes by the first Monday in June is not, under chapter 31, § 25, of the Code of 1899, ground for setting aside a sale either to the state or an individual. The defect is cured by that section. Expressions to the contrary in *McGhee v. Sampelle*, 47 W. Va. 352, 84 S. E. 815, disapproved.

The curative provisions as to tax sales in section 25 of chapter 31 of the Code of 1899 apply to a purchase by the state of land sold for taxes. Point 3 of the syllabus in *McGhee v. Sampelle*, 47 W. Va. 352, 84 S. E. 815, to the contrary, is overruled.

There appears to be no error in the decree complained of. It must therefore be affirmed.

(55 W. Va. 451)

FARMERS' & SHIPPERS' LEAF TOBACCO WAREHOUSE CO. v. PRIDEMORE.

(Supreme Court of Appeals of West Virginia. March 29, 1904.)

JUDGMENT—ENFORCEMENT—INJUNCTION—FORGED TESTIMONY—RELIEF IN EQUITY—NEW TRIAL.

1. As a general rule, a bill in equity based on perjured testimony given at the law trial, or on false or forged documentary evidence introduced there, will not be entertained; and the allegation that the complainant was surprised by the perjury or forged evidence does not change the rule.

2. It is a rule of law that a party voluntarily going to trial does so at his peril, and he cannot have a new trial merely to give him an opportunity of impeaching the testimony of a witness of which he was apprised or could have been apprised beforehand, and of the very purpose for which the witness was to be called.

3. Where a complainant asks an injunction against a judgment, alleging in his bill that he is now able to prove the matter of his plea or defense of the action at law, which he was unable to prove at the trial, but does not allege some reason, founded in fraud, accident, mistake, or some adventitious circumstance, beyond his control, as the cause of such failure of proof, the injunction should not be allowed.

4. Points 2, 3, and 4 of syllabus in *Bloss v. Hull*, 27 W. Va. 503, approved and applied.

(Syllabus by the Court.)

Appeal from Circuit Court, Lincoln County; E. S. Doolittle, Judge.

Bill by the Farmers' & Shippers' Leaf Tobacco Warehouse Company against James Pridemore. Decree for defendant. Plaintiff appeals. Affirmed.

D. E. Wilkinson, Lace Marcum, and Campbell, Holt & Duncan, for appellant. C. W. May, and Simms & Enslow, for appellee.

MILLER, J. The Farmers' & Shippers' Leaf Tobacco Warehouse Company, a corporation formed and existing under the laws of the state of Ohio, and having its principal office and place of business in the city of Cincinnati, Ohio, on the 29th day of May, 1899, instituted its civil action before J. C. Rusak, a justice in and for the county of Lincoln, in Carroll district thereof, against James Pridemore, for the recovery of the amount due on two contracts in writing, to wit, one a promissory note of said Pridemore to said company, bearing date on the 26th day of March, 1896, for \$30, payable 60 days after its date, with interest at 8 per cent., being advanced on 2,000 pounds of tobacco to be shipped to said company; and the other for \$109, bearing date on the 28th day of March, 1896, made and payable as aforesaid, 60 days after its date, with interest at 8 per cent., also being advanced on 4,000 pounds of tobacco to be shipped to the company. Both instruments contain certain provisions concerning commissions to the company on the tobacco. The summons commencing the action was made returnable on the 10th day of June, 1899. On that day the trial seems to have been continued until the 8th day of July, 1899, when, on motion of the plaintiff, the trial was again continued until the 29th day of July following. On the day last mentioned the defendant demanded a jury, whereupon the case was further continued until the 31st day of July, 1899. A jury was then impaneled, which found and returned the following verdict: "In the matter of difference between the plaintiff and defendant, we, the jury, find for the defendant for the sum of \$123.90." Thereupon D. E. Wilkinson, attorney for the plaintiff, who is also counsel for appellant upon this appeal, requested the justice to suspend judgment upon the verdict until 3 o'clock p. m. on August 1, 1899, which was done, and at that time he moved the justice to set aside the verdict, but the justice refused to do so, and then entered judgment upon said verdict in favor of Pridemore against the company for \$123.90, with interest thereon until paid, and costs. The transcript from the docket of the justice shows that the plaintiff filed the two notes, amounting to \$139, to be credited with \$111.55, and demanded judgment for \$27.45, the balance of principal, with proper interest thereon. The defendant filed his claim for \$123.90 as a set-off, "and, the plaintiff and defendant being ready for trial," etc., the jurors were selected and sworn, and, having heard the evidence and argument of counsel, found the verdict aforesaid. No appeal was applied for or taken by either party from the judgment thus rendered.

On the 29th day of November, 1899, ap-

pellant, the plaintiff in the civil action, instituted its suit in chancery in the circuit court of said county, and on the 23d day of the same month filed its bill against said Pridemore, alleging that it carries on the business of commission merchant in the city of Cincinnati, Ohio, and handles and sells leaf tobacco; that during the year 1895 it handled and sold for James Pridemore & Bro. tobacco amounting to the net sum of \$1,086.10, which sum it paid to them in full at the close of the year; and that the firm of James Pridemore & Bro. consisted of said James Pridemore and John Pridemore. Plaintiff further says that some of the shipments made to it during the year 1895 by James Pridemore & Bro. were made in the name of James Pridemore individually, and some in the name of Pridemore Bros.; that one of said shipments of three hogsheads of tobacco was made in the name of James Pridemore, was received by plaintiff on the 21st day of June, 1895, and was sold by it on the 14th day of August, 1895, the net proceeds of which amounted to \$151.35, and for which shipment plaintiff delivered to said James Pridemore a statement bearing date on the 14th day of August, 1895, and at the same time gave to the firm of James Pridemore & Bro. credit therefor on its books; and that the amount thereof was paid in full to said James Pridemore & Bro. within the year 1895, as aforesaid. Plaintiff also alleges that, through its agent, it advanced to James Pridemore the said sums represented by said two notes sued on, amounting to \$139; that on the 17th day of June, 1896, it received from James Pridemore two hogsheads of leaf tobacco, which it on the 2d day of December following sold for the net sum of \$111.55, and gave credit for that amount on the said notes, leaving a balance due thereon of \$27.45 principal. It is further averred that said judgment is erroneous; that, instead thereof, plaintiff should have recovered a judgment against the defendant for said balance of \$27.45, with interest; that said judgment was obtained through fraud, undue means, and false testimony; that on the trial of said action said James Pridemore introduced said statement of the three hogsheads of tobacco shipped in his name in the year 1895, which amounted to the sum of \$151.35, as aforesaid, and which sum had been credited to said James Pridemore & Bro. and paid to them in full in the year 1895, as aforesaid; that the date of said statement had been changed from August 14, 1895, to August 14, 1896; that the statement was admitted as evidence on the said trial; that said James Pridemore testified before the jury that the said three hogsheads of tobacco mentioned in the statement had been shipped to the plaintiff in 1896 in his own name, and that he had received the said statement in August, 1896. Plaintiff further alleges that the change of the date of the statement relating to the three hogs-

heads of tobacco was and is a forgery against it, and to its prejudice; that the testimony of Pridemore was and is untrue; that said Pridemore introduced further evidence on the trial that he had shipped in the year 1896 five hogsheads of tobacco to plaintiff, and that he had been credited with only two of them, amounting to the net sum of \$111.55, and that the other three hogsheads were represented in the statement aforesaid for \$151.35. Plaintiff also alleges that it had no notice whatever of any defense to its demand against Pridemore until after it had closed its evidence on the trial, except the bare claim of \$151.35 for tobacco; that the introduction of the forged statement aforesaid for the three hogsheads of tobacco, amounting to \$151.35, purporting to have been made by plaintiff on the 14th day of August, 1896, was a surprise to plaintiff; that it had no means then at hand by which to discover the fraud which Pridemore was attempting to perpetrate and did thereby perpetrate on the plaintiff; and that the fraud thus perpetrated on the plaintiff by reason of this forged statement was not discovered by it until several days thereafter, when it was too late for any relief at law against the fraud. The plaintiff also avers that it did not receive during the year 1896 any shipments in the name of James Pridemore, except the two hogsheads of tobacco, the proceeds of the sale of which amounted to said \$111.55, and which sum was credited to him as aforesaid; that after the time had expired in which an appeal could have been taken from said judgment, or to move for a new trial of the action upon the ground of newly discovered evidence, it learned the fact that said James Pridemore had shipped two hogsheads of tobacco during the year 1896, other than the two for which he had been given credit as aforesaid, in the name of W. Vickers, his brother-in-law; that plaintiff had paid to Vickers the net proceeds of the sale of said two hogsheads; that plaintiff was at the time of said judgment entirely ignorant of the fact that said tobacco was the property of Pridemore; that, if Pridemore shipped to plaintiff any other hogsheads of tobacco during the year 1896, such shipment was made in the name of some person other than himself; that, if Pridemore shipped the other hogshead during the year 1896, it was shipped in the name of some other person, to the plaintiff at that time unknown; that it did not know until the time to move for a new trial, and until the time to take an appeal had elapsed, that the said two hogsheads of tobacco had been shipped in the name of Vickers, as aforesaid; that plaintiff did not have any means of ascertaining that fact prior to said trial; and that it could not, by the use of due diligence, have ascertained such fact before said trial and rendition of judgment as aforesaid. Plaintiff further charges that the testimony of said James Pridemore as to the shipment

of the three hogsheads of tobacco mentioned in said forged statement was absolutely false; that the alteration of the date of the statement aforesaid by James Pridemore from 1895 to 1896 was and is a forgery, which the said James Pridemore willfully committed, with the specific intent to defraud the plaintiff thereby; that the judgment rendered by the justice as aforesaid against plaintiff was and is a fraud against it; that the judgment was obtained by false and perjured testimony; that said judgment and every part thereof is unjust and erroneous; and that the said Pridemore is justly indebted to the plaintiff in the sum of \$27.45, with proper interest. The bill then prays as injunction to restrain, inhibit, and enjoin said James Pridemore from collecting or attempting to collect said judgment; that the said judgment for \$151.35 in favor of Pridemore be set aside; that a new trial of said action be granted to plaintiff; and for general relief. The injunction was granted by the court as prayed for in the bill, whereupon the defendant, Pridemore, filed his demurrer to said bill, in which demurrer the plaintiff joined; and he also filed his answer, in which he specifically denies all of the material allegations of the bill, and specifically avers therein that at the trial of said action plaintiff was represented by its attorney and by B. F. McGee, its agent, who negotiated and represented it in the transactions relating to the tobacco; that the matter now in controversy was then and there fully litigated; that none of the evidence given on said trial was taken down; that plaintiff made no effort to obtain an appeal from said judgment, or to bring it into the circuit court by certiorari; and that there was no fraud, collusion, or false swearing on the part of defendant or any of his witnesses to bring about said verdict and judgment. Respondent further avers that, at the first calling of the case before the justice, he filed his account, as required by law, showing that he would claim credit for three hogsheads of tobacco sold by plaintiff for him on the 14th day of August, 1896, amounting to \$151.35; that when he so filed his account, which is evidenced by the original statement filed before the justice, the plaintiff then and there demanded of and obtained from the justice a continuance of the trial of said action, for the reason that the filing of the account was new matter, and that it was necessary for it to have a continuance, in order that it might secure evidence in relation thereto; that it was granted a continuance for that purpose; and that it did procure the evidence of certain witnesses, and submitted it to the jury, to show that defendant did not ship to it the three hogsheads of tobacco as claimed by him. Respondent further says that plaintiff had full notice of the nature of his defense to its action, and a fair opportunity of being heard in respect there-

to; that, if plaintiff had any evidence in relation to said three hogsheads of tobacco which was not submitted to the jury, it was its own fault; and that all of said matters arising in said action were passed upon by the jury and justice, and were fully and completely litigated and adjudicated between the parties. Depositions were taken by both parties and filed in the cause. On the 27th day of August, 1901, the cause was heard upon the bill and exhibits, the answer of defendant, Pridemore, with general replication thereto, and upon the depositions taken and filed as aforesaid, whereupon the injunction was dissolved and the bill dismissed at plaintiff's costs. From this decree, plaintiff was allowed an appeal, and assigns as ground of error that the circuit court refused to grant it the relief prayed for in its bill.

By the depositions of plaintiff's sales clerk, auditor, and of other witnesses, who file statements taken from the books of the company, the contention of plaintiff as to the number of hogsheads of tobacco shipped to it by Pridemore & Bro. in 1896, and by James Pridemore in 1898, and as to the disposition of the net proceeds of the sales thereof, is sustained. The sales clerk, having inspected the statement for the three hogsheads of tobacco put in evidence on the trial by the defendant, says that he made out the same on the 14th day of August, 1895; that it is his best impression that he immediately mailed the statement to Pridemore; and that he did not make out or mail to Pridemore any such statement in 1896. But the witness is not asked, and does not testify, that said statement has in any manner been changed or altered since he made out and mailed the same to Pridemore. It is shown that the statement appears to be in the same handwriting as the entry on the company's account of sales book for the month of August, 1895. Witness Beazell, the assistant cashier of the Citizens' National Bank, testifies as follows: "I find the statement [meaning the statement of the hogsheads of tobacco in question] somewhat defaced, but that, on careful examination under a magnifying glass, the date is undoubtedly August 14, 1895. I also find that the account of sales corresponds with an entry on the account of sales books of the company under date of August 14, 1895, and the '5' in the account of sales book bears a striking resemblance to the '5' in said account of sales. I find that the figure '5' in the 1895 in the Pridemore account of sales seems to have been tampered with to make it look like a figure '6,' by placing a dot in the middle of the figure, which dot seems to have been made with different colored ink from that ordinarily used, and thus makes the statement read 1896 instead of 1895." B. F. McGee, another witness for the plaintiff, testifies that he was the agent of the plaintiff during the years 1895, 1896, and 1897; that

he was present at the trial of said action; that he never examined the statement for the three hogsheads of tobacco introduced by Pridemore as evidence until the day of the trial, but that he knew of a similar statement for the same tobacco. James Pridemore testifies that the statement for the three hogsheads of tobacco was not forged by him or by any other person that he knew of, that his evidence given before the justice and the jury was the truth, and that said judgment is the just amount due him from the plaintiff. There is much more of the evidence, but a sufficient portion thereof has been stated for the purpose of making a proper application of the legal principles involved in the determination of this cause.

It has been stated that the judgment complained of was rendered by a justice. Section 50 of chapter 50 of the Code of 1899 prescribes the "rules of pleading" for that court as follows: "First. The complaint by the plaintiff. Second. The answer by the defendant. (2) The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing they shall be filed by him and a reference to them be made in the docket. In either case if the parties appear and the defendant make defense they shall be made up on the return day of the summons, unless good cause be shown to the contrary. * * * (4) The answer of the defendant may contain: First, a denial of the complaint or some part thereof; second, a statement of the facts constituting a defense or counterclaim. (5) Such pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. (6) Either party may except to a pleading of his adversary when it is not sufficiently explicit to be understood, or it contains no cause of action or defense. (7) If the justice deem the exception well founded he shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded. (8) In an action or defense founded upon an account, note, or other writing for the payment of money, it shall be sufficient for the party to deliver the account, note, or other writing to the justice and to state that there is due to him thereon from the adverse party a specific sum, which he claims to recover or set-off in the action. * * * (10) The pleadings may be amended at any time before the trial, or during the trial, when by such amendment substantial justice will be promoted. If the amendment be made during the trial and it be shown to the satisfaction of the justice by the oath of the opposite party, or his agent or attorney that a continuance of the cause is necessary in consequence of such amendment, a continuance shall be granted. * * * (11) The justice may, at any time before the trial, require either party at the request of the other, at

that or some other specified time, if the action or defense be founded upon an account, to file a complete statement of the items thereof, with his complaint or answer, and in case of his default, may preclude him from giving evidence at the trial of any item not so filed." A defendant who files an account or claim of set-off against the plaintiff's demand is deemed to have brought an action against the plaintiff for such account or claim of set-off at the time of filing the same.

It is alleged and proved by plaintiff that it did not know, and had no means of knowing, that defendant had the said statement for \$151.35, bearing date August 14, 1896, until he offered it as evidence on the trial; and upon this ground, with others, it asks in this cause that said judgment be set aside, and that a new trial of the action be granted to it. It is shown that McGee, the agent of plaintiff, was conversant with the transactions between Pridemore & Bro. and James Pridemore and plaintiff; that he knew before and at the time of the trial that Pridemore had a statement relating to the tobacco; that he (McGee) was present with plaintiff's attorney, Wilkinson, at the trial; and that a continuance of the case had before that time been granted to enable the company to procure evidence with which to contest the defendant's claim. Plaintiff could have demanded that the pleadings of the defendant be filed on the return day of the summons, and, if insufficient, could have excepted thereto. It could have demanded that the account of defendant against the plaintiff be filed with the justice, with a complete statement of the items thereof. Before the trial, at plaintiff's request, it was the duty of the justice to require the defendant to file a complete statement of the items of his account upon which he demanded judgment. The plaintiff seems to have been satisfied with such pleadings and notice of defense as defendant had filed before and at the time of the trial. It demanded no other or better notice by written or oral statement from defendant, but went to trial before a jury and submitted its evidence upon the whole case. Under the statute above cited, if the plaintiff had been surprised during the trial by the production of the account in question by the defendant, and it had been then shown to the satisfaction of the justice, by the oath of the plaintiff, or its agent or attorney, both of whom were present, that a continuance of the cause was necessary, in consequence thereof, it would have been the duty of the justice to have granted such continuance upon such terms as to him seemed just. The statement from the books of plaintiff, introduced in this cause to show the alleged alteration of the account filed by defendant as aforesaid, and to prove the falsity of defendant's evidence given on said trial, were all in the possession of plaintiff before and at the time of the trial. It is admitted in plaintiff's brief that the plaintiff's office and place of

business is only 182 miles from the place of the trial by the justice. From the return day of the summons, June 10, 1896, to the day of the trial of the action, July 31, 1896, the plaintiff had ample time to procure its books, papers, and witnesses from Cincinnati to refute the claim of defendant, Pridemore, concerning said account, if it had such evidence. We know that the transmission of a letter from the office of the justice in Carroll district of Lincoln district to the company, by its attorney or agent, and a reply thereto, would not necessarily have required very many days. There is no reason shown why the evidence of the plaintiff presented in this cause was not adduced before the jury and justice, except the statement of plaintiff that it had no means of knowing that the said account was forged, or that the evidence of defendant was false. It seems, by its production by the company in this cause, that the plaintiff then had the same evidence upon that question which it now has. If the plaintiff had demanded its rights under the statute cited, its present defense to said account and judgment could have been fully presented to and considered by the jury on said trial. 2 Story, Eq. Jur. § 895, says: "And this leads us to remark in the next place that relief will not be granted by staying proceedings at law after a verdict, if the party applying has been guilty of laches as to the matter of defense, or might by reasonable diligence have procured the requisite proofs before the trial." Section 896 of this work, after citing authority therefor, says: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because, if a matter has been already investigated in a court of justice according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the Legislature, some by the courts themselves, for the purpose of putting an end to litigation. And it is more important that an end should be put to litigation, than that justice should be done in every case." As a general rule, a court of equity will not interfere with a judgment at law solely because the principal witness was mistaken as to facts, and was subsequently found to be in error. Nor will relief be granted where the party has been deprived of his defense in any manner through his neglect or laches. *Vaughn v. Johnson et al.*, 1 Stok. Ohy. 173; *Walker v. Kretsinger et al.*, 48 Ill. 502. Relief will not be granted for the purposes of a new trial at law where the party lost his opportunity of defense by his own negligence. *Dodge et al. v. Strong*, 2 Johns. Ch. 228. The jurisdiction of a court of equity over trials at law, compelling the party who has gained a verdict to submit to a new trial, or be forever enjoined from proceeding on his verdict, is now very rarely exercised, and never except in a very clear case of fraud or injus-

tice, or upon newly discovered evidence, which could not possibly have been produced at the first trial. *Floyd v. Jayne*, 6 Johns. Ch. 479. An injunction will not be granted to stay proceedings at law on a judgment on the ground that the defendant at law was prevented by public business from making due preparations for and attending at the trial, and that the plaintiff had, on the evidence of one witness, whom he had suborned to swear falsely, recovered a verdict for a much larger sum in damages than he was justly entitled to, and that the Supreme Court had refused to grant a new trial in the cause. *Smith v. Lowry*, 1 Johns. Ch. 320; *High on Inj.* vol. 1, § 173.

Appellant contends that it should have the judgment aforesaid set aside, and cites *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, which, among other things, says: "That a trial was had of the suit No. 607, and the said Mayer introduced evidence of the existence of a letter from your petitioner to the said Boyd authorizing him, the said Boyd, to make a contract by which her lien as lessor on the crops produced by the several defendants and other tenants on said plantation should be waived in favor of the said Mayer or of others, as furnishers of supplies to said tenants; that upon such evidence so offered, and of the existence of which the petitioner could not possibly be aware, and of which she had no knowledge until, subsequent to the trial, judgment was rendered against her in said suit and in the several other suits mentioned; * * * that the pretended letter authorizing him to make such contract, if it ever had an existence, which petitioner denies, was a false and forged document, not written and not signed by her; that your petitioner has never authorized the said Boyd or any other person whatever to waive her lien as lessor in favor of the said Mayer or any other furnisher of supplies, and has never written the pretended letter or any other letter to the said Boyd, or to any other person whatsoever, containing such authority; * * * that the testimony of said Mayer as to the existence of said pretended letter is false and in pursuance of a conspiracy to defraud petitioner, or that said pretended letter, if it ever had an existence, is a false and forged document; that this testimony, and much more testimony necessary to establish the falsity of said evidence upon which said judgments were obtained, and the forgery of said pretended letter to said Boyd, was unknown to petitioner at the time of the trial, and could not have been known to or anticipated by her, and has been discovered by her since the rendition of said judgments in said suit, and since the lapse of the legal delays within which a motion could be made for a new trial; and that there has been no laches on her part in failing to show the falsity of such evidence and the forgery of such pre-

tended letter on the trial of the cause." At page 592, 141 U. S., and page 63, 12 Sup. Ct., 35 L. Ed. 870, the court says: "Such was the case made in the petition. The relief asked was an injunction against Mayer and the defendant in error Holmes, sheriff of the parish, restraining them from executing the above judgments, or any of them; that Mayer be cited to answer the petitioner's demand; that the judgments be annulled and avoided as obtained upon false testimony and forged documents; and that the petitioner have general and equitable relief." And at page 596, 141 U. S., and page 64, 12 Sup. Ct., 35 L. Ed. 870, the court further says: "According to the averments of the original petition for injunction filed in the state court, which averments must be taken to be true in determining the removability of the suit, the judgments in question would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case evidently intended to be presented by the petition is one where, without negligence, laches, or other fault upon the part of petitioner, Mayer has fraudulently obtained judgments, which he seeks, against conscience, to enforce by execution. While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' *Marine Ins. Co. v. Hodgson*, 7 Oranch, 332, 336 [8 L. Ed. 362]; *Hendrickson v. Hinckley*, 17 How. 443, 445 [15 L. Ed. 123]; *Crim v. Handley*, 94 U. S. 652, 653 [24 L. Ed. 216]; *Metcalf v. Williams*, 104 U. S. 93, 96 [26 L. Ed. 665]; *Embry v. Palmer*, 107 U. S. 8, 11 [2 Sup. Ct. 25, 27 L. Ed. 346]; *Knox County v. Harshman*, 133 U. S. 152, 154 [10 Sup. Ct. 257, 33 L. Ed. 586]; 2 *Story's Eq. Jur.* §§ 887, 1574; *Floyd v. Jayne*, 6 Johns. Ch. 479, 482. See, also, *United States v. Throckmorton*, 98 U. S. 61, 65 [25 L. Ed. 93]." It will be at once observed that in the case above cited the letter was alleged to be a forgery, and that plaintiff in that case had no knowledge or means of knowledge thereof until after the trial of the case, and until after the time had elapsed in which a motion for a new trial could have been made. The case before us is very different. Here the plaintiff had its books and its witnesses before and at the time of the trial. By the use of due diligence it could have had its evidence before the jury and

justice at the trial of the action in which the judgment complained of was recovered against it.

Plaintiff also cites *Bloss v. Hull*, 27 W. Va. 508, as follows: "A new trial will not be granted on the ground of newly discovered evidence when it goes merely to impeach the testimony of a witness at a former trial, nor to let in cumulative evidence as to matter which was principally controverted at the former trial; but if the newly discovered evidence is sufficient to utterly destroy the former testimony, by showing that it was entirely false or founded on perjury, then a new trial should be granted. The rule in this respect is the same both in courts of equity and at law. But where the testimony thus discovered relates to a fact which was in issue and supported by evidence in the former trial, it must be of a conclusive character—such as, if it had been produced on the former trial, should have produced a different verdict, and which would necessarily entitle the plaintiff to relief in the suit in which it is alleged, unless overcome by new evidence from the opposite side. *Story's Eq. Pl.* § 413; *Livingston v. Hubbs*, 3 Johns. Ch. 124; *Peagram v. King*, 9 N. C. 605. * * * Second. Equity will not relieve a party against a judgment at law on the ground of after-discovered evidence, or of a defense of which he was ignorant until judgment was rendered, unless he shows that by the exercise of ordinary diligence he could not discover such evidence or defense, or that he was prevented from employing the same by fraud, accident, or the act of the opposite party, unmixed with laches or negligence on his part. *Shields v. McClung*, 6 W. Va. 79; *Knapp v. Snyder*, 15 W. Va. 434; *Slack v. Wood*, 9 Grat. 40; *Enquirer Co. v. Robinson*, 24 Grat. 548. *Hevener v. McClung*, 22 W. Va. 81, is very much like the case at bar. There the defense sought to be introduced was a legal defense, which was suspected by the plaintiff to exist before the judgment at law was rendered, and he was apprised of the evidence by which he could prove it, if it really existed; but he failed to produce the evidence, and let judgment go against him. This court held that such party was not entitled to relief in equity." We are unable to see how this case supports the contention of appellant.

As a general rule, a bill for relief based on perjured testimony given at the law trial, or on false or forged documentary evidence introduced there, will not be entertained; and the allegation that the complainant was surprised by the perjury or forged evidence does not change the rule. 11 *Ency. Pl. & Pr.* 1183. It is a rule of law, on the subject of new trials, that a party going voluntarily to trial goes at his peril, and he cannot have a new trial merely to give him an opportunity of impeaching the testimony of a witness of which he was apprised or could have been apprised beforehand, and of

the very purpose for which he was to be called. He must at least show that he had since discovered testimony of which he had no knowledge before the trial. *Woodworth v. Buskerk*, 1 Johns. Ch. 432; *Gott v. Carr*, 6 Gill & J. 309. Here the plaintiff could have been apprised before and at the time of the trial of the action before the justice of the very purpose for which the witnesses for the defendant were to be called, had it required the defendant to file a complete statement of the items of his account for which he claimed a set-off and judgment. The mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. The doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. *Hamilton v. McLean*, 139 Mo. 678, 687, 41 S. W. 224. There is no allegation of fraud, accident, mistake, or other adventitious circumstances in the plaintiff's bill, whereby it was prevented from producing its proof in defense of said account on the trial before the justice. Failure of proof upon the trial at law will not, in the absence of fraud, accident, mistake, or other adventitious circumstances, warrant a court of equity in granting relief against a judgment. Thus, where complainant asks an injunction against a judgment, alleging in his bill that he is now able to prove the matter of his plea in defense of the action at law, which he was unable to prove at the trial, but does not suggest fraud, accident, mistake, or other circumstances as the cause of such failure of proof, the injunction will not be allowed. *High on Inj. c. 3, § 168*; *Shields v. McClung*, 6 W. Va. 79; *Hogg's Eq. Pr.* 472, 473. There is no allegation in the bill that plaintiff applied for or was refused an appeal from the judgment. No sufficient reason is averred therein why it did not make such application. If sufficient relief could have been had by an appeal from the judgment, but the party aggrieved has been negligent in prosecuting his appeal, and has thereby lost his remedy, he will be denied relief by injunction against the judgment. So, too, a judgment debtor who has lost his remedy by appeal by reason of a defect in his proceedings will not be allowed to enjoin the judgment. *Long v. Smith*, 39 Tex. 160. In the case of *Brown v. Nutter*, 46 S. E. 375, 54 W. Va. —, this court holds that, to sustain a bill of review for newly discovered evidence, the duty devolves upon the plaintiff, first, to produce

evidence clearly decisive of the case; second, to show that such evidence could not have been discovered by due diligence. Hogg's Eq. Pr. 476, 477. According to the well-settled principles of equity, the plaintiff has wholly failed to make out such a case as entitles it to the relief prayed for, because the matters in controversy between the parties were submitted to the jury and justice and passed upon without objection by either litigant. The alleged newly discovered evidence was then in possession of plaintiff, and could have been produced by it on the trial by the use of due diligence. As shown, it is either cumulative or contradictory of Pridemore's evidence.

We are of opinion that there is no error in the decree of the circuit court appealed from. The decree is therefore affirmed.

(55 W. Va. 684)

HALL v. STAUNTON, Clerk of County Court.
(Supreme Court of Appeals of West Virginia.
April 25, 1904.)

MANDAMUS—WHEN ISSUED—ABSTRACT RIGHT.

1. The extraordinary writ of mandamus will never be issued in any case where it is unnecessary, or where, if issued, it would prove unavailing, fruitless, and nugatory. The court will not compel the doing of a vain thing. A mere abstract right, unattended by any substantial benefit to the party asking mandamus, will not be enforced by the writ.

(Syllabus by the Court.)

Petition by Addison Hall for writ of mandamus to E. W. Staunton, clerk of the county court. Refused.

Linn, Byrne & Cato and P. G. Walker, for petitioner. Mollohan, McClintic & Mathews, for respondent.

BRANNON, J. Addison Hall presented to this court a petition praying for a mandamus against E. W. Staunton, clerk of the county court of Kanawha county, to compel Staunton to allow Hall to inspect the pollbooks, tally sheets, and certificates of precinct returns of a special election held in that county on May 9, 1903, upon the question of issuing bonds to fund the county's indebtedness. Staunton resists the award of a mandamus. The petition says that Hall demanded such inspection of Staunton, but was refused it. The petition states that the clerks made a statement from the returns that the bond proposition had carried, but that two members of the county court secretly met and caused to be entered on the election record an order declaring that the proposition to issue bonds had not carried, but that said order was false, and that the returns as originally made showed that the proposition had carried, and that the returns had been fraudulently altered. The petition further states that Hall obtained from the circuit court a mandamus nisi against the members of the

county court requiring them to convene as a board of canvassers and canvass the returns of said election, on the claim that no canvass had been locally made, and that the circuit court quashed the mandamus nisi, and dismissed Hall's petition, with costs, and that Hall had the record copied with a view to applying to the Supreme Court for a writ of error to reverse the judgment of the circuit court; and that he again asked Staunton for an inspection of the said election documents, stating that he desired it in connection with said proceeding, but was refused such inspection. The petitioner says that he desires to see the documents particularly for the reason that he had been informed that the result of the election, as it appeared on the election papers, had been changed, and that he believed that the true returns would show that the bond proposition had been carried. The petition states that "the question of whether or not said writ of error shall be applied for and prosecuted has been under advisement, and petitioner has not decided whether to apply for said writ or to abandon it," and that the facts to be ascertained by such inspection would weigh largely in determining that question. It further states that another object of such inspection was to see whether such forgeries and alterations had been made.

The ruling question is, does Hall present such a case as calls for a mandamus to compel the clerk to allow the inspection of the election papers? And that question may be narrowed to this question: Will the mandamus avail any useful legal purpose for Hall? In *Payne v. Staunton*, 46 S. E. 927, we held that one asking a mandamus must show a right vested in him to be vindicated or aided by the writ. That is not the question in this case. Conceded that one having, or even contemplating, a suit, has a right to inspect records in connection with or in furtherance of it, or even merely to determine upon the advisability of such suit, still he must show that an inspection is necessary; that it will be useful, and avail him for that purpose. More plainly yet, the writ will not be granted where it appears that the thing he seeks will answer no legal purpose. In *State v. County Court*, 47 W. Va. 672, 35 S. E. 959, we said that mandamus "will only go to secure or protect a clear legal right," and that it will not go "if it would prove fruitless." Authorities are there given for those rules of law. "The court will refuse to grant a mandamus when it is manifest it will be barren and fruitless, or useless, or cannot have a beneficial effect." *Cristman v. Peck*, 90 Ill. 150. "Mandamus will not be granted where it would be fruitless to afford the relief sought." *Lamar v. Wilkins*, 28 Ark. 34. "The extraordinary writ of mandamus will never be issued in any case where it is unnecessary, or where, if issued, it would prove unavailing, fruitless, and nugatory. The court will not compel the doing of a vr a

thing. * * * A mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus." 19 Am. & Eng. Ency. L. (2d Ed.) 756.

Test the case by these plain law principles. Hall says that he wants this inspection to make up his mind whether he will or will not ask a writ of error from the judgment of the circuit court refusing a mandamus to compel the county canvassers to canvass the returns of the bond election. This is not a satisfactory statement of actual purpose in asking an inspection. It does not indicate upon what condition or in what event, dependent upon the revelation of such inspection, he will ask a writ of error. He does not say whether, in any event, he will ask it. He does not say that in certain event he will ask a writ of error. But, waive this objection, though forcible, because the petition does not tell of an actual use, in some event, of such inspection. Apart from this objection to the statement of the purpose of inspection, we say that it does not appear that such inspection will serve any legal purpose; but, on the contrary, it is apparent that it will not do so, but will be fruitless and useless. And why? Because those election documents, whatever they might reveal, whether wrongfully altered or not, could not be considered upon either a petition for a writ of error or upon the hearing of such writ if granted; and this for the reason that such writ of error must be heard only on the record as it was in the circuit court when decided, and no papers dehors that record can be looked at. This is unquestionable. Counsel for Hall frankly admits this to be so. This decides the case, for no purpose for which inspection is wanted is specified; and when we know that the papers cannot be used upon a writ of error, we desist of other use. Hall says he wants to see the papers to conclude whether or not to ask a writ of error; but, as they cannot be used upon a writ of error, we fail to see how they could enter into the process of determining for or against applying for a writ of error. No other purpose of inspection being given us, we might stop here, and not enter the field of speculation as to some other purpose for which the papers might be used. The petition does not show that any legal proceeding involving the result of said election is going on in which such election papers are to be used; nor does it say that Hall contemplates any procedure in which they could be used. The only legal proceeding mentioned in the petition as one in connection with which the inspection is asked is that mandamus decided by the circuit court; but that is closed by final judgment. No disclosure made by an inspection of these election papers could be used in amending that case. Let us imagine that Hall should sue out a writ of error, and this court should reverse the circuit court's decision. The record could not be amended so as to introduce

matter shown by those election papers; but this court would upon reversal award a mandamus to compel the canvassers to canvass the election returns, and upon that canvass inspection of the election documents would be had, and all they revealed considered, or presented for consideration, and any wrong done Hall would be righted upon certiorari or mandamus, and thus would be afforded a remedy for any grievance. This is an additional reason against our award against a mandamus, because it lies not where other remedy is at hand. And this goes further to show that an inspection cannot help Hall to get what he would seek by writ of error, and what he sought in the circuit court, namely, a canvass of the returns. How can those documents help to get a canvass by the only suit he mentions—that is, by the writ of error? Though there be the abstract right of inspection, mandamus will not issue when it cannot avail anything.

It is suggested that the matter of costs in the mandamus suit in the circuit court enters into this matter as presenting a pecuniary interest in Hall. We do not see that it is material. The principles above stated apply to costs as to other aspects of the case. Costs depend on the record as completed in the circuit court, and upon the decision touching them the election papers could not be read. We do not rest our decision upon the question whether Hall has such interest as enables him to maintain a writ of mandamus, but we hold that the inspection he seeks could answer no purpose in Hall's concluding whether to ask for a writ of error, because he must know, in considering whether to do so, that the documents can play no part in seeking a writ of error or in its consideration. The inspection would be futile for the purpose, the one only purpose in contemplation.

The petition charged alteration of the return. How can that operate in this case? If altered, that could not be considered on writ of error. We can ascribe this purpose only to a design to discover malefaction for idle curiosity, because it is not indicated that in this there was even a design to render the clerk liable civilly or criminally. There must be a purpose, a substantial right recognized by law to be vindicated, to warrant a mandamus. It is not lightly called into exercise. Merrill on Mandamus, § 49. It will not lie for mere discovery of crime, for mere curiosity or fancy; nor do we think it will lie to reveal crime merely to bring upon another infamy and disgrace. *People v. Masonic*, 98 Ill. 635. In *Payne v. Staunton*, cited, we held that it would not lie for a private individual to ferret out crime. The writ is a civil writ, not a criminal process, nor an auxiliary criminal process. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959. The prosecution of offenses is committed by law to certain public officers and agents, and individuals cannot interfere, except by suing

out a warrant or going before a grand jury. As an individual member of the state, such are his processes to vindicate the broken criminal law, not mandamus. Viewed as a person acting only on his own right, he cannot act, because he has no individual right; and viewed as a member of society representing the public, the law appoints other processes for him than mandamus. So we do not see that the charges of forgery made in the petition can call for mandamus, therefore we refuse the peremptory mandamus, and discharge the rule.

(55 W. Va. 597)

STATE v. SULLIVAN.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

MALICIOUS SHOOTING—CONFLICTING EVIDENCE—NEW TRIAL.

1. On a trial of Sullivan for maliciously shooting White, a warrant for the arrest of Sullivan, sworn out by White, is admissible evidence for the state, to show grudge and malice on the part of Sullivan.

2. If a new trial depends upon the weight of testimony, or inferences from it, the jury are exclusively and almost uncontrollably the judges.

3. Where some evidence has been given to sustain a verdict, a new trial will not be granted merely because the case is somewhat doubtful, or the judge, if a juror, would have found a different verdict. The evidence must be plainly, manifestly insufficient, and the verdict work injustice. This applies a fortiori to an appellate court.

4. The supreme court may in some instances grant a new trial even on conflicting evidence, but should do so rarely and with the utmost caution. It should do so only where the verdict plainly works wrong and injustice.

5. A verdict should not be set aside when the evidence is contradictory, if, after the evidence has been considered most favorably to the verdict, it does not still appear that the verdict is plainly not warranted by the evidence.

6. The opinion of a circuit court refusing a new trial dependent on oral evidence, involving only questions of fact, is very forcible in the appellate court.

(Syllabus by the Court.)

Error to Circuit Court, Mingo County; E. S. Doolittle, Judge.

Wayne Sullivan was convicted of maliciously shooting, and brings error. Affirmed.

John S. Marcum, for plaintiff in error. The Attorney General, for the State.

BRANNON, J. Wayne Sullivan was sentenced to the penitentiary for two years by the circuit court of Mingo county upon an indictment for maliciously shooting John White.

One complaint of Sullivan against the conviction is that the state gave in evidence a warrant issued by a justice for the arrest of Sullivan upon a charge of adultery, which the justice had committed to the hands of White to be executed. The warrant was sworn out by White. The charge being one of malicious shooting, this warrant was competent to show grudge and malice on the part of Sullivan. The fact that White made

the charge might naturally excite grudge and malice in the breast of Sullivan, and tend to show intentional, malicious shooting.

Sullivan complains that the court refused a new trial. Again and again this court is expected to perform the function of a jury and the circuit upon purely questions of fact. The shooting is admitted by Sullivan, but he sets up self-defense. That is peculiarly one of fact in this case, and proper for a jury. *State v. Newman*, 49 W. Va. 724, 39 S. E. 655. White had in his hands a warrant for the arrest of Wayne Sullivan, which had been given him by the justice to execute. Harve Sullivan, brother of the defendant, had received from another justice a warrant to arrest White for the petty offense of contempt to a justice, in failing to return all papers in his hands to the justice; it being ascertained that he was not a bonded constable. Harve Sullivan was made a special constable to execute this warrant, and summoned Wayne Sullivan, a brother, and John Justice, brother-in-law, to assist. They went to White's home, Harve armed with a pistol, and Wayne with a 44 Winchester rifle. White saw them coming, seized a mountain rifle, and stood in his door and warned them not to come in. He also had a pistol, which in the battle he tried to fire, but it snapped. It does not appear that he knew they had a warrant. He and his wife and son say he cocked the gun, and he accidentally touched the trigger, and it went off. They swear he did not shoot at the Sullivans. The Sullivans say he did. Both the Sullivans fired on White while in his house. One ball passed in the back part of the house. A ball from Wayne Sullivan's gun entered both White's arms, and caused the amputation of one. Both sides say, by conflict in the evidence, that the other fired the first shot. Certain it is that the Sullivans went to White's armed to the teeth to execute a warrant for a petty offense. Likely the jury thought they seized this warrant as a cover to execute a sedate plan to kill White. There is evidence that Sullivan said, if White drew a gun on him, he would shoot his heart out. It was proven that there had been mutual arrests of one another before. There was bad blood. Marion Kennedy swore that, before the occurrence, Wayne Sullivan said to him that, if ever he got an opportunity, John White would never have the pleasure of handcuffing another two men together; that he had handcuffed him and Harve together. He told Crocket Hatfield that he would meet John White some time or another on Four Train with a 44. There was considerable oral evidence, conflicting as to the circumstances at the scene of combat. The jury and circuit court have passed on it. A glance at *Hugus'* valuable West Virginia Criminal Digest, 168, will show that we cannot reverse the circuit court and jury without a violation of numerous cases. Whenever a motion is made on the ground that the verdict is contrary to the evidence, the opinion

of the circuit court is entitled to great respect (*State v. Hunter*, 37 W. Va. 744, 17 S. E. 307), because, as Judge Holt put it, "he saw the witnesses face to face, and could, better than we, judge of their credibility" (*Smith v. Parkersburg*, 48 W. Va. 232 [37 S. E. 645]). "Why have juries, if appellate judges are to go into the business of weighing evidence as if by the ounce and pound. We ought not to do this. It is an abuse of power, and misconception of our function and of the jury function. The jury institution and a verdict are to be highly respected." *State v. Bowyer*, 43 W. Va. 182, 27 S. E. 301. There is nowhere that the true aspect of a criminal case can be as well seen as in the circuit court, face to face with the witnesses. *State v. Morgan*, 35 W. Va. 277, 18 S. E. 385. If the question depends on weight of testimony, or inferences or deductions from facts proven, the jury are exclusively and uncontrollably the judges. The court cannot interfere in a doubtful case. The court must be satisfied that the evidence is plainly insufficient. *State v. Cooper*, 26 W. Va. 838; *State v. Donohoo*, 22 W. Va. 761; *Vaiden's Case*, 12 Grat. 717. Where some evidence has been given to sustain the verdict, it is rarely that the appellate court will interfere. *Miller v. Ins. Co.*, 12 W. Va. 116, 29 Am. Rep. 452; *Grayson's Case*, 6 Grat. 712; *Sheff v. Huntington*, 16 W. Va. 307, § 14. And where the evidence is conflicting, the appellate court has still more limited range in interfering with the verdict. In fact, it has often been held that in such case the court may even refuse to certify the evidence at all. *Grayson's Case*, 6 Grat. (Ann. Ed.) 712. A court cannot now refuse, because of section 9, c. 131, Code 1891, requiring all the evidence to be certified. In federal courts a new trial cannot be had on the ground of want of evidence. Once it was so in Virginia. *Baker's Case*, 2 Va. Cas. 353; *Case's Case*, 1 Va. Cas. 264. In *Grayson's Case*, 6 Grat. 712, it is held that "where the evidence is contradictory, and the verdict is against the weight of the evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or superseas, or examinable by an appellate court." In *Caldwell v. Craig*, 21 Grat. (Ann. Ed.) 132, the opinion says: "Upon familiar principles, recognized and approved in numerous cases, when there is a conflict of evidence an appellate court will never set aside a verdict, when the court which tried the case and heard the witnesses concurs with the jury, and has refused a new trial." Now, though, as admitted in *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686, the statute has changed former rulings, so as not to entirely close the door on a new trial where the evidence conflicts, and demanded that conflicting evidence shall be weighed, it has not altered the inherent quality of contradictory evidence. It is still contradictory, still inconclusive, still infects a case with doubt. It still leaves the

fact stand that we cannot, from mere type, tell which side to believe, whereas the jury in the circuit court can do so, and have decided one side to be truthful, the other false. We have held that, even where evidence conflicts, we can grant a new trial. *Grogan v. O. & O. R. Co.*, 39 W. Va. 415, 19 S. E. 563; *Robertson v. Harmon*, 47 W. Va. 500, 35 S. E. 832. "But the power must be exercised cautiously," those cases hold, only where there is plain wrong and injustice. *Gilmer v. Sidenstricker*, 42 W. Va. 52, 24 S. E. 566; *Campbell v. Lynn*, 7 W. Va. 665; *Smith v. Railroad*, 48 W. Va. 69, 35 S. E. 834. "The verdict ought not to be interfered with when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear that the verdict was not plainly warranted by the evidence." *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880. The same rules in civil and criminal cases apply on question of new trial.

Judgment affirmed.

(55 W. Va. 490)

COLSTON et al. v. MILLER.

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

FRAUDULENT CONVEYANCE—EVIDENCE—POSSESSION—FRAUD—RELATIONSHIP OF PARTIES.

1. Retention by the grantor of the possession of real estate, conveyed by him, with intent to defraud his creditors, is a badge of fraud, and casts upon the parties the burden of showing that the grantor is holding in good faith under the grantee as his tenant, or consistently with the deed.

2. When, in case of such retention of possession, the grantee, in an attempt to prove such tenancy, discloses acts of his own, in respect to the crops raised on the land by his alleged tenant, inconsistent with fairness and good faith toward the creditors of the grantor, he thereby not only fails to repel the inference of fraud arising from the act of permitting the grantor to remain in possession, but establishes an additional circumstance tending to show participation on his part in the fraud of the grantor.

3. When a conveyance is attacked by creditors of the grantor on the ground of fraud, the burden is upon the grantee to prove full payment of an adequate consideration for the property, and if it appear that, in addition to the land, he received from the grantor certain choses in action, his failure to show such payment of such consideration for the assignment of such choses in action, as well as part of the alleged purchase money of the land, is potent evidence of fraud in the entire transaction.

4. To sustain the claim of payment of consideration in such case, when the amounts are large, the testimony of the grantee, if uncorroborated by receipts, memoranda, or other documentary evidence, must be clear, positive, definite, consistent with other evidence offered by him, and free from self-contradiction.

5. Relationship between the parties, by blood or affinity, calls upon the court for careful and close scrutiny of the transaction and the conduct of, and evidence offered by, the grantee.

6. Failure to allow set-offs is not cause for reversal of a decree at the instance of a party who did not ask for, or rely upon a claim to, them in the court below.

7. When a conveyance is decreed to be fraudulent upon a bill filed by a single creditor of

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 407, 800, 816.

the grantor, and no other creditors have questioned it, and it does not appear that there are any others, it is unnecessary and erroneous to order a convention of the creditors of the grantor.

(Syllabus by the Court.)

Appeal from Circuit Court, Berkeley County; E. Boyd Faulkner, Judge.

Bill by William B. Colston, administrator, and others, against Maria E. Janney and others. Decree for plaintiffs, and defendant Victor D. Miller, appeals. Affirmed.

Forrest W. Brown, for appellant. Flick, Westenhaver & Noll and Ingles & Nadenbousch, for appellees.

POFFENBARGER, P. Victor D. Miller obtained this appeal from a decree of the circuit court of Berkeley county, declaring a certain deed, executed by Chas. S. Lamon and wife, and purporting to convey to him a tract of land containing 210 acres, 2 rods, and 19 poles, in consideration of \$5,262.50, to have been made with intent to hinder, delay, and defraud the creditors of the said Chas. S. Lamon, and setting the same aside as to the debt due the plaintiffs Wm. B. Colston and Geo. M. Bowers, administrators of Robert Lamon, deceased.

This debt originated in the following manner: John W. Lamon, on the 13th day of May, 1893, made his negotiable promissory note for the sum of \$4,000, to become due and payable four months after its date, which was indorsed, first, by said Chas. S. Lamon, secondly, by said Robert Lamon, thirdly, by G. M. Lamon, and then delivered for value to the National Bank of Martinsburg. At that time said John W. Lamon must have been in failing circumstances, as he afterwards made an assignment for the benefit of creditors, and only a small portion of the debt was afterwards collected out of his estate, and the balance was paid out of the estate of Robert Lamon. Chas. S. Lamon was then the owner of said farm, which was worth not less than \$5,000, and personal estate, consisting of live stock, farming implements, choses in action, and other property, worth about \$4,000. By deed dated May 22, 1894, he conveyed the farm as aforesaid to the appellant, his wife's brother, and assigned to him at about the same time two notes calling for considerable sums of money. On or about the date of the conveyance of the farm, he placed his personal property in the hands of his wife, executing to her a bill of sale thereof, and she converted the same to her use. Out of the estate of Robert Lamon there was collected on said debt, by legal process, \$1,349.21 February 3, 1898, \$632.26 January 30, 1899, and \$879.97 May 4, 1899, and thereupon the administrators of the estate of said Robert Lamon brought this suit for the purpose aforesaid, he having been the second, and Chas. S. Lamon the first, indorser on the note, in consequence of which said Chas. S. Lamon was liable to him for the

amount so paid. Proceedings were then had which resulted, on the 19th day of August, 1902, in the decree complained of.

The court is said to have erred in overruling the demurrer to the original bill. This is no doubt true, as it failed to aver any notice to the defendant Miller of the fraudulent intent charged upon his grantor, or participation therein on his part. But the plaintiffs, perceiving this error, cured it by filing an amended bill, in which the necessary allegations omitted from the original are fully supplied. The only effect of sustaining the demurrer would have been to cause an amendment of the bill to be made. The voluntary amendment is certainly as effective as a compulsory one would have been. Hence the error is clearly harmless.

Nor should the demurrer have been sustained on the ground of laches, as the suit was instituted immediately after the making of the final payment of the debt, until which time no cause of action as to it arose. As the cause of invalidity, if any, is fraud, and not mere want of consideration, the statute of limitation does not apply, and the bill does not disclose such lack of diligence as will bar. If the charge of fraud is sustained, the defendant cannot well say he has been misled or prejudiced by slight delay on the part of the man upon whom he perpetrated the fraud, and the rights of no third party have intervened.

The record abounds with both circumstantial and direct positive evidence of fraudulent intent on the part of the grantor, Chas. S. Lamon. Declarations of his intent and purpose to convey the farm to the defendant Miller to escape the payment of said note are testified to by witnesses, and his subsequent conduct and declarations are tantamount to admissions. Had exceptions to these declarations been taken and the benefit thereof saved, some of them were not admissible against the defendant Miller, because not made in his presence. *Robinson v. Pitzer*, 3 W. Va. 335; *Houston v. McCluney*, 8 W. Va. 135; *Crothers v. Crothers*, 40 W. Va. 169, 20 S. E. 927. But the orders entered in the cause do not show that any objection was made or exception taken at the hearing, and the rule is that, except in the case of inadmissibility because of incompetence of the witness, objections of this kind, not made in the court below, are deemed to have been waived, and will not be entertained on appeal. *Miller v. Gillisple* (decided at the last term) 46 S. E. 451; *Vanscoy v. Stinchcomb*, 29 W. Va. 271, 11 S. E. 927; *Hill v. Proctor*, 10 W. Va. 78. However, it would be absurd to allow such declarations any probative effect against one who never heard them, and, unless the other evidence in the cause will support the finding and decree, it cannot stand. Prior declarations of the grantor are admissible against him, but they do not prove notice to the grantee, unless heard by or communicated to him. *Bischoff v. Hartley*, 9

W. Va. 100 Subsequent declarations of the grantor are generally inadmissible. 14 Am. & Eng. Enc. Law (2d Ed.) 495. Such declarations relating to possession, inconsistent with the deed, are admissible. 14 Am. & Eng. Enc. Law (2d Ed.) 497.

Miller sets up in his respective answers to the original and amended bills, and proves by the depositions of himself and his attorney, Col. Buchanan Schley, of Hagerstown, Md., as well as by the checks themselves, that on the 16th day of June, 1894, he gave Chas. S. Lamon his three checks for sums aggregating \$4,600, all of which were passed through the banks as paid. Two of them were drawn on the Hagerstown Bank, one for \$3,000 and the other for \$600, and Mr. Schley testifies to having gone with Lamon to that bank for the purpose of identifying him, and seen the money for which they called actually paid to Lamon. The other was for \$1,000, dated June 16, 1894, drawn on the Second National Bank of Hagerstown, indorsed by Chas. S. Lamon, and stamped as having been paid June 19, 1894, but credited in the bankbook as of the 16th. Miller and Schley say a medical account of \$235 due from Lamon to the former, who is a physician, and had been treating Lamon, was credited on the purchase money. As to the residue of \$427.50, the two witnesses to the consummation of the alleged sale differ in their testimony. Miller says in his answer, and also testifies, that he paid the balance in cash, part of it on the same day, and the balance, \$250, at Lamon's home some time afterwards, in the presence of Charles Stuckey, whom he admits he had called as a witness to the transaction. Col. Schley says that no money was paid in his office, and that the difference between the aggregate of the checks and medical account and the total amount of purchase money is represented by an indebtedness due from Lamon to Miller, which was deducted by him, with the medical account, to ascertain the amount for which the checks were drawn. His testimony is as follows: "I put down at his suggestion what the farm came to per acre, which I do not now recall, subtracted from it the bill which he owed Dr. Miller, which amount he gave me at the time, the money he said he had borrowed from Dr. Miller, and subtracted those from what I was told he would give for the farm, and told the doctor and himself the balance that was due on the purchase money. For this amount, namely, the balance due, Dr. Miller gave these checks which I have referred to." This he substantially reiterates once or twice. That said sum of \$4,600 was paid by Miller to Lamon as aforesaid admits of no doubt, but neither this fact nor the payment of the whole amount of purchase money, if established, will sustain the transaction if the grantee participated in the fraudulent intent of the grantor in disposing of the property. Payment of the purchase money alone is not

enough. The transaction must have been free from fraud on the part of the grantee. There is but little evidence, other than that which is circumstantial, tending to show a fraudulent purpose on the part of Miller, and that is in the nature of an admission made some time after the purchase. William Barber, who had worked for Lamon as a farm laborer before and after the conveyance, and also for Mrs. Lamon after the death of her husband, testifies to a conversation which he says occurred between Dr. Miller and his sister, Mrs. Lamon, in the fall of 1895. His language is: "I heard Mrs. Lamon say it was soon time for her to have possession of the money or of the place. He said the place was his and the money, too, but he reckoned he would have to leave her have the place some time, but they had better leave well enough alone for the present. He said that things were very quiet now, but they didn't know what might turn up." This is denied by Miller emphatically, but, if the sale was a fraudulent one, it represents the possible and probable status of the property. It would have been an easy matter for Lamon to have handed the money back to Miller to hold upon a secret trust for the benefit of his wife, Miller's own sister, and not at all inconsistent with the fact of actual payment of the money, but clearly inconsistent with an honest purchase of the farm. The same witness says Lamon told him in the spring of 1894 that he had sold the place, and his brother-in-law, Mr. Miller, had the money in government bonds, and that he had three lawyers employed, and that they couldn't touch either the money or the lands—probably meaning that Lamon's creditors could not. James M. Collis, called by the defendants, in response to a question as to what Lamon told him he had received for the place from Dr. Miller, testified he did not mention the amount, but said, "Jim, I had more money in my pocket at once this week than I ever had in my life," and that this remark was made on the day after Lamon's return from the trip to Maryland at the time of the alleged consummation of the sale. This and other similar testimony as to what Lamon said he had done and declared his intention to do, prior to the execution of the deed, though not in themselves amounting to proof of fraud on the part of Miller, illustrate what may have taken place between these two men, the fact of payment of the alleged purchase money to the contrary notwithstanding. Indeed, it is not necessary, in order to make the transaction fraudulent, that the money should have been returned to Miller. It is enough that, with knowledge of Lamon's fraudulent intent and by way of participation therein, Miller paid him the money and took a conveyance of the land, so as to put it out of reach of Lamon's creditors and make it possible for him to prevent them from obtaining satisfaction of their debts out of the proceeds.

The circumstance of relationship of the parties already adverted to, although not sufficient to raise a presumption of fraud, as in the case of a conveyance by a husband to his wife, puts upon the purchaser the necessity of producing evidence of his good faith, and so explaining the facts and circumstances connected with the transaction as to make it withstand a closer and more rigid scrutiny on the part of the court than is exercised when the transaction is between strangers. When relationship of the parties to the conveyance exists, circumstances, known in the law of fraudulent conveyances as badges of fraud, have greater weight than in other cases, for the law cannot overlook and disregard, upon an inquiry as to the good faith of the parties, the natural desire of a brother to protect, defend, and shield a sister or other close relative when pursued by creditors. *Ballard v. Ohewning*, 49 W. Va. 508, 39 S. E. 170; *Bank v. Gould*, 48 W. Va. 90, 35 S. E. 878; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *Bartlett v. Cleavenger*, 35 W. Va. 718, 14 S. E. 273; *Greer v. Mitchell*, 42 W. Va. 490, 26 S. E. 302; *Hutchinson's Ex'r v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 888.

The difficulty of direct proof of fraud lies in its very nature. A fraudulent transaction is always secret and hidden, as far as it is possible for the parties to it to conceal it from those upon whom it is intended to work wrong and injustice. Hence, the necessity of resorting to circumstantial evidence for proof of it. Such evidence, the courts declare, is not only sufficient to establish the fraudulent character of a conveyance, but is often the only kind of evidence it is possible to procure. Thus, in *Lockhard v. Beckley*, 10 W. Va. 87, it is held that: "Although fraud in fact must be shown to impeach a conveyance as to subsequent creditors, it is not required that the actual or express fraudulent intent appear by direct and positive proof; circumstantial evidence is not only sufficient, but in most cases is the only evidence that can be adduced. Fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors." To the same effect, see *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 802; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451; *Reynolds' Adm'r v. Gawthrop's Heirs*, 37 W. Va. 8, 16 S. E. 364; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; *Hunter v. Hunter*, 10 W. Va. 821.

Some of the circumstances tending to establish fraud are so frequently found in the

investigation of these cases, and given so much weight by the courts, that they have been designated as badges of fraud. One of them is the retention of possession of the property by the grantor after the conveyance. *Livesay v. Beard*, 22 W. Va. 585; *Hutchinson's Ex'r v. Boltz*, 35 W. Va. 754, 14 S. E. 267; *Blackshire v. Pettit*, 35 W. Va. 547, 14 S. E. 183. It is one of the circumstances characterizing the transaction now under consideration. The grantor remained in possession until the time of his death, and his widow, who has since married, still resides upon and cultivates the farm. Its effect is to cast upon the parties the burden of clearly showing that it is not in fact inconsistent with the conveyance, as it appears to be. This may be done by proving that the grantor remains in possession under a contract for the use of the land, and accounts for the rental thereof. *Livesay v. Beard*, *supra*; 14 Am. & Eng. Enc. Law (2d Ed.) 497. An attempt to do so has been made here, and it is to be determined whether the explanation is sufficient. In his answer to the original bill, the defendant Miller says that, after having purchased the farm, he agreed that Lamon might stay on it until the following April, paying as rent therefor, as tenant, one-half of the crops, and that, after his death, he rented the farm to his sister at \$300 per year, which she has ever since paid. In his answer to the amended bill, he says he received the wheat crop from the land in November, 1894, and in the month of March, 1895, paid Mrs. Lamon, the widow, \$100 of the proceeds thereof, being the balance thereof after deducting the rent due him for the year ending April 1, 1895. In his testimony, after having had the averment of his answer substantially quoted to him, with the inquiry as to whether it was correct, he said it was, to the very letter. Being then asked why he took all the wheat crop that fall, he explained that the first question was not quite broad enough to cover the contract, and that in fact he was to have \$300 rent for the place, and it was supposed by him and Lamon that one-half of the crop would be sufficient to pay it, but that it had proved to be insufficient. In his second deposition he says, upon cross-examination, he was to have \$300 rent in any event, neither more nor less, no matter what one-half of the crop might yield. Col. Schley's testimony in reference to this is as follows: "I would add here that, as the purchase was made in May, Dr. Miller said it was too late for him to look around for a tenant for that year, and Mr. Lamon said that he would agree to stay on the farm for that year, and the doctor and he agreed upon the rent that was to be paid to the doctor for the farm. It was crop rent, but I do not recall the proportion." Mrs. Lamon did not testify in the case at all. How the circuit court regarded this explanation, it is impossible to know, but, viewed in the light of all the

circumstances, the rental contract, and the subsequent conduct of the parties under it, savor somewhat of indirection and relaxation of the principles governing a business transaction, as well as the want of good faith toward creditors. The sale was made in June, shortly before harvest time, and the corn crop must have been well under way. Hence it is a little remarkable that the tenant should agree to give one-half of the crop. Then, instead of taking half of the crop, the landlord took the whole of the crop of wheat, saying nothing as to any other crop. There may have been method in this, and a design against the creditors, for a division of the crop would have left something for them, but as Miller took it all away, and paid a small amount of money to the widow instead of leaving the tenant's one-half of the crop, no opportunity was allowed any creditor to realize anything from it. Why did he pay the money to her, instead of the administrator? Whatever the understanding may have been at Hagerstown, Miller was careful to make no representation in the neighborhood of the farm in West Virginia as to any tenancy on the part of Lamon. On the contrary, a witness, Collis, testifies that, after Lamon returned from Hagerstown on the occasion of the sale, he went to see him, and was informed that he had sold the farm to Dr. Miller, but was told by Lamon to remain on it, and as long as he (Lamon) was able he would superintend the place. The same witness says Miller came over and told him to do the best he could in farming the place, and that Mr. Lamon would superintend for him. Taking Miller's second statement as to the contract, namely, that he was to have a cash rental of \$300, his subsequent conduct is equally inconsistent in this: that instead of collecting his rent in cash, leaving the crop free from his interference, he did that which amounted to a representation to the public that the crop belonged to him, by taking it and selling it and then deducting his rent. This act was not only inconsistent with the contract, but prejudicial to creditors, as it concealed from them Lamon's ownership of the crop, the only visible property the two defendants can point to as remaining in the hands of the debtor out of all the property he had owned but a short time before. This act of Miller's was so close in point of time to the conveyance as to give rise to more than a suspicion that he was cognizant of Lamon's purpose in disposing of his land, and is perfectly consistent with Miller's participation in that fraudulent purpose. His close relationship to Mrs. Lamon, then left a widow, with whose situation he must have been familiar, taken in connection with the fact that Lamon had transferred to her all of his personal property and had nothing left to answer the demand of any creditor, leaves no room to doubt that at the time he took away the wheat crop he knew of the fraud perpetrated

by Lamon in the sale of his land, and yet he did this act in direct furtherance of that purpose and design. If he was holding the proceeds of the land upon a secret trust for the benefit of his sister, according to the admission on his part, charged in the testimony of Barber, may he not have taken the wheat crop upon the like condition, and made a mere pretense of deducting rent and paying the balance? Does not the circumstance comport with and tend to establish the truth of Barber's statement, rather than to show a bona fide relationship of landlord and tenant? It was just as easy to call the \$100 check the balance of proceeds after deducting rent, as a payment on account of the secret trust fund.

If Miller participated in Lamon's fraudulent design, it is apparent that the wife, his sister, was to profit by it, and that the secret trust, if any, was for the benefit of both husband and wife. If there was a conspiracy against her husband's creditors, she was undoubtedly an active party to it, for she took all the tangible personal property under a flimsy claim of indebtedness to her for money loaned and property brought on the farm by her and mingled with his at the time of their marriage, and Col. Schley seems to be quite positive she was with her husband at his office on some occasion when the fraudulent negotiations were in progress, though he is not certain it was on the day of the payment of the purchase money. This being true, the subsequent fraudulent transactions between her and Miller, and her husband and Miller, concerning the wheat crop, and Lamon's relation to the farm, closely connected in point of time with the principal fraud, constitute admissible and potent circumstantial evidence against Miller on the question of his good faith in purchasing the land. "It seems to be the settled doctrine, sustained by numerous adjudicated cases, that, where the issue involves the fraudulent sale or conveyance of property, evidence of other like conveyances between the same parties at or about the same time is admissible. The ground for the admission of such evidence is that where such transactions of a similar character, executed by the same parties, are closely connected in time, the reasonable inference is that they proceed from the same motive. When two transactions made with different parties are claimed to be fraudulent, only one of which, however, is being controverted, it must be shown that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in evidence for the purpose of establishing the other to be fraudulent. If, however, the conveyances are made on the same day, or both made to relatives of the grantor, or there are any other circumstances connecting them, it is proper to look at the entire transaction, and, in so far as one reflects any light upon the motive prompting the other, to get the benefit of such aid in

coming to a conclusion." 14 Am. & Eng. Enc. Law (2d Ed.) 499, 500.

In addition to the farm, Miller took from Lamon, by assignment, at about the time of the execution of the deed, as indicated by the evidence, two notes, one for \$1,000, executed by John W. Lamon, and on which Miller has since collected \$738.89, and another for \$431.08, executed by Robert Gold, and on which he has realized about \$500. His possession of these notes was disclosed under the prayer of the original bill for discovery, but neither the answer nor the testimony of Miller sufficiently shows that he had given value for them. He deals with them evasively. He fails to disclose their respective amounts, as well as the consideration upon which they were assigned to him. He is unable to state whether they were assigned or merely delivered to him. As to whether he loaned money on them as collateral or purchased them, he is equivocal and indefinite, saying, in his answer, he advanced Lamon money, and, in order to do so, took an assignment from him of the two notes. He has no recollection of the amount advanced, and kept no memorandum of it, but is positive it was more than \$500. Later, he says Lamon applied to him for a loan of \$400, offering the John Lamon note as security, which was declined, and then both notes, which were accepted, and \$375 of the amount requested was advanced thereon, and the balance made up from time to time after the date of the conveyance. His witness, Col. Schley, says Miller purchased the notes, but at what price he never knew. He saw no money paid for them. Miller falsely asserted in his answer that one of them was barred by the statute of limitations, and afterwards endeavored to explain in his deposition that he really meant to say it was worthless, which also, if stated, would have been false, as he realized the entire amount of one of them, and \$738.89 on the other. Another false statement, made in the answer and reiterated in the deposition, is that the notes were transferred prior to the purchase of the land. The deed bears date May 22, 1894, and was recorded on the 12th day of June, 1894, and the assignment of the Robert Gold note is dated June 12, 1894. The date of the assignment of the other does not appear, but Miller's testimony imports that both were assigned at the same time. He has treated the notes as having been purchased, for he took no note or memorandum of the loan to Lamon, and made no memorandum of the amount on his books, on the notes, or elsewhere. After collecting them, he rendered no account of the balance due after reimbursing himself. That the transactions were contemporaneous is manifest. By each, Miller obtained part of Lamon's estate, to the detriment and injury of his creditors. Fraud in one is evidence of fraud in the other, as above shown. As to the notes, as well as the land, the burden was upon Miller to show

payment of a fair and adequate consideration. "If a creditor attacks as fraudulent a conveyance or transfer of property made by his debtor, and proves that his debt existed before such conveyance or transfer, the purchaser, in order to maintain his title, must show that he paid a fair and adequate consideration. It is not necessary, however, that the consideration should have passed at the time of the conveyance; the satisfaction of a pre-existing debt or claim is sufficient." 14 Am. & Eng. Enc. Law (2d Ed.) 503. The decisions of this court have declared the proposition to be sound law, and applied it. *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838. Another rule forcefully applicable here is that looseness or incorrectness in stating the consideration of a conveyance is a badge of fraud. 14 Am. & Eng. Enc. Law (2d Ed.) 519. Inability of a grantor to produce a memorandum or other record of antecedent debts, which, he claims, constituted the consideration of the conveyance, is a badge of fraud. *Id.* 519. Does not reason more emphatically demand of the assignee or grantee an intelligent and reasonably certain specification of what he claims to have loaned or paid, together with some corroborative circumstance? Is it reasonable to say Miller let Lamon have \$375 on the notes, without some memorandum of the aggregate amount agreed upon and the amount actually advanced? That is not the rule or custom among business men, and where the law not only calls for proof of payment, but will scrutinize the evidence of it, the circumstance has weight against the bona fides of the claim of payment.

The foregoing observations apply with equal potency on the question of payment of \$427.50 of the purchase money of the land. Nobody swears to it but Miller. He says he had Stuckey witness the payment of \$250 of it, but Stuckey died before the testimony was given. Why was not a receipt taken? Why, instead of taking a receipt, was Stuckey called in for the express purpose of witnessing the payment? Business men take receipts for money paid when witnesses are present, and there is no necessity of hunting them up and calling them in. The story would be improbable on its face, but for a reason hereafter to be noticed which may have caused the performance of this unusual act. Why was not the \$177.50 paid in Schley's presence, or deposited in the bank and included in the checks? Miller says he paid it on the day of the delivery of the checks. Why did he hand over the checks in Schley's presence, and then retire with Lamon to give him the cash? There is no memorandum, receipt, or other writing by which Miller's statement can be verified, and he gives no reason for failing to pay the money at the time he delivered the checks. Moreover, Schley says no money in addition

to the checks was to be paid, as the parties admitted in his presence that Lamon owed Miller the difference on account of borrowed money. Where is the evidence of that loan? Did these men handle sums as large as \$400 and \$500 between them in the form of loans and payments without passing any receipts or making memoranda? A charge of fraud in a conveyance requires, on the part of the grantee, better evidence of payment of the consideration than Miller has produced as to said sum of \$427.50, and his failure to respond to the demand casts suspicion upon the entire transaction between the parties.

Another badge of fraud attendant upon this conveyance is the pains taken to have witnesses to transactions as to which none were necessary. For what purpose could Stuckey have been called as a witness to the alleged payment of \$250, other than that he might be able to say he saw the money actually put into Lamon's hands, and give it out in the neighborhood as the payment of the last dollar of the purchase money? Then, again, for some mysterious reason, Miller and Lamon so planned as to render it necessary for Col. Schley to go to the bank to identify Lamon. Did not the bank officials know Miller, its own customer? Col. Schley says he and Lamon left Miller at his office when they started to the bank. Why did they consult Schley and transact the business in his presence? The deed had been written by Stuckey, accepted, approved, and recorded several days before the checks were delivered at Schley's office, and there was nothing for him to perform but calculate the amount due. Was it necessary for a physician and an intelligent farmer of large business experience to employ an attorney for that purpose? They evidently went to him for no purpose other than to put him in a position that would enable them to make a witness of him. Having made him an innocent witness to their apparently honest transaction, Miller seems to have forgotten several material representations they made to him. "Wherever there appears to be connected with the transaction circumstances indicating excessive effort to give it the appearance of fairness or regularity, which are not usual attendants of such business, the courts will regard such circumstances as badges of fraud." *Hart v. Sandy*, 39 W. Va. 644. An attempt on the part of one accused of crime to manufacture evidence in his favor is an incriminating circumstance. This being true, it ought to weigh heavily against the parties to a conveyance attacked by creditors as fraudulent.

Other things casting strong suspicion upon the conduct of the parties to this conveyance, and pointing directly to a fraudulent purpose in it on the part of Miller, are disclosed by the record, but those already noticed are sufficient to show that the finding of the circuit court cannot be disturbed. Miller and

his sister, the wife of the grantor, took practically everything he had, leaving nothing for creditors. When such a transaction occurs between relatives, the fact that the grantor is immediately afterwards insolvent or without visible means to satisfy his debts is a badge of fraud. *Stauffer v. Kennedy*, 47 W. Va. 714, 719, 35 S. E. 892; *Reynold's Adm'r's v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *Herzog v. Weller*, 24 W. Va. 199; 14 Am. & Eng. Enc. Law (2d Ed.) 503.

An assignment of error is predicated upon the failure of the court to allow, as set-offs against the debt due the plaintiffs, two notes executed by Robert Lamon, their intestate, in favor of Chas. S. Lamon, one of which is for the sum of \$600, and dated June 15, 1887, and the other for \$300, and dated December 8, 1893. On or about June 15, 1894, Chas. S. Lamon assigned the \$600 note to J. M. Lamon, who says, in his deposition, it was assigned to him for the purpose of collection, for which he was to receive \$50, and that he did collect, out of the estate of Robert Lamon, \$69.99 of the amount due on it. He further says he exchanged for the note one previously executed by Chas. S. Lamon to himself for \$150, and one for \$450 contemporaneously executed by him to Chas. S. Lamon. While rather intimating that the transaction between him and Chas. S. Lamon as to this note was only a pretended transfer, he claims it, and appropriated to his own use what he collected on it. From what source the \$300 note is produced is not indicated by the record. After proof of Robert Lamon's signature, it was offered as evidence. As to the administrator of Chas. S. Lamon, the bill was taken for confessed, and no reference is made to these notes in any pleading, except the answer of Maria E. Janney, the widow of Chas. S. Lamon, and she fails to ask that they be set off against the debt asserted by the plaintiffs against the estate of her former husband. After denying any liability by reason of the indorsement of the John W. Lamon note, and of liability on any other account to the estate of Robert Lamon on the part of the estate of Chas. S. Lamon, she puts in the following averment concerning the notes: "On the contrary, respondent avers and says that at the time of the death of the said Chas. S. Lamon, and now, the said Robert Lamon was indebted to him, and that the estate of the said Robert Lamon is still indebted to him, on account of various transactions amounting at least to the sum of \$1,000, and some of which said indebtedness is evidenced by two notes of the said Robert Lamon, one for \$700 and the other for \$300, the latter dated December 8, 1893;" and, without making further allegations respecting the notes, prays to be dismissed, etc. If either of these notes belongs to the estate of Chas. S. Lamon, the legal title

thereto is held by the administrator, and not by Mrs. Janney, and he, if anybody, should have pleaded it as a set-off. It is an affirmative plea—a cross-action. Code 1899, c. 126, § 9; Kennedy v. Davison, 48 W. Va. 483, 33 S. E. 291; 4 Min. Inst. 787; Hogg's Pl. & Forms, § 259; Hudson v. Kline, 9 Grat. 882. A distributee of a decedent's estate cannot sue at law, and he can do so in equity only under peculiar circumstances, such as refusal or neglect of the administrator to sue, and then he must set forth in his bill the facts necessitating suit in equity by him. Tabb v. Cabell, 17 Grat. 160. Nothing of the kind appears in this answer. However, it is unnecessary to decide whether Mrs. Janney could have had the notes set off against the debt. She does not aver that she is a distributee and entitled to any or all of the decedent's estate, nor does she ask that the notes be set off against the debt. An answer claiming a set-off must contain the substantial requisites of a complaint. 19 Ency. Pl. & Fr. 763. Moreover, she does not appeal, and Miller did not claim any right to set-offs in the court below.

There is an error in the decree, however, which has not been complained of. It refers the cause to a commissioner for a settlement of the accounts of the administrator and of the estate of Chas. S. Lamon, deceased, and orders a convention of his creditors. It does not appear that there are any creditors other than the plaintiffs, and, if there be any, the court can give the plaintiffs all the relief they demand or are entitled to without bringing them in. The bill charges that the debtor in his lifetime fraudulently conveyed away all his property, both real and personal, and each creditor must follow it up and recover it, acquiring a lien upon it from the time of the bringing of his suit. The conveyance and transfers are good between the parties, and can only be avoided at the suit of creditors. It is not a suit to enforce a judgment lien, in which the law requires a convention of creditors. "In cases of this character, therefore, it is not proper to convene the husband's creditors, nor to rent the land." Snyder, J., in Core v. Cunningham, 27 W. Va. 206, 210, a suit to set aside a deed for fraud. As it is unnecessary when but a single creditor attacks the sale, and there are no conflicting claims of priority or other cause for a reference, the cost of a reference ought not to be inflicted upon the grantee, and it is not perceived that there is any ground upon which the plaintiffs or the court may call upon other creditors to attack the conveyance. It is optional with them to assent to it or let it stand. In such cases the law favors the active and diligent creditor, giving him preference over all who have not acquired judgments before the commencement of his suit, and, where there are no judgments, the creditor at large owes no duty to any other creditor of his class. Hence he need not bring them in, nor has he any right

to do so. However, this error is such as can be corrected in this court, and will not reverse the decree. It will be modified so as to dispense with the reference and convention of creditors, and, as so modified, it will be affirmed, and the cause remanded for further proceedings. As the appellant has not complained of this error, and it has not as yet wrought any injury to him, and does not enter into the real controversy presented on this appeal, costs will be awarded to the appellees as the parties substantially prevailing. Core v. Cunningham, 27 W. Va. 206; Linsey v. McGannon, 9 W. Va. 154.

The cause will be remanded, with directions to enter a decree subjecting the land to the payment of the debt due the plaintiff, and for sale thereof in default of payment.

(55 W. Va. 476)

WOODS v. COTTRELL, Justice, et al.

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

JUSTICE OF PEACE—JURISDICTION—SEIZURE OF
GAMING IMPLEMENTS—PROHIBITION—CON-
STITUTIONAL LAW—NUISANCE.

1. A justice who issues a warrant to arrest a party for keeping a slot machine as a gaming table, and to seize the same, and who, on hearing, requires the accused to give recognisance to appear before the criminal or circuit court to answer the charge, and orders the constable to turn over to the clerk of such court the slot machine to abide its order, is acting within his jurisdiction; and a writ of prohibition will not lie against him and the constable to restrain them from executing such order, nor against such clerk to prohibit his retaining the machine until such court act upon it.

2. Section 1, c. 151, Code 1899, in authorizing the seizure of gaming tables or instruments covered by it, is not unconstitutional, as depriving a person of property without due process of law.

3. When gaming tables are seized under a warrant from a justice under Code 1899, c. 151, § 1, the justice cannot order them to be burned. That can be done only upon conviction of their owner, upon the charge of keeping them, in a criminal or circuit court, and under its order.

4. Public nuisance—power to destroy things constituting it.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County; W. Gordon Mathews, Special Judge.

Proceedings by Gibby Woods against Joel Cottrell, justice, and others, for writ of prohibition. Judgment for defendants, and plaintiff brings error. Affirmed.

J. W. Kennedy, Cornwell & Cornwell, John H. Holt, John Bassel, and M. G. Sperry, for plaintiff in error. S. B. Avia, Pros. Atty., for defendants in error.

BRANNON, J. A justice of Kanawha county issued a warrant requiring the arrest of Gibby Woods, charging that he kept and exhibited "a gaming table, called an A. B. C. table, and E. O. table, and faro bank, and

¶ 2. See Constitutional Law, vol. 10, Cent. Dig. § 776.

keno table, and table of like kind, under the denomination of 'slot machine.'" The warrant required the constable to arrest Woods, and bring him before the justice to answer the charge, and also to seize the slot machine and any money staked and exhibited to allure persons to bet at such table or bank; and under it the constable arrested Woods and seized the slot machine, and upon hearing Woods was required to give bond for his appearance before the criminal court to answer the charge, and the slot machine was by the justice's order turned over to the clerk of the criminal court to await its action as to the machine. Two days after the justice's action Woods obtained from the circuit court a rule against the justice, the constable, and the clerk of the criminal court to appear and show cause why a writ of prohibition should not go to prohibit them from proceeding upon the said order of the justice, "and commanding them no further to hold said slot machine from said petitioner." Upon hearing the court discharged the rule, and Woods sued out a writ of error from this court.

At once the question thrusts itself upon us, does prohibition lie in this case? No one can question that a justice has jurisdiction to issue a warrant to begin a prosecution for keeping gaming tables under Code 1899, c. 151, § 1. Say that he erred in deciding that a slot machine is a table, an instrument of gaming, under that statute. It is only an error of judgment within the pale of a lawful jurisdiction. It is not a usurpation of jurisdiction, but mere erroneous decision in a case lawfully before him. The law commanded him to consider and decide whether or not keeping a slot machine was an offense under that statute. He did only what the law required of him—he decided that question. Prohibition lies only where there is "usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Code 1899, c. 110, § 1; *Haldeman v. Davis*, 28 W. Va. 324; *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. It was argued at the bar that the Code just cited says that the writ lies as "matter of right." So it does in those cases where it does lie, but those words do not define the cases where it lies, but were inserted only to say that in cases proper for the writ it should be demandable of right, instead of resting in the discretion of the court as before that enactment. For such error in mere judgment the law provides another remedy. *West v. Rawson*, 40 W. Va. 480, 21 S. E. 1019. If indicted, the criminal court, then the circuit court, then the Supreme Court—all in the due course of law; and this is another reason against prohibition. A bold proposition it is to say that, when a justice sends out a warrant for a criminal act for which the law gives him power to issue it, a prohibition lies, even where the act does not constitute an offense.

Can the question whether it is an offense be tested by prohibition? It is not a criminal writ. Can the usual criminal procedure be arrested and frustrated by this writ? Surely not. To so hold would palsy the vigor of criminal process. Everybody would be asking a prohibition when a warrant is sued out against him. We decline to set such a precedent, and decide the merits without regard to the question of the propriety of thus using the writ, and thus be understood as holding that prohibition can be so used, even though the parties consent, as we do not think that consent can give the writ a function not given it by law. See dissenting opinion in *State v. Godfrey*, 46 S. E. 185, 54 W. Va. —.

Another reason why the writ does not lie, so far as it seeks to restrain the action of the justice, is that he had already acted. When he sent Woods on to the criminal court, he was *functus officio*. The matter was that instant in the criminal court. "Prohibition does not lie to restrain an inferior court after the judgment has been given and fully executed." *Haldeman v. Davis*, 28 W. Va. 224.

Next, as to whether the writ can go to operate upon the constable and clerk. As to the constable: We are to presume that as the justice made his order on December 7th, and the petition for prohibition was not presented until December 9th, the constable had already lost custody of the slot machine. It does not appear to the reverse. Where, after judgment, prohibition is asked to restrain its execution, as may, under some circumstances, be done, it must appear that execution has not been done; but in this case it does not so appear. *City v. Beller*, 45 W. Va. 44, 30 S. E. 152; *Wilkinson v. Hoke*, 39 W. Va. 406, 19 S. E. 520; *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. 392. And the constable is not a judicial officer, nor is the clerk, and prohibition is only to judicial tribunals. As to clerk: The rule proposes that the writ shall command him "no further to hold said slot machine from the petitioner"; that is, that he surrender it to Woods. It can have no other significance. It would be worthless otherwise. This makes the writ an action of detinue—a function which it cannot perform. If the order of the justice were void (as it is not), or if that feature touching the machine were void, it could be so held in an action of detinue, which would be the proper process. Prohibition does not lie where other plain remedy exists. But, aside from the last consideration, the statute gives authority to seize, under the warrant of the justice, a gaming table or faro bank, and the power to burn it, and within this would be included the power to hold it as evidence in furtherance of the prosecution originating with the warrant, and to answer final judgment of its condemnation. Now, this seizure is thus under color of statute authority and jurisdiction; not without jurisdiction, not an excess or abuse of jurisdiction, but within

the very letter of the jurisdiction given by the statute. The arrest, holding the accused to answer in court, and seizure of the instrument, thus preventing its use in gaming until trial and judgment, all these are under color and justification of the authority or jurisdiction given by the statute. To sustain a jurisdiction wide enough to justify not only the issue of the warrant and hold the accused to answer an indictment, but also the seizure of the slot machine, is not to assert a power in the justice to burn the machine. We do not think he has that power. This warrant was issued under a statute which does not give the justice power to hear and determine final judgment. His only power is to determine whether there is probable cause to hold the party to answer in the trial court. We cannot cut his power into separate pieces, and say that, whilst he cannot try the guilt of the accused, and impose punishment, yet he can pass judgment that the machine be burned. We think that whether the machine shall be burned or released depends on whether the accused is guilty. If not guilty, he is not himself to be punished, neither is the machine to be burned; and as only the trial court can determine his guilt, so only it can condemn the machine to be burned. If the party is guilty, destruction of the machine follows the ascertainment of his guilt. If acquitted, judgment of restitution to him of his property follows. Though the thing be plainly an instrument of gaming under the statute, yet, if its owner be acquitted of using it for that purpose, it cannot be destroyed, as it is only instruments actually used and kept for gaming that are thus condemned to destruction.

It is argued that only after trial by a jury and conviction of the accused can the gaming table be seized. This cannot be so. It is designed to take from the accused the gaming instrument, and stop its use until trial. It goes along with the accused to share his fate.

It is argued that there is no authority to turn over to the court as evidence the slot machine, and that that part of the justice's order is an excess and abuse of his powers, and warrants prohibition, as the statute gives only power to burn. We have just said that the statute does not contemplate a burning by order of the justice, and this would justify the commitment of the slot machine to the custody of the criminal court to abide its order, so that it may have possession and execute its judgment of burning. The justice had jurisdiction under the statute to decide whether there was probable cause to charge the accused. Surely that cannot be doubted. It is plain, too, that he had power to retain the machine as evidence, and also to answer judgment of condemnation of it. The general law justifies not merely seizure of articles admissible as evidence, but even search of the person charged in order to get evidence. State necessity calls for it. 1 Bishop,

Crim. Proc. § 210; Hughes, Crim. Proc. § 8132. The above considerations, based on only section 1, c. 151, Code 1899, besides general law, to show that the justice had jurisdiction to seize and provide for the retention of the article, may be strongly supplemented by Code 1899, c. 155, allowing warrants to search premises to find gaming implements, as it gives power to the justice to issue search warrants, and allow seizure, and directs that the article be safely kept by direction of the justice to be used as evidence, and then, in some cases, burned. The law thus plainly gave the justice jurisdiction to do all he did in this case. *Boyd v. U. S.*, 110 U. S. 618, 6 Sup. Ct. 524, 29 L. Ed. 746, is a valuable case as to limit of right of search where it is illegal, or compels one to furnish evidence against himself. Thus we see clearly that the justice had jurisdiction. It is proposed to make the civil writ of prohibition review and reverse his action for supposed error, as if it were appellate process. Prohibition has no such office. *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. The case of *State v. Godfrey*, 46 S. E. 185, 54 W. Va. —, does not conflict with this case, because the town ordinance under which the warrant issued was void; there was no jurisdiction.

It is said that the statute, in authorizing the seizure and withholding of a gaming table, is a violation of the Constitution, as it takes property without due process. This argument goes upon the theory, in part at least, that it is the justice who commands the burning of the gaming table. It may be that, if such were the construction of the statute, trial before the justice would be due process. *Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91. But we hold that it is only the trial court, after conviction, that can order such burning, and it cannot be intimated that this is not due process. It cannot be maintained that the clause of the statute authorizing the seizure and burning a gaming table is unconstitutional. Mere gaming is not, at common law, an offense, but only by statute; but keeping a gaming house is a public nuisance by common law. 14 Am. & Eng. Ency. L. (2d Ed.) 686; 1 Wood on Nuisance, § 45. It is law very ancient that upon an indictment for maintaining a public nuisance not only may the offender be punished, but the nuisance may be abated as part of the judgment, and the thing with which the nuisance is done may be destroyed. 1 Am. & Eng. Ency. L. (2d Ed.) 78; 2 Wood on Nuisance, § 364. This is a governmental power, existing under that vast power called the "police power." It is coeval with government. Under it all criminal law finds its warrant. 1 McClain, Crim. L. § 23. We cannot believe that it was the design of the state Constitution or of the fourteenth amendment to the national Constitution, in declaring that no one shall be deprived of property without due process of law, to enervate and emasculate

late government of powers so essential and deeply rooted in the social fabric long before the adoption of American Constitutions. They effect no repeal of such inherent common-law powers. In *re Converse*, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 233, 43 L. R. A. 727; 25 Am. & Eng. Ency. L. (2d Ed.) 146. So the established law of public nuisance and remedy will warrant the seizure and detention and custody of the machine by the criminal court as evidence, and to execute its judgment. In fact, this confiscation of the table is a part of the punishment, just as are the fine and imprisonment. Of course, the Constitutions do not debar the Legislature from fixing punishment. Bishop, Stat. Crimes, § 993. The old common law confiscated the felon's property. That general forfeiture of the common law, as a mere sequence of conviction, cannot be enacted in this state because of our Bill of Rights saying, "No conviction shall work corruption of blood or forfeiture of estate." This abolished power to declare a forfeiture as a legal consequence of conviction; but it does not inhibit a provision like that in the gaming act, forfeiting the particular thing working the mischief, the instrument of the nuisance or offense. The Legislature may divest property in that particular thing. "Forfeitures of specific articles . . . are a species of fine, resting on the same principles as a sentence to pay a sum of money. We have no general practice of imposing this sort of forfeiture, but it is sometimes done under the direction of a statute." Bishop's New Cr. L. § 944. The Legislature may determine when that which is otherwise property shall cease to be such if kept against law. It is subject to police power. *Train v. Boston Co. (Mass.)* 59 Am. Rep. 113; *State v. Lewis (Ind.)* 33 N. E. 1024, 20 L. R. A. 52; *People v. Budd (N. Y.)* 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460. In *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, a state act authorizing private individuals and certain officers to destroy fish nets was held lawful exercise of police power, and not to deprive persons of property without due process. In some states are statutes confiscating intoxicating liquors kept for sale contrary to law, and authorizing their seizure. In *Fisher v. McGirr (Mass.)* 61 Am. Dec. 381, it is held that "the Legislature may declare possession of certain property to be unlawful, where such property would be dangerous, injurious, or noxious, and may be due process of law, by proceeding in rem, provided for the abatement of the nuisance, and the punishment of the offender, by the seizure and confiscations of the property, by the removal, sale, or destruction of the noxious articles." The Supreme Court has held in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, that "the destruction, in the exercise of the police power of the state, of property used in violation of law in main-

taining a public nuisance, is not taking of property for public use, and does not deprive the owner of it without due process of law." It held that the state had constitutional power to declare any place kept for illegal manufacture or sale of liquors a public nuisance, and abate it, and at the same time provide for the trial of the offender. An Iowa statute provided that, if the existence of a nuisance is established by trial, it should be abated by the judgment by seizing and destroying the liquor, and that the fixtures and furniture used on the premises for manufacture or sale of liquor should be removed and sold. It was argued that the seizure and destruction of the liquor and removal and sale of the fixtures was contrary to the fourteenth amendment; that this could not be done by legislative enactment, whereas this legislation forfeited the property; that forfeiture must be by action against the thing; and that in a criminal prosecution the property is not involved, as is contended in this case, and that the defendant was entitled to his day in court upon the forfeiture of the property. The court said—what we say—that property cannot be forfeited by a legislative act, but only by judgment of a court, after notice, that the statute did not forfeit property by legislative enactments, but, as in many other instances, authorizes the courts, in cases where it has been established on judicial investigation that the property is such or has been so used as to be a nuisance, to abate it by destroying and selling the property. It said that in actions wherein the existence of the nuisance is established under the law in question the action is against the thing—the place—as well as against the person. In either case the question is whether the place was a nuisance, and, if so, whether the person was engaged in keeping it. The court said that, as the proceeding is against person and thing both, the person has due notice, and his day in court to defend against forfeiture, as also to defend himself. Just so in this case. *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. 606. Where one has his day in court, and regular trial, that is due process. *Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91. Such anti-liquor laws forfeiting property have been frequently sustained. *Black on Intox. Liquors*, § 54; *Preston v. Drew (Me.)* 54 Am. Dec. 639; Bishop on Stat. Crimes, §§ 993, 994. We conclude that the statute in question is valid both as to the person proceeded against and the implements used for gaming.

The question whether a slot machine is an instrument of gaming within the meaning of section 1, c. 151, Code 1899, was fully and ably argued orally and in briefs, and this court is as well prepared to decide it now as it likely ever will be, though strictly it is not proper to decide it, as prohibition does not lie. As it was stated in argument that indictments are pending in some counties against persons for keeping slot machines,

and that those using them want to know whether they are violating the law or not, some of the members of the court favor expressing our opinion upon it; but, some members objecting, we do not consider the question in this opinion.

We affirm the judgment discharging the rule.

(55 W. Va. 529)

POLING v. CONDON-LANE BOOM & LUMBER CO. et al.

(Supreme Court of Appeals of West Virginia. April 1, 1904.)

**CONTRACT—ASSIGNMENT—CONSTRUCTION—
APPEAL—REVIEW—OBJECTIONS TO
EVIDENCE.**

1. A contract in which the *delectus personae* is material, as where a person agrees to use his personal skill and knowledge, or has been contracted with by reason of the trust and confidence placed in him, cannot be assigned by such person, while the agreement remains executory, without the consent of the other contracting party; but a contract in which the *delectus personae* is not material, and which is for services that may be as well performed by one person as another, is assignable, unless the assignment thereof be prohibited by the terms of the contract. *Held*, the contract in this case is assignable.

2. If a contract, other than a money demand, specifies no time within which performance is to take place, the promisor is allowed such time for performance as is reasonable, taking into consideration the subject-matter of the contract.

3. A decree of the circuit court confirming the report of its commissioner will not be disturbed on appeal unless plainly wrong. *McCrum v. Stone*, 14 S. E. 989, 36 W. Va. 649.

4. Point 4 in syllabus of *Bank v. Prager & Son*, 41 S. E. 363, 50 W. Va. 660, approved and applied.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by J. E. Poling, trustee, against the Condon-Lane Boom & Lumber Company and others. Decree for plaintiff, and the above-named defendant appeals. Affirmed.

C. W. Dalley, for appellant. F. M. Reynolds and J. P. Scott, for appellee.

MILLER, J. The appellant, Condon-Lane Boom & Lumber Company, and defendant George Pyle made a contract for the sale and delivery of saw logs, contained in the following letters: "Bretz, W. Va., July 20, 1892. Mr. George Pyle, Hendricks, W. Va.—Dear Sir: We will buy your logs on Laurel Fork of the Cheat River, to be put in Laurel Fork not more than fifteen miles from its mouth, and to be driven into the Dry Fork of the Cheat River. We to furnish a scaler, who will be satisfactory to both parties; you to pay 50 cts. per day and board the scaler, and we to pay the balance of his salary. We will advance you One Dollar (\$1.00) per M. ft. when the logs are scaled and branded, balance when they are driven into the Dry

Fork. If you put in a good splash dam to insure the logs coming to Dry Fork, we will advance one dollar additional when put in Laurel Fork. We will pay the balance when the timber is in the Dry Fork at or below the Laurel Fork. All logs to be scaled by Doyle's Rule and to be straight and sound scale. * * * These prices to hold good for one year from date, and is subject to your acceptance agreeing to sell all timber you cut during the next twelve months, at the foregoing prices; otherwise we are not bound by this letter." To which Pyle replied: "Hulings, W. Va., July 27, 1892. Condon-Lane Boom & Lumber Co., Bretz, W. Va.—Gentlemen: I accept your proposition as conveyed in your letter of the 20th inst., with these provisos:—that you are not to buy any logs on Laurel Fork, except those engaged by Mr. S. R. Blackman, for the period of one year from date; and I further agree not to cut any 'Pulp' wood for the period of one year from date." To this letter, appellant made answer: "Bretz, W. Va., July 27, 1892. Mr. Geo. Pyle, Hulings, W. Va.—Dear Sir: Your favor of even date received, and in reply we agree not to buy any timber for one year on Laurel Fork, except what has been engaged by Mr. S. R. Blackman, with the understanding that you cut no 'Pulp' wood during the same time." These letters constitute a binding contract between said parties. On the 17th day of October, 1893, said Pyle made a general assignment by deed of trust, bearing date on that day, properly acknowledged, and duly admitted to record in Tucker county, by which he "granted, sold, released, assigned, transferred and set over to J. E. Poling, trustee, his lands, goods, and chattels, and choses in action of every name, nature, and description, * * * more particularly enumerated and described in the schedule annexed thereto, marked No. 9, to have and to hold the same unto the said Poling, in trust, nevertheless, to sell and dispose of the said personal estate, to collect the said choses in action, and dispose of the proceeds of said contract and property in the manner following, to wit: First to pay all such debts as by the laws of West Virginia, as are entitled to preference in such cases. Second to pay and discharge all the reasonable expenses cost and charges of putting in the logs cut on the Eugene Hedrick lands and for driving the same and all other logs out of Laurel Fork, by reason of the contract, between said party of the first part, and the Condon-Lane Boom & Lumber Co. and all reasonable expenses in complying with said contract that is to say put in timber, cut and driving same as required by said contract, and all cost of carrying into effect the trust hereby created including the lawful commissions, of the party of the second part, for his services in executing the said trust. Third to distribute and pay the remainder of said proceeds to the creditors of the said party of the first

part, for all debts and liabilities, which he may owe, or for which he may lawfully be held responsible to any person whomsoever, provided that should the proceeds arising from the sale of his 'assets' or by reason of said contract not being sufficient to pay all his indebtedness then said debts are to be paid ratably and in proportion." The schedule referred to above is in the words and figures following: "One team horses and harness complete, all camp equipments on Laurel Fork, in Randolph Co. consisting of bedding cant hooks saws axes and every thing belonging to me at said camp or in said county, all money due said Geo. Pyle, from the Condon-Lane Boom & Lumber Co. by virtue of a contract between him and said Co. all that is now due and to become due by virtue of said contract and all other property not included."

At the October rules, 1899, said J. E. Poling, trustee, filed his bill in the clerk's office of the circuit court of Tucker county against appellant, the Condon-Lane Boom & Lumber Company, George Pyle, the Hendricks Company, Limited, and L. W. James. He alleges therein the making of said contract by and between appellant company and Pyle for the sale and delivery of saw logs; the execution of said assignment; that said Pyle had completed, or nearly completed, the said contract between himself and the said Condon-Lane Boom & Lumber Company, at the date of said assignment; and that, after the said assignment was made, Poling, as trustee in said assignment, went on and completed the contract in every respect, as he had a right to do under said assignment, so that the full amount of plaintiff's claim, which he alleges to be \$8,111.28, was due and owing to him, as assignee of Pyle, from said last-mentioned company. The bill further alleges that in May, 1895, plaintiff had instituted a chancery suit in said court against said Pyle, the Condon-Lane Boom & Lumber Company, L. W. James, the Hendricks Company, Limited, and others (naming them), the object of which suit was to have audited and adjudicated the claims against said Pyle, secured by said deed of trust, to have the instruction of the court to the trustee as to the disbursement of the funds in his hands as trustee under said deed of assignment, and to fix and adjudicate the rights of all the parties in interest; that the said last-mentioned cause was referred to a commissioner to convene the creditors of Pyle, to ascertain the assets conveyed by said deed of trust to the trustee therein, and for other purposes, and that the commissioner reported, among other things, that said boom and lumber company was due on its said contract with Pyle the sum of \$8,111.28, but it is shown by a copy of the summons, and of the return of the attempted service thereof on appellant, that no valid service was had upon, and it is agreed that no appearance of any kind was made by, it in said last-mentioned cause. Therefore the proceedings

therein are void and of no binding effect upon appellant. Plaintiff, Poling, also alleges that at the February rules, 1896, an action at law was instituted in said circuit court by him, as trustee, against said boom and lumber company, for the recovery of \$10,248.11, as the amount due from it upon the said logging contract made by it with Pyle as aforesaid, which action is still pending; that said defendant L. W. James some time in 1896 instituted a suit in chancery in said court against the said boom and lumber company, the Hendricks Company, Limited, J. E. Poling, trustee, and George Pyle, setting up a claim to \$3,500 of the money due from said boom and lumber company to Pyle under said logging contract, by virtue of an order for \$3,500 drawn by Pyle on said boom and lumber company in favor of James, dated March 20, 1893, which has not been paid; that said James, in his said bill, admitted his indebtedness to the said Hendricks Company to the amount of \$425, with proper interest thereon, and that, to secure said \$425, he (James) had assigned to said Hendricks Company the said \$3,500 order as collateral security; that said order was then in the possession of said Hendricks Company; and that said last-mentioned cause is still pending. Plaintiff charges that said boom and lumber company is liable to him, as trustee, for the sum of \$8,111.28, with interest from the 1st day of January, 1894, and he submits to the court for its adjudication the several questions arising in this cause as to the disposition of the fund to be paid to the plaintiff, as such trustee, when recovered from said boom and lumber company, and as to the respective rights of said Hendricks Company and L. W. James in the said order given to James by Pyle as aforesaid. Plaintiff prays the court to enter a decree in the cause requiring said boom and lumber company to pay to him, as trustee, said sum of \$8,111.28, with interest as aforesaid, as the balance due from it on said logging contract made by it with Pyle as aforesaid; that the rights of said several parties as to the \$3,500 order be ascertained and determined; and for general relief.

The defendant boom and lumber company tendered its demurrer, and also filed its answer to said bill. The demurrer says that the bill is insufficient, first, because it shows no liability for any sum of money on the part of this defendant to the plaintiff; second, because the assignment executed by the defendant George Pyle to the plaintiff does not purport to assign any sum of money which might have been due from this defendant to the said George Pyle at the time of the execution of said assignment; third, because the plaintiff's bill is based upon the carrying out by the plaintiff of the contract set up in the bill between this defendant and George Pyle, while the said Pyle's assignment does not purport to confer such power upon the plaintiff, and could not have conferred such power, even had it purported to do so.

On the 30th day of August, 1901, the cause was heard by the court upon the papers theretofore read; former orders and decrees; upon the demurrer of the defendant said boom and lumber company; upon its amended answer, and the answer of defendant L. W. James, with general replications thereto, and the special reply in writing by said boom and lumber company to said answer of James; the depositions taken and filed on behalf of both the plaintiff and said last-mentioned company; and upon all of the exhibits filed in said cause. Whereupon the said demurrer was overruled, and the cause was referred to Jeff Lipscomb, one of the commissioners of the court, to ascertain and report upon 11 different questions, which may be all condensed into, and are in substance, an inquiry of what, if anything, is due from the said boom and lumber company to the plaintiff upon the matters alleged in the bill. Under this order of reference the said commissioner made up and submitted on the 1st day of March, 1902, a voluminous statement and report, finding, as his general conclusion, that the said boom and lumber company is indebted on said contract made with Pyle as aforesaid in the sum of \$8,486.00 principal, with interest thereon from July 15, 1898, to March 5, 1902, \$1,992.15, making in the aggregate \$8,458.24 as the amount due on the day and year last aforesaid. The plaintiff filed exceptions in writing to said report, because the commissioner had allowed therein two credits to said boom and lumber company—one for \$319.42, and the other for \$125. The appellant Condon-Lane Boom & Lumber Company also filed 13 specific exceptions to so many parts thereof, and a fourteenth to the report as a whole.

On the 28th day of August, 1902, the cause was again heard upon the papers formerly read, former orders and decrees, the said report of Commissioner Lipscomb, and upon the exceptions thereto filed by both plaintiff and appellant as aforesaid. On consideration whereof the court overruled each and every one of said exceptions, confirmed said report in accordance with the findings of said commissioner as to the amount due the plaintiff, J. E. Poling, trustee, on account of the matters set up in his bill, and adjudged, ordered, and decreed that the plaintiff, J. E. Poling, trustee, should recover from the defendant said boom and lumber company \$8,458.24, with interest thereon from the 5th day of March, 1902, until paid, and his costs by him about his said suit expended. From this decree said boom and lumber company was allowed an appeal. It assigns various errors, among which is the overruling of said demurrer, and refusal of the court to sustain its said exceptions to the commissioner's report.

It is not contended that the court did not have jurisdiction of the general subject-matter of the suit. It is plain that the court had such jurisdiction. To that extent, at least, the demurrer was properly overruled. In support of its demurrer, appellant's counsel

cite Clark on Contracts, p. 525, where it is stated: "It is the settled rule, subject to exceptions which are apparent rather than real, that a person cannot assign his liabilities under a contract, or, to put the matter from the point of view of the other party to the contract, a person cannot be compelled to accept performance of the contract from a person who was not originally a party to it. The reason for the rule lies not only in the right of a person to know to whom he is to look for the satisfaction of his rights under a contract, but, more particularly, in his right to the benefit which he contemplates from the character, credit, and substance of the person with whom he has contracted. The exceptions to this rule are apparent, rather than real. As stated in the black-letter text, a person may assign the liabilities imposed upon him by a contract which he has made if the other party to the contract consents. This, however, as we shall see, is, in effect, a new contract. It is a rescission by agreement of the old contract, and the substitution of a new one, in which the same acts are to be performed by different parties. Another apparent exception is in this, namely, that if a person undertakes to do work for another which requires no special skill and he has not been selected for the work with reference to any personal qualifications, he may have the work done by some equally competent third person. This, however, is not an assignment of his liabilities, for he does not cease to be liable if the work is not done in accordance with the contract." *Id.* 525. *Smelting Co. v. Mining Co.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, is also cited. At pages 387, 388, 127 U. S., and page 1309, 8 Sup. Ct., 32 L. Ed. 246, Mr. Justice Gray, delivering the opinion of the court, says: "At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305 [93 Am. Dec. 93]; *Boston Ice Co. v. Potter*, 123 Mass. 28 [25 Am. Rep. 9]; *King v. Batterson*, 18 R. I. 117, 120 [43 Am. Rep. 13]; *Lansden v. McCarthy*, 45 Mo. 106. * * * 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such that the party whose agreement conferred these

rights must have intended them to be exercised only by him in whom he actually cided."

The plaintiff contends that the contract in question was and is assignable, and supports his contention by the citation of numerous authorities. 2 Am. & Eng. Enc. Law (2d Ed.) 1035, says: "As a general rule, in all cases where a contract is executory in its nature, and an executor or administrator would succeed to the rights and liabilities of a deceased party to the contract, the contract is assignable. * * * A contract in which the *delectus personæ* is not material, and is an agreement for services which may be as well performed by one person as another, is assignable." Contracts in which the *delectus personæ* is material, as where a person agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed in him, cannot be assigned by such person while the agreement remains executory, without the consent of the other contracting party. When the assignment of a contract is made, its obligations will still rest upon the assignor, who, in case of default on the part of his assignee, must respond to the other party to the contract. 2 Am. & Eng. Enc. Law (2d Ed.) 1036. It will be observed that Pyle assigned and transferred to Poling, trustee, among other things, "all money due said Geo. Pyle, from the Condon-Lane Boom and Lumber Co. by virtue of a contract between him and said Co. all that is now due and to become due by virtue of said contract and all other property not included." No personal confidence or peculiar skill on the part of Pyle seems to have been contemplated or contracted for by said company in this instance. We find no reason or authority for saying that the contract in question is not assignable, and could not be assigned to Poling, trustee, by Pyle, as alleged. We fail to see how appellant could be prejudiced by an assignment of the contract to Poling. It was required to pay no money until certain work was done, according to the very terms of the contract.

Appellant insists that the bill shows no liability from it to the plaintiff. This involves a construction of the contract. Appellant bought the saw logs from Pyle. No limit as to number or quantity is named. They were to be scaled by a scaler furnished by the company, who would be satisfactory to both parties. When scaled and branded, \$1 per thousand feet was to be advanced by the company to Pyle. The logs were then to be put into Laurel Fork, not more than 15 miles from its mouth, and to be driven into said Dry Fork. The balance of the purchase price was to be paid when the logs were driven into said Dry Fork, but no time is fixed for the completion of that work. In order to expedite the driving of the logs, appellant proposed to pay Pyle an additional dollar on each thousand feet when he should put the logs into Laurel Fork, provided Pyle

would put a good splash dam in Laurel Fork, to insure the coming of the logs into Dry Fork. The balance, in either event, was to be paid when the timber was in the Dry Fork at or below Laurel Fork (meaning at the mouth of Laurel Fork). Certain prices are named. It is then stated: "These prices to hold good for one year from date (July 20, 1892), and is subject to your acceptance, agreeing to sell all timber you cut during the next twelve months, at the foregoing prices, otherwise we are not bound by this letter." Recurring to the bill, it is alleged therein that Pyle, at the time of the assignment thereof by him, had completed, or nearly completed, the contract between himself and appellant company, meaning the logging contract hereinbefore set out, and that, after the said assignment was made, the plaintiff, as trustee in said assignment, went on and completed said contract in every respect. We think the allegations of the bill are sufficient, and that the demurrer thereto was properly overruled.

It will be observed that the contract fixes no time limit for the scaling, branding, or delivery of the logs. Certain advances were to be made to Pyle when they were scaled and branded. An additional advance was to be made when they were put into Laurel Fork, provided a good splash dam had then been built by Pyle to insure the coming of the logs into Dry Fork; i. e., to insure the speedy delivery of the logs at the place appointed therefor. No certain time could have been fixed for the delivery of the logs in Dry Fork, as that work depended upon the uncertainty of water, and the presence of ice in Laurel Fork, a swift mountain stream, down which the logs could be drifted only on a high stage of water therein. The parties were acquainted with the country and its physical conditions. It is therefore but fair to say that they contemplated and fully considered all of those contingencies when the agreement in controversy was made. Pyle sold, and the company bought of him, all of the timber which he might cut, during the next 12 months, at the prices named in the contract. He therefore had a right to cut timber during the entire period, and to be paid therefor the price fixed as aforesaid, upon compliance by him with the conditions specified in the contract; but it would have been an impossibility for him to have had all of the timber cut within that time by him scaled, branded, and delivered in Dry Fork, a distance from the place of scaling and branding of about 15 miles, within the said period. The offer of the company to pay to Pyle an additional dollar on each thousand feet, when the logs were put into Laurel Fork, provided he would build the splash dam, is evidence of the desire of the company that the logs should be delivered in Dry Fork as speedily as possible, and that the freshets which might occur in Laurel Fork should be fully utilized for that purpose.

If a contract other than a money demand

specifies no time within which performance is to take place, the promisor is allowed such time for performance as is reasonable, taking into consideration the subject-matter of the contract. *Hammon on Contracts*, § 444; *Boyd & Co. v. Gunnison & Co.*, 14 W. Va. 1; *Clark on Contracts*, § 251.

Chapter 119 of the Acts of 1882, Appendix to Code of 1899, provides for the adoption of trade-marks by timber dealers. Section 6 declares that "when timber is purchased by the proprietor of any such trade-mark, and the said trade-mark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties." Section 8 further provides that "in any action, suit or contest in which the title to any timber upon which any such trade-mark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trade-mark in the absence of satisfactory proof to the contrary." It is proved that the trade-mark or timber brand of the Condon-Lane Boom & Lumber Company was Z; that said Z brand was adopted by the company as its trade-mark in 1892; that all of the logs cut by Pyle on Laurel Fork under said contract were scaled and branded for the company with said trade-mark or timber brand by one J. F. Gillispie, who was employed by the company for that purpose, with the assent of Pyle; that Gillispie commenced scaling and branding the logs in 1892, and finished the work in January, 1894; and that, as the logs were scaled and branded by him, they were put into Laurel Fork at a point from 10½ to 15 miles from its mouth. For this work the company paid to Gillispie all except \$5 of the portion of the expense thereof which by its agreement with Pyle it was to pay. As soon as the logs were scaled and branded by the scaler agreed upon by the parties, the title to the logs passed to, and was vested in, the vendee company. The seller, Pyle, was then entitled thereon to \$1 per thousand feet; and the vendee was then entitled to a delivery thereof at the place specified in the contract before making any further payment, except the \$1 per thousand, contingent on the putting in by Pyle of a good splash dam as aforesaid. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685; 3 Min. Inst. 98; *Morgan v. King*, 28 W. Va. 1, 57 Am. Rep. 683; *Chapman v. Campbell*, 13 Gratt. 105.

Appellant, in its answer filed, avers, among other things, that whatever contract was made by it with Pyle, if any, by reason of the letters set out in the plaintiff's bill, had expired, by reason of the very limitation shown on the face of said letters, long before the date of the assignment, and that, in addition to said expiration, the said George Pyle announced that he could not carry out

said contract, and expressly surrendered the same, and any rights he had thereunder, before the execution of his assignment. As will be observed, the only express limitations therein upon Pyle, as to time, are that he will sell to the company all timber cut by him during the next 12 months from July 20, 1892, at the prices named. There is neither allegation nor evidence in the record that Pyle sold any timber cut by him during that year to any person except appellant.

As to the alleged surrender of the contract by Pyle, it is claimed that during the latter part of September, 1893, L. W. James sued out an attachment against Pyle for a large sum of money; that soon thereafter Pyle went to Philadelphia to get money from the aforesaid boom and lumber company to pay off this claim, but did not get it. Pyle says that, during his interview with the representatives of the company about the matter, he handed the papers then in his possession, constituting the contract, to R. F. Whitmer, in the office of the company, for examination; that when he left the office the papers were forgotten by him; and that afterwards Whitmer promised to send them to him, which was never done. On the other hand, the company produced two witnesses who swear, in substance, that about the 28th day of September, 1893, Pyle came to the office of the company in Philadelphia, and said he was in trouble; that an attachment had issued against him, and that he could not and would not carry out his contract; that he wanted to give it up; and that he then voluntarily gave it up to Mr. Lane. This evidence is in turn denied by Pyle, who further testifies that Whitmer told him that they could not pay him any money, because they had heard by telegram about the attachment, and that everything was attached and tied up. There are many more conflicting and contradictory statements in the testimony about this matter. Nothing was paid to Pyle by the company for the alleged surrender of the contract. It is proved that, soon after the making of the contract, Pyle commenced to cut and put in the logs under it; that at the time he was in Philadelphia all the logs had been cut; that a large part of them had then been scaled, branded, and put into Laurel Fork, and driven into Dry Fork; that about two-thirds of the logs had been put into Laurel Fork, and about one-half thereof had been driven into Dry Fork, when Pyle made his assignment. It appears that when Pyle was in Philadelphia, and also at the time he made his assignment, a considerable sum of money was due him from the company.

It has been held that the delivery of a note by the holder to the maker, with intent thereby to discharge the debt, discharges the debt. *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265, and cases there cited. Shortly before the time of the alleged surrender of the contract by Pyle, James had sued out an attachment against, and had caused the

same to be levied upon, the property of Pyle, for a large sum, afterwards fixed at \$3,500 by an award of arbitrators, which was entered as the judgment of the court. The rights of other creditors had also intervened; Pyle being then insolvent, as is shown by the record, although that question is not raised. Upon the facts and circumstances disclosed, it does not seem reasonable that Pyle went to Philadelphia with intent to voluntarily and gratuitously surrender, and that he did voluntarily surrender, his said contract, and relinquish his right to the money then due and to become due thereunder, as is claimed by the company. He could have done this by letter to the company inclosing the contract. The commissioner found against the contention of the appellant upon this question, and the circuit court approved and confirmed his finding. A finding of facts by a commissioner, confirmed by the circuit court, is viewed by the appellate court with peculiar respect, and such finding will not be disturbed unless plainly erroneous. *Carter v. Gill*, 47 W. Va. 504, 35 S. E. 828; *Keneweg v. Schlansky*, 47 W. Va. 287, 34 S. E. 773. We cannot disturb the decree of the circuit court for that reason.

The company wrote and caused to be sent to Poling the following letter, the receipt of which he acknowledged by a reply on the 26th day of February, 1894:

"Feb. 22nd, '94.

"J. E. Poling, Esq., Hendricks, W. Va.—
Dear Sir: There has been sent in to us a bill for logs scaled during 1894. We fail to recognize the bill, as we have no knowledge of our buying these logs, and therefore will not accept any responsibility in regard to same.

"We presume these are the logs you spoke to Mr. Whitmer about when at Hendricks, when he distinctly states to you that the Company would in no manner, shape or form purchase any more logs other than what they had purchased, as they were compelled to put their money into the railroad. These logs you put into the river at your own risk and we will in no wise be responsible for same. Yours very truly, [Signed] Condon-Lane Boom & Lumber Co."

Appellant strenuously contends that by this letter it refused to receive any logs under the said contract; that, even if Pyle had the power to assign the contract to Poling, with right to Poling to carry out the provisions thereof, Poling had no right, after his receipt of the letter, to attempt to deliver the logs to the company, by floating them into Dry Fork, but that he should have proceeded in such a way as to suffer as little damage as possible, and then have sued the company for its breach of the contract. "If, during the performance of a contract, or after the time for performance arrives, one of the parties, by work or act, openly and clearly refuses to perform his promise, in whole or in part, the other party is thereupon exonerated from performing his part of the contract, and is at once entitled to bring ac-

tion. Thus, if a man order goods to be manufactured for him, and afterwards, and before all the goods have been made and delivered, refuses without cause to keep his promise, the seller may recover the damage thereby sustained, without making or tendering the rest of the goods. * * * To constitute a breach by renunciation, the repudiation of the contract must be unequivocal and absolute. A mere assertion that the party will be unable to fulfill his promise, or that he intends in the future to refuse to perform it, is insufficient. There must be, in substance, an avowed determination not to abide by the contract. The renunciation must deal with the entire performance to which the contract binds the promisor, else it does not discharge the promisee. * * * The innocent party may, if he wishes, keep the contract alive for certain purposes, in spite of the other's renunciation of it, provided, always, that he must do nothing to increase the damages otherwise recoverable. In order that a mere notice of an intention not to perform may constitute a breach, the other party must act upon it. If the innocent party will not accept the other's renunciation, and continues to insist upon performance, the contract remains in existence for the benefit, and at the risk, of both parties." *Hammon on Contracts*, §§ 454, 456; *Davis v. Bronson* (N. D.) 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 791, 797. This letter is not a repudiation or renunciation of the contract. The language, "We presume these are the logs you spoke to Mr. Whitmer about, when at Hendricks, when he distinctly stated to you that the company would in no manner, shape or form purchase any more logs, other than what they had purchased, as they were compelled to put their money into the railroad," is not such renunciation or repudiation of the contract as falls within the rule of law sought to be invoked by appellant.

The evidence shows that the last lot of the Pyle logs was scaled and branded by Gillisple in January, 1894, and that the measurement thereof amounted to 546,203 feet. All the other logs were scaled and branded during the years 1892 and 1893. The monthly statements of the logs scaled, branded, and put into Laurel Fork are, for the months of August, October, November, and December, 1892, for January, March, April, and December, 1893, and for January, 1894. It also appears that the company paid to Pyle thereon as follows:

1892. Sept.	\$ 132 07
" Nov.	221 97
" Dec.	105 00
1893. Jan.	300 00
" Feb.	615 28
" Mar.	480 45
" April. To Hendricks Co.	319 42
" May	547 60
" Sept.	125 00
Total	\$2,948 94

It is further shown that no logs were cut by Pyle after the expiration of 12 months from the date of the contract; that no logs

were cut by either Pyle or Poling after the assignment of the contract by Pyle to Poling; that, after a part of the logs were driven out of Laurel Fork, Wilson, the head sawyer on the company's mill, examined and made an estimate of the logs yet in the stream; that after the assignment Mr. Whitmer, whose name is signed to a letter dated January 11, 1894, as general manager of the company, told Pyle to go on and put the logs in the stream. Whitmer also testifies that he knew that logs were put into the stream after Pyle was in Philadelphia in September, 1893. It is further shown that the company made no objection to the scaling, branding, or placing of the logs in the stream as aforesaid. J. F. Gillisple, the scaler selected by appellant, testifies that he scaled and branded 2,271,673 feet of logs, which amounted, at the prices named, to \$10,248.11; that monthly statements of the timber scaled and branded by him were furnished to the company as it was put into the stream; that these logs were driven out of Laurel Fork into Dry Fork; that part of them came down Dry Fork to the said boom and lumber company's dam; that some of them were sawed on the company's mill at Bretz, some went on down the river, and some were taken out of Dry Fork and sawed into pulp wood by the company; that he saw all of these logs put into Laurel Fork; that he made it his business to see that they were properly put in and branded; that the last of the logs were branded and put into Laurel Fork in January, 1894; that George Pyle had charge of the work of driving the logs into Dry Fork, so far as he knew; and that he saw a good many of the logs driven into Dry Fork. It is also shown that 1,674,264 feet of the logs were put into Laurel Fork before the assignment, and that about one-half of the whole amount, by estimation, had been driven into Dry Fork within one year from the date of the contract. It is not contended that proper diligence was not used in the prosecution of the work, either before or after the assignment, or that the assignment of itself occasioned loss or damage to appellant. It appears that Pyle had charge of most of the work of drifting after the assignment. No error of calculation in said report of the commissioner is claimed. The exceptions are based mainly on the alleged insufficiency of the evidence to support the several findings therein.

It is also insisted as error that the circuit court did not pass upon the exceptions made and filed by appellant to plaintiff's depositions. It does not appear by the record that the court sustained or overruled said exceptions. We cannot say what, if any, weight the court gave to the evidence so excepted to. We do say, however, that there is sufficient legal evidence in the cause to justify the general finding of the commissioner, and the decree of the court thereon. It must be presumed that the court considered only le-

gal and proper evidence. *Bank v. Prager & Son et al.*, 50 W. Va. 660, 41 S. E. 363. "The decree of the circuit court confirming the report of its commissioner will not be disturbed on appeal unless plainly wrong." *Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989.

Applying the oft-repeated rule of this court above stated, the decree of the circuit court complained of must be affirmed, and the cause remanded to the circuit court of Tucker county, that a final determination may be had of the remaining questions in the cause, or of such of them as may be deemed proper.

(55 W. Va. 472)

DUDLEY v. STATE.

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

INDICTMENT—ORDER OF DISMISSAL—DISCHARGE OF ACCUSED.

1. An order retiring an indictment for felony from the trial docket of a court is equivalent to the dismissal thereof, and the same may not thereafter, on motion of the state, be restored to the docket for trial.

2. If an indictment has been improperly placed on the trial docket, and the accused has been arrested on a capias to answer the same, he may be discharged therefrom on a writ of habeas corpus.

(Syllabus by the Court.)

Error to Circuit Court, Cabell County; E. S. Doolittle, Judge.

Application of James Dudley for writ of habeas corpus. From an order refusing the writ, he brings error. Reversed.

A. L. Hooten, for plaintiff in error. The Attorney General, for the State.

DENT, J. James Dudley complains of a judgment of the circuit court of Mingo county refusing to discharge him from custody on a writ of habeas corpus, as being illegally held to answer an indictment against him found at the September term, 1899, and which was retired from the docket on the 8th day of January, 1901, and reinstated thereon by the order of the court on the 8th day of June, 1903, and a capias to answer the same, under which he is now held in custody. The statement of facts is as follows: "On the 21st day of May, 1895, James Dudley was convicted of a felony in the circuit court of Mingo county, West Virginia, and sentenced to confinement in the penitentiary for a term of eighteen years. On the 8th day of April, 1899, he was granted by G. W. Atkinson, the Governor of the state, a conditional pardon, and was liberated from the penitentiary in accordance with the terms thereof. On the 1st day of June, 1899, Dudley was arrested, charged with having attempted to murder one A. B. Parlor, and was on the 18th day of July, 1899, by order of the Governor, returned to the penitentiary to serve out the balance of the sentence imposed on him, by reason of the

breach of the condition of his pardon. At the September term, 1899, of the circuit court of Mingo county, the grand jury returned an indictment against Dudley, charging him with having committed an assault on the 1st day of June, 1899, on A. B. Parlor, with intent then and there to maim, disfigure, disable, and kill, and on the 18th day of May, 1900, Dudley was, by order of the circuit court of Mingo county, taken from the penitentiary to Mingo county for trial on the above indictment, and was on the 18th day of September, 1900, by order of the circuit court, returned to the penitentiary, to be therein confined under the former sentence of the court; the order reciting that the state was not ready to try the case, by reason of the absence of a material witness. On the 8th day of January, 1901, on motion of the state, by its attorney, and for reasons appearing to the court, the circuit court of Mingo county entered an order retiring from the docket the indictment found against Dudley at the September term, 1899, for his attempt to kill Parlor. On the 1st day of May, 1903, Dudley presented to the circuit court of Marshall county, West Virginia, his petition for a writ of habeas corpus; praying, for reasons therein assigned, and as set forth in this statement, that he be discharged from further confinement in the penitentiary. On the 11th day of June, 1903, the last-named circuit court entered an order discharging Dudley from further confinement in the penitentiary by reason of the sentence imposed on him by the circuit court of Mingo county on the 21st day of May, 1895. On the 12th day of June, 1903, immediately upon being released from the penitentiary, Dudley was arrested by virtue of a capias issued by the clerk of the circuit court of Mingo county, and taken to Mingo county, and lodged in the county jail thereof. On the 22d day of August, 1903, Dudley presented to the judge of the Eighth Judicial Circuit of the state of West Virginia his petition for a writ of habeas corpus, praying, for reasons therein assigned, that he be released from the custody of the sheriff of Mingo county, and for such other, further, and general relief as his case required and to the court might seem meet and proper; and on the 12th day of September, 1903, on final hearing, the prayer of Dudley was refused, and his petition was dismissed, from which order this writ was allowed. The contention of the plaintiff in error is that the order entered on the 8th day of January, 1901, by the circuit court of Mingo county, retiring the case against this plaintiff from the docket, had all the force and effect of a nolle prosequi, and worked a discontinuance of the same, and that, the case having been retired from the docket, the capias upon which plaintiff was arrested on the 12th day of June, 1903, was illegally issued; there being no indictment pending against plaintiff at the time."

So far as the order of the Governor in re-

storing the petitioner to the penitentiary is concerned, the illegality thereof was determined by the judgment of the circuit court of Marshall county discharging the petitioner from custody thereunder, and that matter has become *res adjudicata*, and cannot now be reviewed by this court. The only question for consideration here is whether the petitioner can be held to answer the indictment now pending against him in the circuit court of Mingo county. After the petitioner was restored to the penitentiary, it clearly appears that there was nothing in the way of his being tried on the indictment then pending against him, and the circuit court did send for him; but on motion of the state the trial was postponed, and he was recommitted to the penitentiary. The indictment was then, on the same motion, retired from the docket, and was not restored until after the prisoner was discharged in 1903. Section 25, c. 159, Code 1899, provides that "every person charged with felony and remanded to a circuit court for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the indictment is found against him without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict." The only excuse given for not trying the petitioner as required in this section is because he had been illegally recommitted to the penitentiary by order of the Governor. It is not claimed that he could not have been tried, as he was in the custody of the law and under order of the court, but that the court and prosecuting attorney were laboring under the belief that he was legally confined in the penitentiary for his former offense, and that would render it unnecessary to try him under the second indictment. The petitioner was not afforded the opportunity to insist on a speedy trial, but was illegally held in custody, and if the indictment had remained a live indictment on the docket, while the state was illegally holding him, he might well insist that he should be discharged under the foregoing section, as his illegal detention does not come within any of its provisions; and he might well claim, as he was subject to the order of the court, that he was being held to answer the pending indictment against him, as this was the only legal cause for his detention. *State v. Kellison* (decided at this term) 47 S. E. 166. It is the state's fault, and not the petitioner's, that he was not brought to trial within the time prescribed. The state avoided doing so by having an order made retiring the indictment from the docket, and keeping the same so retired for more than six

terms of court, at any of which, had it been proper, the petitioner might have been tried. Such retirement from the docket without the consent or fault of the prisoner must be held equivalent to a dismissal thereof for failure to prosecute. It is true, the case was not retired from the docket for failure to prosecute, but was retired from the docket to avoid the necessity of prosecution, which, so far as petitioner is concerned, and who was not consulted with regard thereto, amounts to the same thing as a dismissal for failure to prosecute. Had he been brought into court, he would have had the right to have demanded a speedy trial or a dismissal of the indictment, and the court may not do that in the absence of the prisoner which it could not do were he present. In *re Bigelow*, 95 Am. St. Rep. 187; *People v. Matson*, 129 Ill. 591, 22 N. E. 456; *People v. Morino*, 85 Cal. 515, 24 Pac. 892; In *re McMicken*, 35 Kan. 406. The indictment being dismissed, it could not, after a long lapse of time, be reinstated on motion of the state. *State v. Rodoicich*, 66 Minn. 294, 69 N. W. 25.

Prosecuting attorneys may not retire felony cases from the docket, and restore them at their pleasure. Their duty requires them to prosecute or dismiss, and they cannot at their pleasure adopt an intermediate practice to avoid the necessity of a trial, and yet prevent the dismissal of the indictment. If they fail to prosecute when they can, the law discharges the accused, and an order retiring an indictment from the docket dismisses it.

The judgment of the circuit court is reversed, and the accused is discharged from further prosecution on the indictment mentioned.

(55 W. Va. 498)

**NATIONAL CASH REGISTER CO. v.
UNION BARGAIN HOUSE.**

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

APPEAL—AFFIRMANCE.

1. Where the record is so imperfect as not to disclose error in a judgment, it is presumed to be right, and on writ of error will be affirmed.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County; J. M. Sanders, Judge.

Proceedings between the National Cash Register Company and the Union Bargain House. From the judgment the National Cash Register Company brings error. Affirmed.

T. L. Henritze and Strother & Strother, for plaintiff in error. R. C. & B. McClaugherty and D. E. French, for defendant in error.

BRANNON, J. In the petition for the writ of error it is said that the National Cash Register Company sold Womach, trading as Union

Bargain House, a cash register, reserving title until payment of purchase money, and that E. B. Taylor & Co. levied an execution against Womach on the register, and the register company filed before the justice claim to it, asking its release from the execution, and after trial before the justice the case went to the circuit court on appeal, when it was decided against the register company, and it took out a writ of error.

There is no paper to show even a commencement of action before a justice, though from an order we may say there was. That order says an order to summon the parties was issued, but it is not in the record, but an order between the register company and Meoni & Co. and C. Womach appears. The judgment of the circuit court recites that the case was heard by the court upon agreed statement of facts filed with the papers, but the statement is not in the record. The entry in the justice's docket does say that it was agreed that Taylor & Co. were execution creditors of the Union Bargain House, and that the execution was levied on "the cash register referred to in the order herein, and which is claimed by the plaintiff"; but that order is not in the record so as to describe or identify the register, nor is the execution, nor is there proof what register was levied on, nor that it was the same sold by the register company to the Bargain House. There is notice of reservation of title printed, but not made a part of the record by bill of exceptions or otherwise. There is no evidence to identify the register as the one sold, or as the one to which the reservation of title was reserved.

A judgment is presumed to be right, and unless we have the evidence certified, whether the case was tried by a jury, or a court in lieu of it, we cannot reverse. *Robertson v. Harmon*, 47 W. Va. 500, 35 S. E. 832; *State v. Miller*, 26 W. Va. 106. We must affirm the judgment, as we must take it to be right until shown not to be. *Hickman v. Painter*, 11 W. Va. 386; 3 Oyc. 419; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569.

(55 W. Va. 546)

**RICHARDSON et al. v. McCONAUGHEY
et al.**

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

**FAROL EVIDENCE—DEED—FAROL TRUST—
LACHES.**

1. Points 1, 3, and 8 of syllabus, *Troll v. Carter*, 15 W. Va. 567, reaffirmed.

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County; Jos. R. Paull, Judge.

Bill by M. L. Richardson and her husband against Ann McConaughy and others. Decree for defendants, and plaintiffs appeal. Affirmed.

J. E. Hooten and Melghen & Oldham, for appellants. J. Howard Holt, for appellees.

McWHORTER, J. David McConaughy executed his will by which he devised to his wife, Ann McConaughy, all of his real estate and personal property, giving her full control thereof, and to receive all the proceeds or assets arising from the same, and she to pay all just debts which he might owe at his death, and keep all the property free from incumbrances so long as she remained his widow, or until his youngest son, David McConaughy, Jr., should arrive at the age of 30 years, when, if the said David, Jr., should be living, he gave him 100 acres of the farm on which testator lived, including the dwelling house and other improvements pertaining thereto, and provided that if his wife, Ann, so desired, she should remain with him, he to keep and provide for her thereafter during her natural life; and gave to his son Samuel 100 acres of land and \$500, and to his sons Robert A. and James B. each 100 acres of land, and bequeathed to his daughters, Martha L. Richardson, Sarah Ann Hogue, M. Virginia McConaughy, and Isabella F. McConaughy, each \$1,000, and stated that the said Mrs. Richardson had received the \$1,000 intended for her—which will was dated the 10th day of April, 1874, and admitted to probate on the 3d day of September of the same year, in the clerk's office of the county court of Marshall county. On the 16th of March, 1899, Martha L. Richardson and her husband, E. P. Richardson, sued out of the clerk's office of the circuit court of Marshall county their subpoena in chancery against Ann McConaughy and the heirs at law of David McConaughy, deceased, and filed their bill of complaint alleging: That her father, David McConaughy, had died seised of some \$40,000 worth of real estate and considerable personal property, amounting, according to the appraisement made by Ann McConaughy, the administratrix, on or about the 4th of September, 1874, to the sum of \$8,969.69. That there were no debts against the estate other than a debt of \$581.80 due to James A. and Elizabeth Chambers, which debt was paid by the administratrix on or about the 3d day of August, 1875. That Ann remained the widow of the testator, and David, Jr., arrived at the age of 30 years in the year 1889. That the testator by his said will disposed of only a portion of his real and personal property, and that there remained of said estate to be divided among the children of the decedent and the heirs of such children as had died all of his real estate situated in the town of Cameron and about 100 acres of farm land after the estate of Ann McConaughy therein should cease. That early in the year 1889, after said David, Jr., arrived at the age of 30 years, and the widow and the then surviving children of said decedent, viz., David W., Samuel D., Robert A., James B., Isabella F. Dean, formerly Isabella F. McConaughy, and plaintiff Martha L. Richardson, agreed upon a friendly and amicable partition of all the said real estate not disposed of by the will.

That E. P. Richardson, plaintiff and husband of Martha L., consented to and joined in said agreement with his wife, and Anna Pearl Hogue, who was then an infant, was represented in said agreement by her guardian, David W. McConaughy. The terms of the agreement were talked over previous to the 18th of February, 1889, and on that day the agreement in regard to the partition of the real estate was concluded. That by said agreement 100 acres of the home farm were conveyed to said David W. as and for the 100 acres devised to him by said will, and 100 acres of said farm in Liberty District were conveyed to Robert A. as and for the 100 acres devised to him, and 79 acres and 100 poles of said farm in Liberty District were conveyed to said James B. McConaughy as and for 100 acres devised to him, and 107 acres of the home farm in Cameron District were conveyed to said Samuel D. McConaughy as and for the said 100 acres devised to him by the will. Said conveyances were by deeds of the date of February 18, 1889, duly executed by Ann McConaughy and all the adult heirs of David McConaughy, deceased, including the plaintiffs, and delivered to the respective grantees, and all duly recorded. That it was agreed that the residue of said real estate owned by David McConaughy, deceased, at the time of his death should be partitioned among the heirs at law, and to effect such partition it was agreed to make the said Ann McConaughy the channel or means through whom conveyances should be made to the different children, and two deeds conveying all the residue of said real estate owned by said decedent to the said Ann McConaughy were made and duly executed by all his adult children, including plaintiffs, and delivered to said Ann McConaughy. One of said deeds, dated January 24, 1890, conveyed 53 acres, more or less, of the home farm, but was not signed or acknowledged by plaintiffs until the 18th of February, 1889; the other was dated February 18, 1889, and conveyed to Ann McConaughy 38 acres and 100 poles of the home farm, and all the lots and parcels of said real estate within the corporate limits of the town of Cameron—which deeds were exhibited with the bill. That recitals in said two deeds were that conveyances were made in consideration of "natural love and affection for second party, and for other good and valid considerations moving them thereto"; but the fact is alleged to be that both of said conveyances were made to said Ann in trust that she would reconvey all said real estate to the said children and adult heirs of the said decedent, according to the terms of said agreement to partition the same, and it is stated how other portions were to be reconveyed to the different heirs: "And the two-story brick building known as the 'Reinheimer Business Building' with its lots of about 250 feet front as it was then fenced in, was to be reconveyed to the said Martha L. Richardson and the

defendant Isabella F. Dean, then Isabella F. McConaughy, to have and to hold the same for and during their lives, with remainder to the survivor of them during her life, and then to the said David W. McConaughy, Samuel D. McConaughy, Robert A. McConaughy, and James B. McConaughy, or to their heirs, in fee forever; but the said Ann McConaughy was to retain and reserve to herself a life estate in said property, and the balance of the farm land was to be conveyed to Samuel D. McConaughy and David W. McConaughy." That on the said 18th day of February a deed was written conveying the said two-story brick building and said lot of ground to said plaintiff Martha L. and Isabella F. in accordance with said agreement, but plaintiffs were unable to state whether said deed was signed and acknowledged by Ann McConaughy or not, but that she then and there agreed to sign and acknowledge said deed, and all the said adult children and heirs also agreed that said deed should be signed, acknowledged, and delivered by said Ann to the said plaintiff Martha and defendant Isabella F., and that, in consideration of said agreement to reconvey said property to said Martha and Isabella as stated the plaintiffs signed and acknowledged the said two deeds to Ann. That said Ann McConaughy on the 18th day of February, 1889, promised them that the said deed to Martha and Isabella would be taken by her son, together with the other deeds that were made or agreed to be made on that date, to the office of the recorder of Marshall county and placed upon record. That they believed or supposed for a long time that the deed to Martha and Isabella had been executed and placed on record, and that they knew nothing to the contrary, and supposed same had been done, until some time about the month of —, 1898. That some time in the year 1898 said Ann McConaughy leased a portion of said real estate, which was to be so reconveyed, to E. P. Richardson. Said E. P. Richardson, in consideration of said agreement made on the 18th day of February, 1889, by which the plaintiff Martha, his wife, was to become the owner of a life estate of the undivided one-half interest in said real estate, made valuable improvements on said real estate, consisting of a two-story frame business building and other improvements, costing in all the sum of \$3,200. That about the month of May, 1898, said Ann made an offer to plaintiff Martha that she would give her and said Isabella immediate possession of said real estate if they would pay her the sum of \$200 a year during the rest of her life. When plaintiff informed Isabella of her offer, she refused to accept it. That plaintiff Martha then accepted the offer, and plaintiffs immediately began to put the two-story brick business building in a complete state of repair, and that they laid out and expended in making such repairs about \$150, which they were induced to do in consideration of said agree-

ment made on the 18th day of February, 1889, by which said plaintiff Martha was to become the owner of a life estate in the undivided half interest in said real estate. That while they were so engaged in making said repairs some dispute arose between them and said Ann as to the interest said Martha was to have in said real estate, when, on examining the record of the recorder of deeds, plaintiffs for the first time found that no such deed had ever been left for record. They then went to Ann, and she said to them, "The deed has been lost, and I will never make another in its place," and refused to carry out her agreement to put Martha in possession, and refused to make her a deed for said real estate, as provided in the agreement of February 18, 1889. Plaintiffs further allege that Ann, David W., and James B. McConaughy and Isabella F. Dean had combined, confederated, and conspired together to cheat and defraud plaintiff Martha out of her interest in the real estate of her father which was not disposed of by his will, and that Samuel D. and Robert A. McConaughy had sided with and abetted said combination and conspiracy to cheat and defraud them, and allege that to carry said conspiracy into effect the said Ann McConaughy, by deed dated October 8, 1898, conveyed a portion of said real estate that was to be conveyed to the said Martha and Isabella to said James B. McConaughy for an alleged consideration of \$500, and by deed of same date said Ann conveyed another portion of said real estate to David McConaughy Dean, an infant son of said Isabella, aged about 8 years, for an alleged consideration of \$500, and by deed dated the 24th of December, 1898, said Ann conveyed another portion of said real estate to said David W. McConaughy and Isabella F. Dean for an alleged consideration of \$3,000, and by the same deed she conveyed another portion of said real estate, being the residue thereof, to said David W. for an alleged consideration of \$500—copies of which deeds were exhibited with the bill; that no consideration at all was paid for any of said last-mentioned conveyances, and that said deeds were made to cheat and defraud the plaintiff Martha out of her interest in the said real estate, and at the time said deeds were made by said adult grantees therein after they knew that said real estate had been assigned to the said Martha, to have and to hold an undivided one-half interest therein for and during her life after the death of said Ann McConaughy, and, if said Martha survived the said Isabella, then she was to have and to hold the whole of said real estate during her life; that said Ann had wholly violated the trust upon which the real estate so described was so conveyed to her, so far as the interest of the plaintiff Martha in said real estate was concerned, but that so far as the interests of the other defendants were concerned she executed the trust. Plaintiffs further allege that they did not know what interest the

defendant Anna Pearl Hogue was to have in the real estate of the decedent, David McConaughey, but that after the said Anna Pearl Hogue became 21 years of age she executed a deed to said Ann McConaughey for the tract of land conveyed by the adult heirs by deed of the 18th of February, 1889, containing 38 acres and 100 poles, and also the real estate within the corporate limits of the town of Cameron which was described and conveyed by the said adult heirs, dated the 21st day of January, 1889, which deed made by said Ann Pearl was dated May 28, 1897, and duly recorded; that the said several parcels of real estate described in the four deeds made by said Ann McConaughey to the several heirs of the decedent, dated, the first two October 8, 1898, and the last two December 24, 1898, together comprise the real estate that was assigned to said plaintiff Martha and the defendant Isabella as their share of the real estate of said David McConaughey, deceased, by the agreement made on the 18th day of February, 1889; and prayed that the said Ann McConaughey be decreed to hold in trust the land described in the deed of the 18th of February, 1889, made by the adult heirs of David McConaughey to Ann, described as containing 38 acres and 100 poles, and also lots and parcels of land within the corporate limits of the town of Cameron; and that the said deeds made by said Ann McConaughey to James B. McConaughey et al., dated, the first two October 8, 1898, and the other two December 24, 1898, be decreed to be in violation of such trust and a fraud upon the rights of plaintiffs, and that the same be set aside and annulled so far as they affect the rights of plaintiffs in the property described therein; and that said Ann McConaughey be compelled to specifically perform the trust upon which she held the said 38 acres and 100 poles and the lots and parcels within the corporate limits of Cameron, and that she be required by good and sufficient deed to convey to plaintiff Martha L. Richardson a one-half interest in the real estate mentioned and described in said four deeds, to have and to hold for and during her natural life, and, should said Martha survive the said Isabella, then Martha to have and to hold the whole of said real estate, her life estate therein being reserved by the said Ann McConaughey, and, on her refusing to make such conveyance, that the court appoint a special commissioner to make the same, and for general relief.

The defendants, Ann, David W., Samuel D., Robert A., and James B. McConaughey and Anna Pearl Hogue and Isabella F. Dean tendered their demurrer to said bill because, among other things, the bill does not allege that the agreement "upon a free and amicable partition" was in writing, and signed by the parties made defendants, and in consequence the terms of that agreement cannot be enforced under the statute of frauds; that the agreement could not be enforced against An-

na Pearl Hogue, at any event, even if it had been in writing and signed by her guardian; that the exhibits are inconsistent with the allegations of the bill, and, taken together, show that there is no equity in the bill; that there is no agreement or memorandum in writing of that agreement signed by Ann McConaughey agreeing to reconvey the property as alleged; that no time is alleged in which said reconveyance was to be made, and that, if Ann McConaughey was to retain a life estate in said property, plaintiff could have no interest until after her death; that there is no averment in the bill of any agreement in writing that Ann McConaughey would execute any such conveyance, or that she signed, acknowledged, and delivered the deed alleged to have been written on February 18, 1889, and because the laches of plaintiffs in setting up their pretended claims after the lapse of more than 10 years is a complete bar to the same, which bar defendants plead by way of analogy to the bar of the statute of limitations, and also plead the statute of limitations of 10 years to any such contract or agreement as that pretended to have been made; that the bill is multifarious in having set up said contract as the one to be enforced, and then attempting to set up another and different contract for the leasing of said real estate by Ann to Richardson, without exhibiting said contract or giving its terms in full, which terms would show the statements with respect to the first contract to be utterly unfounded in fact; that the bill is further multifarious in setting up a contract alleging to have been entered into in the month of May, 1898, between Ann McConaughey of the one part and Martha L. Richardson of the other, said allegations being wholly at variance with the allegations immediately preceding, to the effect that Ann had already leased the property to E. P. Richardson; that the said defendants Ann, David W., James B. McConaughey, and Isabella F. Dean had combined, conferred, and conspired together to cheat and defraud plaintiff Martha L. Richardson out of the real estate of her father, and that Samuel D. and Robert A. McConaughey had aided and abetted in said combination and conspiracy, and had stated no grounds in the bill upon which to rest such allegation; that the exhibits filed with the bill showed that said Ann McConaughey was the owner in fee simple of said real estate alleged to have been conveyed by the said adult heirs, and could do what she pleased with the same without giving plaintiffs any ground for complaint. On the 5th day of June, 1899, the cause was submitted on the demurrer, the demurrer was sustained, and, the plaintiffs not desiring to amend the bill, the same was dismissed.

It is insisted on the part of the appellees that the case comes within the doctrine laid down in *Troll v. Carter*, 15 W. Va. 567, while the appellants claim that it is clearly covered by the exceptions in said case set out, as stat-

ed in syllabus 2, to which the rule is not properly applicable. Judge Green, in delivering the opinion of the court in that case, says, "It is a general rule of evidence that parol testimony cannot be admitted to vary or add to a written contract, and especially a contract or deed conveying lands," and cites quite a number of authorities, which see on page 576. And in point 3 of the syllabus in that case it is held: "If a party obtains a deed without any consideration upon a parol agreement that he will hold the land in trust for the grantor, such trust will not be enforced, as it would violate the statute of frauds, and this general rule to permit parol evidence to establish such a trust"—the rule constituting the first point in the syllabus of the case, "Parol evidence cannot be admitted to vary or add to a deed as a general rule." Syllabus, point 3, applies to deeds made without any consideration upon a parol agreement. With much more force it would apply where there is valuable consideration.

The conveyances made in case at bar, upon which the trust is sought to be established, recite on their face that "the parties of the first part, in consideration of their natural love and affection for second party and for other good and valuable considerations moving them thereto, do grant," etc.; the grantee being the mother of the grantors. These deeds convey the property with general warranty, and it is not alleged in the bill that the conveyances were without consideration. In *Troll v. Carter*, cited, Judge Green cites *Porter v. Mayfield*, 21 Pa. 263: "There are cases wherein trusts may be proved by oral testimony, but not in violation of the rule that protects written agreements against such testimony. As a deed of conveyance is intended to define the relations between the parties to it, it is not contradicted when it is shown that the vendee purchased in trust for a third person, for such evidence only establishes a new and consistent relation. But evidence that at the time of the conveyance the vendee agreed to hold the title in trust for the vendor is a flat contradiction of the written instrument executed by the parties as the bond and evidence of their relation, and would make it void from its very inception. Oral testimony can have no such power. As between vendor and vendee, such testimony cannot be heard to change a title absolute on its face into a trust." It was, however, held in *Lingelfelter v. Ritchey*, 58 Pa. 485 [98 Am. Dec. 308], that parol evidence might be received to establish a trust in favor of the grantor. But the decided weight of authority as well as reason sustains the position that 'parol evidence that at the time of the conveyance the vendee agreed to hold the title in trust for the vendor' is not admissible. See *Leeman v. Whitley*, 4 Russ. 423 (5 Eng. Cond. Ch. Cases, 746); *Hogan v. Jaques et al.*, 19 N. J. Eq. 123 [97 Am. Dec. 644]; *Squire v. Harder*, 1 Paige, 494 [19 Am. Dec. 446]; *Farrington v. Barr et al.*, 36 N. H. 86. But the correctness of the other posi-

tion taken by the court in *Porter v. Mayfield*, 21 Pa. 264, that, 'as a deed of conveyance is intended to define the relations between the parties to it, it is not contradicted when it is shown that the vendee purchased in trust for a third person, for such evidence established a new and consistent relation,' is by no means so obvious." It will be seen that, while Judge Green agrees with the case of *Porter v. Mayfield* as far as it holds that parol evidence is not admissible to establish a trust in favor of the grantor, he questions the proposition that the deed "is not contradicted when it is shown that the vendor purchased in trust for a third party." This last proposition, as held in *Porter v. Mayfield*, has, however, been sustained by this court in *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329.

It is not alleged in the bill that the parol agreement was to hold in trust for the grantor the property conveyed, but it is claimed that it was to be held in trust—a life estate in part of it, to begin at the death of the grantee, to the plaintiff Martha L. Richardson and Isabella F. Dean, her sister, and to the survivor of them; the remainder to D. W. McConaughy and others or to their heirs in fee. The bill does not allege that this agreement was in writing, but that it was agreed to be in writing, and plaintiffs supposed that a deed to that effect was executed and placed upon record, as defendant Ann McConaughy had agreed to do; that the same was to be placed on record by her at the same time that her deeds, by which she holds the property, were recorded; that plaintiff did not discover that said deed had never been recorded until she examined the records in 1898. The conveyances to Ann McConaughy are dated February 18, 1889, which is the date of her verbal agreement, as set up in the bill, to execute a writing or deed reserving to plaintiff her rights in the premises, while this suit was commenced on the 16th day of March, 1899, more than 10 years after said parol agreement, relied upon by plaintiffs, was made. Appellees insist that the laches of plaintiffs in setting up their pretended claim after the lapse of more than 10 years is a complete bar, and defendants plead it by way of demurrer as analogous to the bar of the statute of limitations. In *Troll v. Carter*, cited (Syl., point 8), it is held that the courts will not enforce a parol trust where a great lapse of time has intervened since the absolute deed was executed, and where the grantee has during such time acted as the absolute owner of the property, unless the laches of those claiming to be cestuis que trust is satisfactorily explained. In the case at bar there is no attempt at explanation, unless it can be said that plaintiffs thought the defendant Ann McConaughy had, 10 years prior to the bringing of this suit, in pursuance of her promise, placed upon record a deed preserving the rights of the plaintiff. It was certainly the duty of plaintiffs, if such promise

was made on the part of Ann McConaughy to place such deed upon record, to know that it was done as promised. It is not alleged that such deed was executed or delivered, and nothing claimed but a mere verbal promise on the part of Ann that she would have such a deed recorded in favor of plaintiff.

Plaintiff was guilty of gross laches, and makes no explanation to entitle her to relief. There is no error in the decree, and the same is affirmed.

POFFENBARGER, P. (concurring). The bill alleges a conveyance by the plaintiffs and other heirs to Ann McConaughy of certain real estate upon the understanding and agreement that she should immediately execute to the grantors, severally, deeds reconveying to them certain portions of the land so conveyed to her, reserving to herself life estates in the several tracts so to be reconveyed, and that the particular tract to be conveyed to the plaintiffs was described and identified, and a deed for the conveyance thereof to them prepared for execution by the said Ann McConaughy. The conveyance to her was a step in the performance of an antecedent agreement for the partition of real estate among the grantors, subject to a life estate therein to the grantee. Ann McConaughy, under this agreement, was to act as a sort of conduit or agency for the exchange of titles in effecting partition, and the titles were to pass in and out of her instantaneously. It was upon this agreement that the conveyances were made to her. The bill does not allege that she took the land conveyed to her upon a trust for the grantors. It does not say she agreed to hold the lands for them. It does not attempt to set up an express parol trust in contradiction of the deed. It attempts to allege that she committed a fraud upon the grantors in refusing to perform a contract upon the faith of which the conveyances were made to her. The facts alleged in the bill and proposed to be established by parol evidence, if they were sufficiently alleged, constitute what, in law, is termed a "constructive trust"—a trust springing out of a fraud—and to such a trust the statute of frauds does not apply. The case is, therefore, not within the third point of the syllabus in *Troll v. Carter*, 15 W. Va. 567, but falls within the exception to the statute of frauds mentioned in point 2 of the syllabus of that case, which says, among other things: "If a grantee in a deed has procured it by fraud, he will be held by a court of equity to be a trustee of the real owner." This is a principle almost as old as the statute of frauds itself. At an early day the courts established the doctrine that a statute which had been enacted for the purpose of preventing and suppressing frauds and perjuries could not be allowed to become itself an instrumentality or engine for the perpetration of fraud.

"A second well-settled and even common form of trust *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and, having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement." 2 Pom. Eq. Jur. § 1055.

"The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, which, by reason of the statute, a party is not bound to perform for want of its being in writing. This was early laid down by Lord Macclesfield, Chancellor, in a case arising upon a promise of a defendant, about to marry, that his wife should enjoy all her own estate to her separate use after the marriage, which promise, as one made 'upon consideration of marriage,' could not regularly be enforced. His lordship declared that, 'in cases of fraud, equity should relieve, even against the words of the statute,—as, if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere.'" Browne on Statute of Frauds, § 439.

"Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive. Lord Hardwicke stated 'that the court adhered to this principle, that the statute of frauds should never be understood to protect fraud, and therefore, wherever a case is infected with fraud, the court will not suffer the statute to protect it.' Lord Thurlow added that 'the moment you impeach a deed for fraud you must either deny the effect of fraud upon the deed, or you must admit parol evidence to prove it.' If this was not so, the law would be reduced to this absurdity: If a fraud could once succeed in procuring the transaction to be reduced to writing and signed by the parties, it would be protected by the law itself, and there would be no possible means of reaching and correcting the wrong. But in such case the bill must contain a clear and distinct charge of fraud. Therefore, whenever the bill sets out a clear case of fraud, parol evidence will be admitted to prove it, even if the effect of such

evidence is to contradict, vary, alter, or destroy written instruments. The mere refusal of a grantee to execute, or the denial of the existence of an invalid parol trust upon which he promised to hold the property, is not such a fraud as will take the case out of the statute. But where a valuable interest passes to one on the faith of a contract he refuses to perform, equity will compel restitution or give other appropriate relief. In any case, if the trust arises from the acts of the parties, and not exclusively from their agreements, the statute of frauds is not a bar to the proof." *Perry on Trusts*, § 226.

But the bill is defective in this: that it fails to allege or charge that the defendant Ann McConaughy fraudulently procured the making of said conveyance to her. It should have charged that she procured the making of said conveyance by falsely and fraudulently representing and promising that she would immediately reconvey a certain portion of the land in accordance with the agreement of partition, and took said conveyance fraudulently intending, at the time, not to comply with her said promise to reconvey, and, with the like fraudulent intent, has refused to comply with said promise. *Manning v. Pippen*, 95 Ala. 537, 11 South, 56; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Perry on Trusts*, § 226. The bill only charges that, after having made this agreement and obtained the conveyance in pursuance thereof, she refused to perform. This is not enough. Mere breach of the agreement does not raise a trust and take the case out of the statute of frauds. *Browne on Statute of Frauds*, § 94a, 439. The same work, at section 441, says: "A simple illustration of the rule that, when the statute of frauds has been used as a cover to a fraud, equity will relieve against the fraud, notwithstanding its provisions, is found in a case reported by Viner, and stated by him to have occurred in Lord Nottingham's time, and to have been the first instance in which any equitable exception to the statute appears. There was a verbal agreement for an absolute conveyance of land, and for a defeasance to be executed by the grantee; but he, having obtained the conveyance, refused to execute the defeasance, and relied upon the statute, but his plea was overruled, and he was compelled to execute according to his agreement. Here the attempted fraud consisted not merely in refusing to do what he agreed, but in deceiving the plaintiff out of his property. And the case is analogous to that put by Lord Macclesfield, as falling within the rule, where one agreement in writing is proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former."

It may be that the facts set up in the bill, if established by evidence, would sustain the charge of fraud. *Browne on Statute of Frauds*, §§ 94a, 439. But the bill ought to charge fraud in express terms. Nothing is to be considered here but the bill, as the

case stands upon the ruling of the court upon the demurrer, and the courts say the bill must contain a clear and distinct charge of fraud. *Irnham v. Child*, 1 Bro. Ch. 94; *Portmore v. Morris*, 2 Bro. Ch. 219; *Forsyth v. Clark*, 3 Wend. 637; *Gouverneur v. El-mendorf*, 5 Johns. Ch. 79; *Kennedy v. Kennedy*, 2 Ala. 571. In *Troll v. Carter*, 15 W. Va. 567, 583, Judge Green directs particular attention to the want of any charge of fraud in the bill or the evidence.

Intent is a necessary element of fraud in such case. The agreement may have been made, and the conveyance taken, in good faith and with an honest intention to reconvey, and the fraudulent design of dishonestly retaining the property or disposing of it in violation of the agreement may have been formed afterwards. This would amount to no more than a breach of the agreement, and the bill alleges nothing inconsistent with such a state of facts. The court cannot assume that there was fraud in the procurement of the conveyance. It must be alleged as well as proved. It is fraud in acquiring the title, not merely in the retention of it, that raises the trust. If the evidence establishing such fraud were before the court, an amendment could be allowed, but the court cannot say whether an amendment would avail anything or not. Hence, under the rule, the plaintiffs having declined to amend in the court below, the decree of dismissal must be affirmed.

For the foregoing reasons, I concur in the decision, but not in all the reasoning of the opinion prepared by Judge McWHORTER.

(55 W. Va. 404)

DOLL v. BENDER.

(Supreme Court of Appeals of West Virginia.
March 22, 1904.)

ELECTIONS — BALLOTS — DEFEASANCE — WRITING CANDIDATE'S NAME — DISTINGUISHING MARKS — CANCELLATION.

1. Two of four columns on a ballot sheet are defaced. The Republican column is not defaced. The Democratic is defaced by broken lines as to all its offices and candidates except two, and their names are skipped by the lines, and thus left on that ballot, but their names are written in the Republican column for the same offices for which they stand in the Democratic column. The Republican ballot only has been voted. The voter has not voted two ballots.

2. Though a candidate's name is written in the space above the office on a ballot, it will be held a vote for him for the office below his name, where the printed name for that office is erased, and that above the written name is not erased.

3. The provision in Code 1899, c. 3, § 34, that where a name is substituted for one on a ballot it must be written in the space below the printed name, is directory. Though the name is not there written, the vote will be counted for the written name for the office for which it is plainly intended.

4. Distinguishing marks on a ballot will not cause its exclusion from the count.

5. Though lines through the heading of a ballot or through the ballot are not used, still if other marks of cancellation are used, and they

plainly indicate that the ballot has not been voted, the ballot is effectually defaced, and cannot be counted.

6. Though defacing lines do not pass entirely through a ballot or its heading, yet, if it is manifest that the voter did not intend to vote that ballot, the defacement is sufficient.

7. Defacing marks to cancel a ballot must be within the ballot column or its heading. Words only above the heading or elsewhere outside the ballot, such as "I vote this ticket," do not select that ballot and cancel the others.

8. A name is written in the space between two offices, and the printed names of the candidates are not erased. The ballot counts for the office above the written name and for that name, not for the candidate for the office below. It would be otherwise if the printed name of the candidate for the office below were erased.

9. A ballot from which some of the offices and names of candidates for them have been cut entirely out with a knife, instead of being erased with a pen or pencil, is a good ballot for the offices and candidates left in it. The provision of the statute requiring erasure with pen or pencil is directory.

(Syllabus by the Court.)

Error to Circuit Court, Berkeley County; E. Boyd Faulkner, Judge.

Action by Frank W. Doll against I. L. Bender. Judgment for defendant, and plaintiff brings error. Affirmed.

Flick, Westenlaver & Noll and Faulkner, Walker & Woods, for plaintiff in error. Forrest W. Brown, H. H. Emmert, and A. G. Dayton, for defendant in error.

BRANNON, J. At the election in Berkeley county in November, 1902, Frank W. Doll was the Democratic nominee for the clerkship of the county court, and I. L. Bender the Republican nominee. The canvassing board found that Bender had been elected by a majority of four. Doll demanded a recount, and upon it the board found that Doll received 2,135 votes and Bender 2,146, giving Bender a majority of 11. The contestation was as to 146 ballots, and they were withdrawn from the mass, and made a part of the record. Doll carried the case to the circuit court by a writ of certiorari, and upon it that court found that Bender had received 2,146 votes and Doll 2,141. From the judgment of the circuit court declaring Bender elected Doll has sued out a writ of error in this court.

The ballot sheets have four columns, Democratic, People's Anti-Ring Ticket, Prohibition, and Republican. We adhere to the law stated in *Morris v. Board*, 49 W. Va. 260, 39 N. E. 500, and *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690, that the voter must select and use one, and only one, ballot from those on the ballot sheet. We reject those violating this rule. In this connection, take a specimen sheet. The People's and Prohibition columns or ballots are canceled by lines. No line in the Republican column. Three broken, not continuous, lines cancel all names and offices on the Democratic ballot, except for county commissioner and the candidate, Parks, and school superintendent and the

candidate, Shirley, the lines skipping these, and leaving them untouched. In the Republican column, in the space between the place assigned for prosecuting attorney and commissioner, the name of Parks is written, and in the space between the place assigned for county clerk and county superintendent the name of Shirley is written. The printed candidates for commissioner and superintendent are erased. This sheet raises several questions. Does it violate the rule that a voter must use only one ballot? If the names of Parks and Shirley had not been written in the Republican ballot, and for the same offices for which they stood on the Democratic ballot, it would be a case of two ballots. Though their names yet remained on the Democratic ballot, yet they are written for the same offices on the Republican. A voter cannot vote twice for the same person at the same election for the same place. By leaving the Republican column untouched, we say that one was selected, and, seeing the names of Parks and Shirley written in it, we see that the voter intended to vote for them, and this is the plainer because he has left them on the Democratic ticket. But their presence there is surplusage, performing no office. We see all the balance of that ballot erased. A voter uses two columns where one person is voted for on one ballot, another on another, or where the same person is voted for on one ballot for one office, and on another for another office. Code 1899, c. 3, § 84, says that a ballot can be defaced by erasing its party heading, or drawing lines clear through it, "or in any other way indicating that the same has not been voted." Considering that the Democratic ballot is erased except as to Parks and Shirley, that their names are written in the Republican ballot for the same offices and the Republican candidates erased, and that the latter ballot is without defacement, we conclude that the intent was to select it and discard the Democratic column. The Democratic ballot was canceled.

A graver question arises on this ballot. Can it be counted for Bender? Bender's name is printed for clerk, and in the space below it, required by statute to be there for the purpose of allowing the voter to vote for some one other than Bender by erasing his name and writing in the space another name, the voter has written "J. W. Shirley," making it read, "For Clerk of the County Court, I. L. Bender, J. W. Shirley." As the statute says that when this blank space has a name written in it, and the printed name is not erased, the ballot shall be counted for the written name, it may be said this is a vote, not for Bender for clerk, but for Shirley. Inspection of the two ballots tells us that such was not the intent of the voter. He did not intend to vote for Shirley for clerk, because Shirley appears on the Democratic ballot as Democratic nominee for school superintendent, and the voter let his

name stand for that office in the Democratic ballot, thus voting for him for that office, and wrote his name in the Republican ballot just above the words "For County Superintendent of Schools," and erased the name of the Republican nominee for that office. If he had not left Shirley's name for superintendent in the Democratic column, it would not be so plain, but that indicates for what office for Shirley he desired to vote in the Republican column. Placing the name of Shirley above the words "For County Superintendent" does not change the sense; for the words, "J. W. Shirley for County Superintendent" mean the same as "For County Superintendent J. W. Shirley." And the fact that he dealt with Parks in the same way confirms this view. He intended to vote for him for county commissioner, and did not intend to vote for prosecuting attorney, though he put the name of Parks in the space below the name of the candidate of that office, instead of that below that of the candidate on the Republican ballot for commissioner. He did not intend to vote for Parks or Shirley for offices for which they were not running. He erased the Republican names for those offices, and left the Republican candidates for prosecutor and county clerk, showing what offices he desired Parks and Shirley to fill. But it will be said that this view ignores Code 1890, c. 3, § 34, saying that a voter desiring not to vote for any candidate on the ballot "may strike out the name so printed on said ballot, and write in the blank space next following the name of the candidate or person for whom he so desires to vote. But if he fails to strike from said ballot the name printed thereon the name written in said blank shall alone be counted." It is urged that in *Morris v. Board*, 49 W. Va. 251, 38 S. E. 500, the opinion holds the statute in general sense mandatory, and particularly that the law requiring a voter who does not wish to vote for the printed candidate to write another name in the space below the printed name is mandatory, so that the substituted name must be put in that space, and, if it is not, it is no vote. It will be seen that the reference in that case to the space below the printed name was as an argument under the statute to show that one column must be selected and made the sole expression of the voter's will. The question whether, after one column has been selected and the others erased, the voter must write the substituted name in that space, and nowhere else, was not up in that case. This case does present, in the ballot now in hand, that question. In that case it is definitely stated that there are provisions in this statute that are merely directory. We did not intend to hold that the provision as to putting the name in this space is mandatory. It was not in the mind. We now say that when the voter has used one ballot we can investigate his intention as to his vote. It was the law, before the

enactment of the Australian ballot, that the voter's intent must be sought and observed from his ballot. His ballot might be awkward and irregular, but, where his intent is plain, that intent must stand. We cannot think the new system has wholly abrogated this rule. The paper is a ballot still to express intent. We cannot think that we cannot look at intention. Some cases do hold that under this new system, looking at its object to suppress fraud, bribery, and other election evils, the voter must strictly follow the statute; that the Legislature has told him just how he shall vote, and departure from it loses him his vote. But the better opinion seems to be that generally, where the statute does not expressly or by plain implication reject the ballot, it is not to be cast out. Though we cannot let the voter use two ballots, can we not say what he meant by the one selected? For this position I would first call upon the statute itself in that clause of section 66 reading, "And any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate or candidates affected thereby." This tells us that we must take this one ballot, scrutinize and find out the voter's intention, and say, if it is at all possible to do so, for whom he intended to vote. This language of the statute is alone a warrant for the position just stated. So is general law. See *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; *Opinion of Judge Ellis*, *Parker v. Hughes*, 64 Kan. 216, 67 Pac. 637, 56 L. R. A. 275, 91 Am. St. Rep. 229. See *Dunlevy v. County Court* as to intention of voter, 47 W. Va. 513, 35 S. E. 956. "Though a candidate's name is written above the name of the office on the ballot, it will be construed for him where the printed name below name of office is erased." *Kreitz v. Behrensmeyer* (Ill.) 17 N. E. 232, 8 Am. St. Rep. 351. Therefore the vote was for Shirley for superintendent, the name of the nominee for that office being erased, and it was not a vote for Shirley for clerk, but for Bender.

Another question: Some of the ballots have the names of persons on their backs. One has the words "Good bye" at the foot of a column. Another the figure 4 where a printed name is erased. Another has part of the offices on a ballot cut out with a knife. Section 79 provides: "No voter shall place any mark upon his ballot, nor suffer or permit any other person to do so, by which it may be afterward identified as the ballot voted by him. Whoever shall violate any provision of this section shall be deemed guilty of a felony," and be confined in the penitentiary. Section 76 condemns others for inducing voters to place names or other distinguishing marks on ballots. These names, and perhaps some other marks on these ballots, would be distinguishing marks under the statute; but we do not discuss

what are distinguishing marks, since we have concluded that they do not make ballots void. These provisions against such marks or earmarks are among the most important enactments in this statute, it is true, being intended to defeat bribery, intimidation, and all sorts of corruption in elections by covering the ballot with the veil of entire secrecy. Contracts made against a statute prohibiting an act and imposing a penalty for doing it, are void. Things done in contravention of such a statute are void. But a vote is not a contract. Elaborate discussion has been had as to these marks. It may not be without value to refer to some of the cases. "A ballot so prepared by a voter as to contain distinguishing marks, which, if permitted to be passed, would enable it to be identified, cannot be counted." *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837. And in *Parker v. Orr*, 158 Ill. 909, 41 N. E. 1002, 30 L. R. A. 227, it is held that this is so even if the statute contain no prohibition, so vital is the object of the provision. See *Perkins v. Bertrand*, 192 Ill. 58, 61 N. E. 406, 85 Am. St. Rep. 315; *Parker v. Hughes*, 64 Kan. 216, 67 Pac. 637, 56 L. R. A. 275, 91 Am. St. Rep. 216; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180; *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; note in *Taylor v. Bleakley*, 49 Am. St. Rep. 243; *Coughlin v. McElroy* (Conn.) 43 Atl. 854, 77 Am. St. Rep. 301; *Rutledge v. Crawford*, 91 Cal. 528, 27 Pac. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212. Some courts hold that, to be a distinguishing mark, it must have been made with intent that it be such; but I venture for myself to say that the statute declares any mark to be such if it identify the ballot, let the intent be what it may, unless by accident or clumsiness. We hold that such mark does not destroy the ballot, on the principle that a citizen can be disfranchised only by clear expression of legislative intent to do so. The Legislature has not said that this mark shall reject the ballot. It had the particular matter under consideration. It selected its penalty. It made the act a crime, but did not add that the ballot should not be counted. In section 66 we find specified several causes for which ballots shall not be counted, and this affords reason to say that it was not intended to make this mark a ground of rejection. The Legislature has not commanded the courts to reject a ballot for this cause. The statute is the sole chart, guide, and authority as to elections. It is fairly to be presumed that, if the Legislature intended a distinguishing mark to destroy a ballot, it would have said so while enumerating grounds for rejecting ballots. I think it will appear from cases cited above that the weight of authority is that if the statute does not expressly reject a ballot for this cause, it counts; especially opinions in *Parker v. Hughes*, 64 Kan. 216, 67 Pac. 637, 56 L. R. A. 275, 91 Am. St. Rep. 216, and *Patton*

v. Watkins, 131 Ala. 397, 31 South. 98, 90 Am. St. Rep. 73. I will add that the Illinois act rejects all ballots not made out as it directs.

Here is a ballot sheet having the Republican column clear, and the three other columns have the party headings untouched, but just below them are large crosses like the letter X, erasing some candidates and leaving many others untouched. These crosses run down the columns about one-third, leaving two-thirds unerased. It is claimed the Republican ballot cannot count, because the voter has voted three ballots. The Code, § 34, directs the voter to select one ballot on the sheet, and then adds that "every other ballot on the same sheet shall be defaced by drawing one or more lines with pen and ink or indelible pencil from the top to the bottom thereof, or across the heading thereof, or in any other way indicating that the same has not been voted." It is true these crosses only cover parts of the ballots, but they are found in three columns or ballots alike, and the fourth is not defaced, "indicating" that the voter intended to destroy three ballots and vote the remaining one. Whilst he did not run a line from top to bottom or across the party headings—the two modes of defacement specified by the statute—yet we think these crosses come in under the words, "or in any other way indicating that the same has not been voted." They show that the intention was to erase the three columns.

Here is another ballot sheet. The two middle ballots are erased by lines clear through, except they leave the party headings and the place for Congressmen. The Anti-Ring column has no printed name for Congressman, the Prohibition has. The Republican ballot leaves the heading and congressman, *Alston G. Dayton*, untouched, and all other places for officers and printed candidates are erased by short straight lines erasing the offices to be filled and printed names of candidates, except that it leaves untouched "For Prosecuting Attorney, *Ward B. Lindsay*," and "For Clerk of the Circuit Court, *L. Dew Gerhardt*." The Democratic ballot is not in any way erased. The names of *Lindsay* and *Gerhardt* are written in it in spaces below the names of *J. M. Woods* and *Samuel L. Dodd*, the Democratic candidates for prosecuting attorney and clerk of the circuit court. We hold that the voter has selected the Democratic ballot and destroyed the others. He has transferred to the Democratic ballot the names of *Lindsay* and *Gerhardt*, and so they are on both ballots, but the transfer takes them from the Republican ballot. Under principles stated above, their names on the Republican ballot do not make the voter vote two ballots. The voter's intent to vote for them is plainly shown by leaving them on the Republican and transferring them to the Democratic ballot. But he voted for three congressmen, it will be said. We cannot think he intended to do this. We think he intended to

vote for John T. McGraw, Democratic nominee, for that place. The Democratic ballot has no erasures except in such transfer of Lindsay's and Gerhardt's names. This fact induces the court to say that, as the statute allows the voter to destroy a ballot "in any other way indicating that the same has not been voted," the voter designed to efface every ballot but the Democratic.

Here is a sheet on which the voter has not touched the Democratic column, but on the other three has drawn lines half way down, leaving the party headings, erasing the Prohibition congressman, Rev. R. M. Strickler, leaving the Republican candidate, Alston G. Dayton, and places and candidates for several offices on the Prohibition and Republican columns. He leaves the name John B. Wilson, the only printed name on the People's ballot, for clerk of the circuit court. We think that the voter has indicated sufficiently that he rejected all other ballots but the Democratic, although his erasure lines do not erase some candidates on those rejected ballots.

We reject ballots wanting names of one or both poll clerks, because the names of two poll clerks are a most material earmark to attest the genuineness of a ballot; but why give the reason when section 66 expressly says that such a ballot is void, and shall not be counted? *Kirkpatrick v. Deegans*, 53 W. Va. 275, 44 S. E. 464.

Here is a ballot sheet which has the Democratic ballot undefaced. In the next there are crosses about the middle. In the Republican ballot a line clear through, except that it has the congressman untouched. The party headings are untouched. There are the places and names of numerous candidates untouched in the two middle columns. We conclude that it is a good ballot, because we think the crosses in two columns and the long line nearly through the Republican column indicate with fair certainty that the voter intended to vote the Democratic ballot, because it is untouched by any mark and the others are marred. Whilst we require the voter to use one ballot, we must not be too rigid and captious as to the manner of the defacement of other ballots, because the statute says that any marks of defacement which "indicate" that the voter intended not to vote a ballot will do.

Here is a ballot sheet having a line drawn just under the letters of the party headings of all the ballots except the Democratic, and a pencil mark over the words "Republican Ticket," erasing them. In the People's Anti-Ring column a line from its top down two inches, then crossing the line dividing that column and the Prohibition column and entering it and going down to the bottom of the Prohibition column. Another line begins at the bottom of the People's Anti-Ring column and runs up it to nearly the line just described. There is but one name on that

ticket, and it is erased by the line. There are the names of the offices and three printed names left in the Prohibition column untouched. A line runs from top to bottom of the Republican ballot. The Democratic ballot untouched. It is plain that the Democratic ballot was voted; the others not voted, but canceled.

Here is a ballot sheet having three lines from the top halfway down the ballots; the names of some candidates and their offices left in two of them. The Republican ballot is untouched, except that the name of Dayton for congressman is erased and McGraw's written in the space below, and for commissioner Crozinger's name erased and that of Parks written in the space below. How can we doubt that the voter selected the Republican ticket, amended it, and canceled all others?

Here is one having crosses and lines erasing two ballots, headings and candidates and offices from two of the ballots, and eight crosses over the candidates and offices on the Republican ballot, but leaving four offices and candidates on it not defaced. The Democratic ballot has no sign of mark on it. We hold the three other ballots canceled.

Here is one with lines in three columns from congressman to bottom, leaving headings and names of three congressmen, the other column having no printed name for Congress. In the Democratic column one candidate has been erased, and a name put in: but in other respects it is just as printed. We hold that all the ballots but the Democratic were erased.

Here is one having three columns erased. The Democratic column is untouched, save that the name of Doll is erased, and just to the right of his name Bender's name is written, his name crossing the line between the columns. Though the name is not in the space below, and one half of it inside and the other outside the column, it is a good vote for Bender. The intent to vote for him is plain.

Here is a ballot sheet without the sign of any mark in any of the four columns or their headings. Just above the Republican ticket are the words, "I vote this ticket." It is plain the vote was intended for the Republican ticket. But no marks are on the ballots. The statute contemplates marks of erasure, and they inside the columns, or through the headings, whatever the mark may be. These columns are just as printed. Such an indication as this will not do. The words do not necessarily refer to any one ballot, though likely meant to select the Republican. They are a mere memorandum on the same paper, but not a part of the ballot.

Here is a sheet with three columns clearly erased by lines from top to bottom. No lines or marks in the Democratic column. In it Doll's name is erased, and Bender's written in the space above, instead of in the

space below. So with several other names. The writing of the name above the designation of the office does not destroy the vote for Bender. As he is on the Republican ticket for a certain office, writing it in above that same office in the Democratic and erasing it from the Republican column shows that the intent was to vote for him for that same office. We cannot say that writing "Bender" in the space above clerk of county court shows that he intended to vote for him for the office above, clerk of circuit court, because Dodd's name is erased for the latter office, and Gerhardt, the Republican candidate for that office, written in. Failure to write a substituted name in the proper space is not fatal where intent is plain. We must not use the Australian ballot to defeat plain intent and the sacred right of suffrage.

A ballot has the name of a Democratic candidate for clerk of circuit court erased, and Bender's written in the space below and Doll's left for clerk of county court. It is a vote for Doll, not only because Bender's name is written in below the clerk of circuit court, but the candidate for that office is erased, and Doll's untouched.

A sheet leaves all headings, has a cross over all of the printed names of candidates for Congress, thus erasing them, but A. G. Dayton's name is written under the place for that office in the Prohibition ballot. The name of David Deck, Prohibition nominee for county clerk, is erased, and Bender's name inserted in the space below. Other names are so inserted in that ballot. We hold that the Prohibition ballot was voted; the others rejected by the cross-marks specified above.

Here is a sheet from which the voter, to make sure that he did not vote for four Democratic names, cut them out with a knife. The remainder of the ticket is good. He has used a knife to erase the candidates instead of a pen or pencil. Objection may be made to this as a strong distinguishing mark, but cannot as one of mutilation. The balance of the Democratic ballot is clear. He has cut out only part, not canceled the whole ballot.

A sheet has the Democratic, People's, and Prohibition ballots properly erased. Three lines run from prosecuting attorney, inclusive, down to the bottom of the Republican ticket; others covering the names of several offices and candidates, including the office of clerk and name of Bender, thus erasing them; but the voter, having thus erased Bender and Zeller, the Republican candidate for superintendent, has written in the space below, over the erasing lines, the names of Doll and Dunn, the Democratic and Prohibition candidates for clerk of county court and school superintendent. Though these pencil erasing lines erase the names of three candidates for other offices, the voter has again erased them with ink. We think

this shows intent to vote for Doll and Dunn.

A sheet has all party headings intact, the congressman also; the balance of People's Prohibition, and Republican ballots erased by lines. On the Democratic ballot a line runs from the congressman down, erasing all names to county clerk, skipping it, and then resuming and going on to bottom. We think all three ballots, except Democratic, were erased, and that the Democratic was voted as to congressman and clerk.

Other specimens of ballots could be given, but these will suffice to illustrate the legal principles ruling the case.

Upon a canvass of the contested ballots we find that Bender received 2,181 and Doll 2,128 votes, and we therefore affirm the judgment of the circuit court, which declared Bender elected and affirmed the judgment of the canvassing board.

POFFENBARGER, P. (concurring). All the controverted ballots in this case were disposed of under the principles laid down in *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. No difficulty whatever was experienced in reaching a unanimous conclusion as to every one of them. Many ballots counted by the board of canvassers and the circuit court were rejected here, and some not counted by said board, and probably not counted by the court, were counted here, and in every instance of counting and rejecting the court acted with perfect unanimity. My purpose in writing this opinion is, therefore, not to criticize or dissent from any conclusion involved in the decision. It is merely to elaborate upon, and express in my own language, some of the principles which governed the action of the court in passing upon the ballots.

There were 148 of them, presenting diverse methods of marking and raising numerous questions. Most of them, however, called for the application of the statute requiring defacement of all the ballots on the sheet except the one voted, and the principal questions raised in this connection were, what amounts to a defacement, and how is the intention of the voter to deface to be ascertained and determined from the marks found on the ballot sheet? The statute provides that the voter shall deface the ballots not voted "by drawing one or more lines with pen and ink or indelible pencil from the top to the bottom thereof, or across the heading thereof, or in any other way indicating that the same has not been voted by the voter." Under the last clause of the statute as quoted above it was considered and held that a small cross, a straight line up and down the ballot of any length, a number of small crosses at various places on the ballot, or any other sort of line or lines on the ballot or in the heading thereof, is *prima facie* a defacement of that ballot. In the first instance, then, the ballots alone are examined, and, if it is found that there are marks of some kind on all but one of them, the voter is deemed to have

sufficiently manifested his intention to deface all the ballots except the one left unmarked. In order to deface a ballot, therefore, it is not necessary in all cases that the line or lines shall be across the heading thereof, or so drawn as to cover all the names on the ballot. But this prima facie intention of defacement may be rebutted and overthrown by something else appearing on the sheet. On some of the ballot sheets the two middle ballots were wholly defaced by lines drawn from the top to the bottom, while the Democratic had a broken line drawn through it, leaving one or more names on it undefaced, while on others the Republican ballot was in the same condition. In the absence of anything appearing on the sheet to the contrary, this Democratic ballot would be deemed to have been defaced. But on turning to the Republican ballot it is found that the names thereon immediately opposite the undefaced names on the Democratic ballot have been stricken out, and all the balance of the Republican ballot left unmarked. This circumstance overthrows the prima facie defacement of the Democratic ballot by showing the intent of the voter to vote for part of the candidates on the Republican ticket and part of the candidates on the Democratic ticket, contrary to the mandate of the statute, and there is no defacement of either the Republican or the Democratic ballot. This is illustrated by the ballots found on page 290 of the record, top page, 292, 302, 304, 310, 314, 336, 342, 360, 364, 468, 390, 396, 398, 402, 414, 416, 420, and others.

This principle is further illustrated by another class of ballots, a representative of which is found on page 284 of the record. The Democratic ballot is prima facie destroyed by a broken line, which omits to mark out two names. The two middle ballots on the sheet are defaced by cross-marks through the headings thereof. The two names on the Republican ballot immediately opposite the two undefaced names on the Democratic ballot are crossed out. If nothing further appeared, this ballot would be rejected for the reasons above given, as the prima facie defacement of the Democratic ballot is overthrown and rebutted by what appears so far on the Republican ballot. But all this is changed by something further apparent on the Republican ballot. The two undefaced names on the Democratic ballot are written under the two names defaced on the Republican ballot, which shows conclusively the intent of the voter to do all his voting on the Republican ballot. That in the Republican ballot, which, without anything further appearing therein, would have negated the intent to deface the Democratic ballot, manifested by the broken line drawn through it, is overthrown by the transfer of the names, and the prima facie defacement of the Democratic ballot remains unaltered. Further illustrations of this will be found on pages, 159, 195, 213, 251, 255, 306, 312, 320, 344, 358, 388, and 418. A ballot

held to be good under this rule is found on page 261. The broken line in the Democratic column left two names untouched—Dodd for circuit clerk and Doll for county clerk. The Republican ballot had the name of Dodd's opponent stricken out and Dodd's transferred. Prima facie, the Democratic ballot was defaced, and there was nothing anywhere on the sheet to the contrary except the marking out of Gerhardt's name, and this circumstance, which would have destroyed the ballot, was itself overthrown by the transfer of Dodd's name. Bender's name not having been stricken out, nothing appeared on the sheet to indicate that the remaining unmarked name on the Democratic ballot was voted.

As between Bender and Doll, the ballot last above described falls under the rule under which the ballot found on page 209 of the record was counted. By a broken line all the names on the Republican ticket were defaced except that of Bender. The two middle ballots were entirely defaced. The Democratic ballot was free from any mark, except one indicating the vote on the road law. It was held that nothing appeared on the sheet to negative the intent to deface the Republican ballot, manifested by the broken line, and that the entire Democratic ticket had been voted, and the Republican ticket defaced. Upon the same principle the ballots found on pages 141 and 354 were counted.

A peculiar ballot is found on page 322. The Republican, Prohibition, and Anti-Ring ballots are thoroughly defaced by a line drawn from the top to the bottom of each. The Democratic ballot has all the names marked out by a broken line drawn from top to bottom except those of Dodd for circuit clerk and Doll for county clerk. This was rejected by the board of canvassers. It was counted here for Doll, it being held that there is a presumption that the voter intended to vote for somebody, and he had not violated the mandate of the statute by attempting to vote for persons on more than one ballot without transferring the names into a single column. He had thoroughly defaced all the ballots except the Democratic ballot. Upon that ballot he had placed marks which, in the absence of anything to the contrary, would have manifested a sufficient intent to deface it. But this prima facie defacement is overthrown and rebutted by leaving two names on it unmarked. The court held the two names to be an undefaced part of the ballot, to be counted under section 66, which impliedly says a part of a ballot shall be counted if it is possible to ascertain from it the elector's choice of candidates. Every other ballot was thoroughly defaced, and part of this one left undefaced. It is a part of a ballot, and no mandatory provision of the statute is violated by counting it. A similar ballot is found on page 308, where the Republican, Prohibition, and Anti-Ring ballots are defaced by a line drawn through each of them from top to bottom, and the

Democratic ballot has a line drawn from the heading down to and through the name of the candidate for prosecuting attorney, leaving all other names on that ballot unmarked. This ballot also was rejected by the board of canvassers, but counted here.

A ballot sheet not counted by the board of canvassers or by this court is one found on page 382. On each of the ballots a line begins with the senatorial ticket, and runs to the bottom, except that the line on the Democratic ticket is broken so as to leave one name at the break unmarked. Prima facie all of the ballots on this sheet are defaced. The congressional candidate on each of them is left unmarked, and one additional candidate on the Democratic ticket. There is no more reason to say that the voter intended to vote for a man on any one of these ballots than there is to say he intended to vote for a man on either of the other.

These illustrations are sufficient to indicate the application of the principles upon which questions concerning cancellation of ballots were determined. The other class of questions in the case relate to the intent of the voter as to candidates whose names appeared upon, or are written by him in, the column or ballot he voted. Whatever may be said of the expression in the opinion in *Morris v. Board*, 49 W. Va. 251, 38 S. E. 500, which is said to have intimated that the statutory provision which says a voter desiring to vote for a person whose name does not appear on the printed ballot selected by him shall erase the name of the person whom he wishes to displace by that of another candidate, and write the name of such other candidate in the blank space below the name erased, is mandatory, it is certainly true, as an examination of the opinion in that case will show, that the point did not arise in the case, and nothing called for a decision upon it. It appears in the opinion in the form of a question. It is also true that it was expressly stated in *Daniel v. Simms*, 49 W. Va. 554, 574, 39 S. E. 690, that "if the voter has placed the names of all persons for whom he offers to vote in one column, and has thus prepared his ballot, his vote should be counted if his intention can be ascertained from that ballot, although he may not have written the names in the exact places in the column designated by the statute." This declares that provision of the statute to be directory, and not mandatory. The question did not arise in that case, but it had arisen in *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, and had been there decided in the same way. The statute does not prohibit the counting of the ballot for the person whose name is transferred because of failure to write it in the space prescribed therefor. No provision of the statute has been declared to be mandatory except in those instances in which it was declared by the Legislature that the ballot should not be counted in case of failure to comply with the

statutory requirement. Section 66 does not say every ballot from which the voter's intention as to candidates can be ascertained shall be counted, but it contains a provision from which it is naturally and reasonably to be inferred that such was the legislative intention. It prohibits the counting of "any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates." The converse of this, namely, that any ballot or part of a ballot from which it is possible to determine such choice, shall be counted, must be true. If so, the rules of law governing inquiries as to the intent of the voter, except so far as controlled by the statute, must govern in determining from the ballots selected and voted the persons for whom the elector voted, and in passing upon the ballots to which names have been transferred these rules, in so far as they are unchanged by the statute, have been applied.

DENT, J. (concurring). I concur in the result in this case for the reason that according to the rules and principles of *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, the Republican candidate, I. L. Bender, had a majority over his Democratic opponent, Frank W. Doll, of not less than 14. The result of this decision gives the Republican candidate a majority of 3. If the question asked in *Morris v. Board*, 49 W. Va. 230, 38 S. E. 500, to wit, "Under these authorities I think I may ask whether the plain requirement of our statute that the voter shall select one ballot only is not mandatory, and whether that provision that he shall place a substitute candidate's name in a particular blank space under the erased name is not also mandatory," had been wholly answered in the affirmative, the latter clause relating to the blank space would have caused the rejection of 11 more ballots, 8 of which were for Bender and 3 for Doll, would have changed the result reached, and elected Doll by 2 majority. Such a holding, in my opinion, as given in *Dunlevy v. County Court*, is not justified by the statute, and would have been a positive breach of moral law. I am aware that there are some people who at least profess to believe that elections, being human institutions, are governed solely by human inclinations, and are not subject to the supervision or control of that moral code of ethics promulgated by God through the greatest of all human law-givers from Sinai's hoary summit. This, however, is a great and grievous error, for the eighth commandment, "Thou shalt not steal," forbids not only larceny as defined in the Criminal Code, but also the unjust deprivation of every person's civil, religious, political, and personal rights of life, liberty, reputation, and property—even though done under the sanction of legal procedure. While the tenth commandment, "Thou shalt not covet," rebukes even the desire to do such things. The selfish disregard

of these plain inhibitions of both revealed and natural law, supported by the dictates of a pure conscience, brings on political corruption, poisons the very fountain head of civil authority—the ballot box—and ends in disrespect to all law, followed by lawlessness, fraud, rapine, murder, and lynching by rope, fire, and torture. A broken moral law, by whoever done, however done, and wherever done, is certain to bring its retribution, which may fall on the head of the innocent and pure, but for which the aggressor must some day, somewhere and somehow, make full restitution. This is a lesson which men are slow to learn and unwilling to receive, although the history of the past is but a record of one half of its profound truth, while the other half awaits the revelations of eternity. With my unshaken and fixed belief in the moral law, the supreme rule of Almighty God, the final triumph of perfect righteousness, and the sure punishment of all iniquity, I could not do otherwise than concur in sustaining the expressed will of the people, bound as I am by the oath of office under which I hold my commission. A cross and a crown of thorns are far more to be preferred than success achieved through the broken laws of God.

While I concur in the result, I cannot yield assent to the mandatory character of the statute relating to the choice of the voting column, except that, when more than one of the ballots have nothing on them to indicate which one of them was not voted and which was, then neither of them should be counted, for the reason that the choice of the voter as to any office is nonascertainable. The present opinion saps the foundation from under such holding and leaves it suspended on the mere dictum of the court. The reason for the law having ceased, the law ceases with it. Its continuance in operation can have but one effect alone, and that is it may compel the election officers to sometimes defeat the will of the people by rejecting ballots on which voters have plainly made their intention appear. It accomplished no other purpose in this case, except it caused the rejection of 38 ballots with the intention of the voter so plainly written on the face thereof that no one could be deceived thereby. Twenty-three of these ballots were for Bender, and 15 thereof for Doll, making a net loss of 8 to Bender. If Bender had lost 4 more or Doll 4 less, or Bender 2 more and Doll 2 less, the result of the election would have been changed.

(55 W. Va. 500)

CINCINNATI, P., B. S. & P. PACKET CO.
v. BELLVILLE et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

PROHIBITION—WHEN LIES—INFERIOR COURTS—
JUSTICE OF THE PEACE—JUDGMENT—ENTRY.

1. Prohibition will not lie to restrain an inferior court from exercising jurisdiction in a

particular case, in a class of cases of which such court had jurisdiction.

2. Although the statute requires that a judgment of a justice shall be entered within 24 hours after trial (Sundays excepted), a judgment rendered within such time, but entered after the time thus directed, is not void.

3. Where a judgment in an action tried before a justice is rendered and publicly announced by the justice on the day and at the close of the trial, although the clerical work of entering the judgment upon his docket is not performed until a few days thereafter, the statute is substantially complied with.

4. After a justice has rendered and publicly announced his judgment in an action at the close of the trial, the entry thereof upon the justice's docket is purely ministerial, and not judicial.

(Syllabus by the Court.)

Error from Circuit Court, Cabell County;
E. S. Doolittle, Judge.

Petition by the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company against Samuel Bellville and others for a writ of prohibition. From a judgment denying the writ, plaintiff brings error. Affirmed.

W. K. Cowden and W. S. Laidley, for plaintiff in error. Wallace & Fitzpatrick, for defendants in error.

McWHORTER, J. J. M. McCoach & Co. brought their suit before a justice of Cabell county against the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, claiming judgment for money due on contract for \$25. The case was tried on the 26th day of March, 1902. The justice rendered judgment for the plaintiffs for the sum of \$14.38. On the 5th day of April, 1902, the defendant packet company filed its petition in the circuit court of Cabell county, praying for a rule against Samuel Bellville, the justice who rendered the judgment, and the plaintiffs, to show cause why a writ of prohibition should not be awarded, prohibiting said justice from proceeding further in said action, and from issuing execution or taking any further steps for the collection of said judgment. The grounds for such prohibition, as set out in the petition, are that on the day fixed in the summons for the trial of said cause, and the defendant having appeared on the 21st of January, 1902, the cause was by agreement continued from time to time until the 26th day of March, when the defendant appeared and made defense to said action, and, after hearing all the evidence adduced upon the trial, the said justice, on the said 26th day of March, 1902, rendered judgment therein against the defendant for said sum of \$14.38, with interest and costs; that, although said judgment was so rendered, the justice did not enter up the same within 24 hours (Sundays excepted) after the judgment was rendered; that he did not enter up said judgment on the 27th, 28th, or 29th of March, but that he did, afterwards, more

§ 3. See *Justices of the Peace*, vol. XI, Cent. Dig. § 295.

than 72 hours after the time said judgment was rendered, wrongfully and illegally enter up the judgment on his docket; that after the same was entered up notice was given to plaintiff that on the 5th day of April, 1902, at 2:30 o'clock, defendants would move the justice to set aside and annul the judgment so entered, on the ground that it was illegal, because not entered within 24 hours after its rendition, but the justice overruled the motion and refused to set aside the judgment; and that, unless prohibited, the justice would continue to usurp and abuse his power as such justice, and exceed his legitimate power in such case, by issuing execution on said judgment, and proceed to collect the same. The circuit court issued the rule; the plaintiff appeared and moved to quash the petition, and demurred thereto, and prayed that the rule be discharged; and the court sustained the demurrer and discharged the rule, and entered judgment against defendant for the costs in the proceedings, when defendant procured a writ of error to said judgment.

It is contended by plaintiff in error that this case is controlled by the case of *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634. That was a case which had been to this court before. *A. J. Lowther* in 1886 had brought suit against *Davis*, and on the 8th day of April, 1886, had the verdict of a jury in the case, tried before two justices, in his favor for \$184 and costs. No entry was made of any judgment on said verdict. Afterwards a justice issued an execution. Notice was given to the plaintiff to quash the execution. The justice overruled the motion to quash, and refused an appeal from his judgment. An appeal was granted, however, by the circuit court, and on motion of plaintiff the appeal was dismissed as improvidently awarded, and *Davis* brought it to this court on writ of error, and the court held that the circuit court erred in dismissing the appeal, and the justice erred in overruling the motion of the defendant, *Davis*, to quash the execution, for the reason that there was no judgment on which it could have been legally issued; and the case was remanded to the circuit court for trial on the appeal. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20. On the 20th of March, 1888, the two justices who tried the case entered judgment upon the said verdict as of the 8th day of April, 1886. Plaintiff, *Lowther*, died, and his administrator made a motion before the justice to revive the judgment in his name, which motion was opposed by the defendant, and the justice refused to revive, and on appeal to the circuit court his action was affirmed. The administrator brought it to this court on writ of error, and the judgment of the circuit court was here affirmed. *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634. At page 332, 37 W. Va., page 630, 16 S. E., 18 L. R. A. 634, it is said in the opinion: "In the first place, the case

may be regarded as a *res adjudicata*; this court having in effect directed the execution to be quashed upon the ground that no such judgment had been rendered or entered. It is true that the record now produced of an attempt on the part of the two justices to enter a judgment *nunc pro tunc* was not then before this court; but the principle often announced is that everything litigated on the former trial, or which might and ought to have been litigated, is closed by the final adjudication here." The question raised in the case at bar is not directly passed upon in the said last-named case.

In 23 A. & E. E. L. (2d Ed.) 209: "Prohibition cannot be used in place of the ordinary remedies provided by law for review and correction of errors. Accordingly it will not lie where there is an adequate remedy by appeal, writ of error, or writ of certiorari. Even the erroneous decision of a jurisdictional question, the court having jurisdiction of the general class of cases to which the particular case belongs, is not ground for issuing a writ of prohibition, since there is an adequate remedy by appeal. The writ will not lie to restrain an inferior court from exercising jurisdiction in a particular case, in a class of cases of which such court had jurisdiction." And cases are there cited. In *McConiha v. Guthrie*, 21 W. Va. 134, syllabus, point 2: "The rule is well established that, where the inferior court has originally jurisdiction of the cause, the writ of prohibition will lie only where such court, during the proceedings or in the conduct of the trial, clearly exceeds its legitimate powers in some collateral matter arising in the cause over which it has no authority; but, unless it has so exceeded its authority, on an application for such writ the court above will not inquire whether it has decided right or not."

In *Hutchinson's Treatise*, § 131, it is said: "Although the statute requires that a judgment of a justice shall be entered, as we have seen, without delay, or within twenty-four hours after trial (Sundays excepted), a judgment entered after the time or the day thus directed by the statute is not absolutely void. It is irregular, but will be effectual as a judgment until reversed or properly set aside"—citing *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634, and other authorities. In *Hall v. Tuttle*, 6 Hill, 88, 40 Am. Dec. 382, it is held: "Though statute require judgment to be forthwith rendered and entered upon the return of a verdict, a judgment rendered in due time will not be reversed because not entered in the docket until two or three days thereafter." See note at the end of this case, 40 Am. Dec.

In *Conwell v. Kuykendall*, 29 Kan., syllabus, point 2, it is held: "Where a judgment in an action tried before a justice of the peace is rendered and publicly announced by the justice by the fourth day after the close of the trial, both days inclusive, section 115,

c. 81, Comp. Laws 1879, is substantially complied with, although the clerical work of entering the judgment on the docket is not completed until a few days thereafter." In *Stallcup v. Baker*, 18 Ohio St. 544, it is held that the rendition of judgment by a justice on a verdict of the jury is a judicial, and not a ministerial, act, and neglect on his part to render judgment on such verdict within the time required by law to make it valid is not a breach of his official bond, conditioned that he "shall well and truly perform every ministerial act that is enjoined upon him by law and by virtue of said office." In *Stephens v. Santee*, 49 N. Y. 35, it is held that the entry of judgment is in no respect the exercise of judicial power, but the performance of a mere ministerial act. "An omission, therefore, to make such an entry, will not render the entire proceedings a nullity. It may be made by the justice at any time, and will, for the purpose of sustaining the proceedings, be regarded as made." *Christopher v. Van Liew*, 57 Barb. 17, was a case where a justice rendered a verdict in favor of plaintiff, and by mistake in his docket entered a judgment in favor of defendant, and, a transcript thereof being filed and docketed in the county clerk's office, the plaintiff was compelled to pay the judgment. The justice was held liable as for an act of ministerial neglect and carelessness, by which the plaintiff had been directly injured; and it was also held that the justice had the right to correct such a mistake in his docket the moment he discovered it, the error being merely clerical. In *Robinson v. Kious*, 4 Ohio St. 593, the court holds that the statute, which provides that "upon a verdict the justice must immediately render judgment accordingly, does not make a judgment rendered upon a subsequent day absolutely void, but it makes it irregular, and for such irregularity, when not waived, it is reversible."

The announcement of the conclusion arrived at by the justice is the judgment. The entry of it upon his docket is simply the evidence of the judgment. The petition for rule in case at bar alleges the rendition of the judgment on the 26th day of March, the day of the trial of the case. Both parties litigant knew precisely what the judgment was. There is no dispute about the jurisdiction of the justice, both of the person of defendant and of the subject-matter in controversy.

The judgment of the circuit court is right, and must be affirmed.

(55 W. Va. 565)

DUNBRACK v. NEALL et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

INSURANCE—RIGHTS OF PARTIES—INTEREST OF MORTGAGOR—ACCOUNTING BY MORTGAGEE.

1. By verbal agreement, N. sold to D. certain real estate on March 23, 1896, for \$2,500, but

the contract was not completed by the payment of \$625, cash payment, and execution and delivery of the deed from N. to D., and deed of trust by D. to J. S. N., trustee, to secure the deferred payments, aggregating \$1,875, until June 29, 1896; the deeds bearing the first-named date. On the 4th day of June, 1896, N. took an insurance policy on the buildings in her own name for \$2,000, and paid the premium thereon. After the completion of the contract, N. offered to assign to D. the insurance policy upon repayment to her by D. of the premium, which D. refused to do. N. then assigned the same, with the assent of the insuring company, to D., and the said company indorsed on the policy, "This policy is hereby transferred and assigned to A. C. Dunbrack with loss, if any, payable to J. S. Neall, trustee for Mary A. Neall, as his interest may appear," which policy was held by J. S. N., trustee. *Held*, said insurance was for the sole benefit of N., and D. had no interest in said policy.

2. Where a creditor secured by trust deed procured insurance on the trust property for his own benefit, and the premium was paid out of his own money, the trust debtor cannot require the creditor to account to him for money received on account of such insurance.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by A. C. Dunbrack against Mary A. Neall and others. Decree for plaintiff. Defendants appeal. Reversed.

W. B. Maxwell, for appellants. W. G. Worley, for appellee.

McWHORTER, J. By deed dated the 28th day of March, 1896, Mary A. Neall and James A. Neall, her husband, of Philadelphia, Pa., by J. S. Neall, their attorney in fact, conveyed to A. C. Dunbrack certain parcels of land therein described, being in the town of Parsons, in Tucker county, in consideration of \$2,500, of which \$625 was paid in cash, and three notes signed by A. C. Dunbrack, bearing even date with the deed, for \$625, payable, respectively, on or before the 28th days of March, 1897, 1898, and 1899, and being the deferred installments of purchase money on said property. On the same day said Dunbrack executed a deed of trust to J. S. Neall, trustee, on the same property, to secure the payment of said notes. While the deeds bear date on the 28th of March, the transaction was not really consummated and the deeds delivered until the 29th day of June, 1896. On the 4th day of June, 1896, before the transaction had been completed in writing, Mary A. Neall insured the building on the property so conveyed in the Scottish Union & National Insurance Company for \$2,000. After the execution of said deed of conveyance and trust deed, on the 27th of July, 1896, she indorsed on said policy an assignment of the same to A. C. Dunbrack, subject to the consent of the insurance company; and, on the 7th of August following, the insurance company, by its agent, indorsed its consent to said assignment, and at the same time entered thereon the further indorsement: "This policy is hereby transfer-

red and assigned to A. C. Dunbrack with loss, if any, payable to J. S. Neall, trustee for Mary A. Neall, as his interest may appear." On the 18th of May, 1897, the insured building was burned. The trustee, Neall, gave notice to sell the property conveyed by said deed of trust, to be sold on the 18th day of August, 1897. On the 12th day of August, 1897, Dunbrack presented his bill of complaint against Mary A. Neall, J. S. Neall, trustee, and the Scottish Union & National Insurance Company, to the judge of the circuit court of Tucker county, praying an injunction to restrain the trustee from selling the said property on the 18th of August, or any other day, until the further order of the court, and that the trustee be required to give bond as required by law, and that he be required to produce said insurance policy, with a full statement of all steps taken by him to collect the same, and that said insurance company be required, on its part, to answer and set up in said suit why said insurance policy had not been paid by it, and any defense, if any it had, against such payment, and that said company be required to pay the face of said policy, \$2,000, and interest thereon, into court, to be paid by it to the said Neall direct upon her said trust deed, and that plaintiff, after being permitted to retain the cost of the suit, might be permitted to pay to said Mary Neall the balance due on said trust deed, if there be any balance then due, and that she then be required to release said trust deed and relieve the said land from the lien thereon, and for general relief.

Plaintiff, in his bill, alleges the assignment by Mrs. Neall to plaintiff with the knowledge and assent of said company, and his own assignment thereof to Trustee Neall as security for said purchase money; that the said policy was delivered by plaintiff to the trustee, who was a nonresident of the state of West Virginia, and a resident of Colorado; and alleged that said insurance policy was necessarily a primary security for said trust debt, and, by every construction of law and equity, and the understanding of parties, in case of destruction of property by fire the same was to be immediately collected and paid upon said debt, and to the relief of the land, and there was no good reason why such collection and application should not be made by the trustee, and that no just defense could be made by the company to making such payment; that, by reason of said \$2,000 insurance, plaintiff "was estopped from taking further insurance on said building"; that said trustee, acting through his local attorney, had not collected said policy, nor taken any steps to do so, nor produced the policy, nor allowed plaintiff, in his behalf, to take legal steps for its collection, but, on the contrary, had advertised said land for sale under said trust deed, and that, unless this court of equity would intervene to prevent, the property would be sold at

great loss and detriment to plaintiff; that plaintiff was advised that, under the circumstances, a court of equity would intervene and lend its assistance to stop the high-handed outrage, by staying and enjoining the trustee from making sale until he had collected said insurance and applied the proceeds to said debt, or demonstrated by proper legal proceedings that the same was uncollectible, and further he had submitted himself to the jurisdiction of the court by executing a proper bond, so that plaintiff might have some assurance that the trust debt would be properly paid to the beneficiary and any balance to plaintiff; and the court, having and taken jurisdiction for this purpose should take such jurisdiction for all purposes, and should in this proceeding require said trustee to produce and file his insurance policy, and require said insurance company to at once make any and all defense it might have to the payment of its liability thereunder, and, if it should appear that no just defense existed, require it to pay the amount at once into court, to be applied to payment of said trust debt, and the plaintiff be permitted to pay the balance to the entire discharge of said debt and relief of said land. The defendants, Mary A. Neall and J. S. Neall, trustee, filed their joint and separate answers, showing that the deed of conveyance and trust deed were delivered on the 29th day of June, 1896, the acknowledgment of the trust deed by Dunbrack bearing that date, and the cash payment of \$625 being made on that day; that the policy of insurance was taken by Mary A. Neall on the 4th day of June, while she was uncertain as to whether the sale to Dunbrack would be consummated; that she paid the whole of the premium thereon, and that, when plaintiff complied with the terms of the sale, she, by her agent, offered to assign said insurance policy to plaintiff if he would pay her the premium which she had paid thereon, which plaintiff refused to do; she then set about to get the policy so transferred that, in case of loss of the building, she would be able to receive some of the benefit from her said insurance, and accordingly, by the consent of the company, had the indorsement made and indorsed on said policy, in which condition it was at the time of the fire which destroyed the building; that, after the destruction of the building, respondents made proof of loss, and demanded payment of the insurance company, but the company refused to pay until the trustee should exhaust his remedy under the trust deed by sale of the land, establishing the amount of his loss, if any, as provided in the indorsement on said policy, save and except the sum of \$1,000, which the said trustee received and accepted in full settlement of his claim against the said insurance company. The trustee then advertised the land to be sold on the 18th of August, 1897. Respondents denied that it was ever agreed between them

and plaintiff that the policy should be taken and held by them as a primary or any other kind of security; that plaintiff refused to pay the premium, and he had no legal or equitable right to have the benefit of the policy, or of any part of it; and denied that they had a contract of understanding with the plaintiff that in case of fire they should collect the amount of the policy and apply it on the purchase money, or that there was any understanding or agreement to that effect, or any other effect, which would relieve plaintiff from the payment of the purchase money due by him; and that the allegations of plaintiff's bill that such an agreement and understanding were entered into were utterly false and untrue; and denied that their insurance being in force prevented plaintiff from taking insurance in his own name; that no action had been instituted upon said policy, because of the provision of said policy that the same should be paid to respondent Neall, trustee, "as his interest may appear," which condition, when met by the demand of said insurance company that his interest could only be made to appear after having exhausted the real estate embraced in the deed of trust, had presented such a question that respondent had not made that risk by entering suit upon the policy; and denied the right of plaintiff to be entertained in this court, and denied every allegation in the bill not admitted in the answer, and prayed that the injunction be dissolved.

The Scottish Union & National Insurance Company filed its answer, admitting that it had issued the policy to Mary A. Neall; that Mary A. Neall offered plaintiff to have said policy assigned to him if he would repay her the premium which she had paid therefor, but he flatly and positively refused to do so, and she did not assign said policy to him; that she then set about to devise some plan whereby she could derive some benefit and advantage from said policy, which by the terms of a condition therein became void when she sold said property; accordingly she, by her agent, informed respondent, through its agents, that she had sold the property, taking a trust deed to secure the unpaid purchase money, and asked that the policy be so transferred that she could have the benefit of it in case of fire, and it was arranged by proper assignment that the loss, if any, should be payable to Neall, trustee for Mary A. Neall, as his interest should appear, all of which was done without having or asking the consent of the plaintiff; and averred that, plaintiff having utterly and absolutely refused to have anything to do with said policy, the same must now stand on the same footing as a policy of insurance taken by a mortgagee for his own and sole benefit, and the plaintiff could have no benefit of said insurance, either against respondent, or as a credit upon the purchase money due by him to Mary A. Neall, and that the adjustment and payment of said policy was wholly a

matter between the respondent and Neall and her trustee, and denied that plaintiff had any interest whatever in said policy of insurance; and filed with its answer a copy of agreement of settlement for \$1,000 between itself and J. S. Neall, trustee, for Mary A. Neall, as well as a copy of the policy.

On the 15th of December, 1897, the cause came on to be heard upon the bill and the said answers, and general replications thereto, and exhibits filed with the bill and answers, and depositions, and upon a motion to dissolve the injunction; and the court was of opinion that the cause, upon the pleadings and proof, was for the plaintiff, and overruled the motion to dissolve the injunction, and was further of the opinion that plaintiff, Dunbrack, was entitled to have the full amount of the insurance policy mentioned in the proceedings applied to and set off against the purchase money and to the defendant Mary A. Neall; that the assignment of said policy by said company to Neall, trustee, and the settlement made by the company with said trustee was without the plaintiff's authority, and not binding upon him; that, by reason of the admission and ratification of such compromise by the defendant Mary A. Neall, she was bound by such compromise, so far as plaintiff was concerned, but that she would be entitled to recover from the plaintiff the balance of said purchase money, after deducting the amount of said insurance policy, with its proper interest, less any sum paid for such policy by said Mary A. Neall, with its proper interest, and any proper costs incurred by her in collecting the debt, said costs to include any advertisements of sale under the deed of trust, but no commissions for making sale, no sale having been made, and, in account stated, the plaintiff would be entitled to the costs of this suit; and that an order of reference should be had in the cause to state an account according to the opinion of the court set forth in the order; and referred the cause to one of the commissioners to report accordingly.

The defendants tendered a bill of review on the 23th of November, 1898, which was rejected. The commissioner filed his report, dated the 7th day of March, 1898, to which report Mary A. Neall and J. S. Neall, trustee, filed their six several exceptions: First, "because no report whatever, should be made in this cause"; because the insurance policy became mortgagee's insurance after the sale to Dunbrack and the assignment of the policy, and payable to Neall, trustee, as his interest should appear as was clearly shown by the evidence taken before the commissioner, and that Dunbrack was not entitled to have the benefit thereof, but that the insurance company was entitled to be substituted to the lien of Mary A. Neall to the extent of the payment made by it to her on said policy; because, by the evidence of Dunbrack himself, he was not entitled to any benefit of said policy, because he never paid for the

same, never had it in possession, and was not entitled to it until he had repaid the premium, and, not having repaid the premium at the time of the loss, was not entitled to have the possession of it, or receive any of the benefit thereof; because the proposed assignment of said insurance policy to Dunbrack was entirely conditional and contingent upon his repayment of the premium to Mrs. Neall, which he never did; and because the commissioner allowed no compensation whatever to the trustee, Neall, for his services.

On the 28th day of November the cause was brought on to be heard upon the papers, orders, decrees, and report of the commissioner, and the exceptions thereto, the depositions of witnesses, and exception of the plaintiff to the reading of the deposition of F. C. Carroll, when all exceptions to the report were overruled, and the exception to the reading and excluding of the deposition of F. C. Carroll was sustained, and the commissioner's report in all other respects confirmed; and it appearing from the report of the commissioner, Conley, that there was a balance due Mary A. Neall on account of her vendor's lien from the plaintiff, Dunbrack, of the sum of \$31.30, after giving Dunbrack credit as in the report set forth, which report shows that he was credited with the whole amount of the policy, \$2,000, it was adjudged, ordered, and decreed that the vendor's lien of said Mary A. Neall against the property was fully satisfied, and it perpetuated the injunction; but which decree was without prejudice to the rights of Mary A. Neall or her trustee against the defendant insurance company, if any such rights she might have, and the right to proceed against the same by any proper proceedings. From which decree said Mary A. Neall appealed.

Was the decree of December 15, 1897, appealable? This decree failed to adjudicate the principal issue made by the allegations of the bill, viz., the liability of the insurance company on the policy for \$2,000; the prayer of the bill being that the said company be required to pay the amount of the policy, with interest thereon, into court, and that the same be paid to the defendant Mary Neall upon her said trust debt. In *Hill v. Als*, 27 W. Va. 215, the syllabus is as follows: "(1) The provision of the statute authorizing appeals to this court in chancery causes, wherein there is a decree 'adjudicating the principles of the cause,' authorizes such appeal only where the decree appealed from adjudicates all the controversies between the parties raised by the pleadings or otherwise in the cause. (2) Where the record in a cause shows that the pleadings present two or more controversies between the plaintiff and the different defendants, only one of which was passed upon by the circuit court, and the others left undecided, this court will dismiss the appeal, as having been improvidently awarded." The case of *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. 914, is to the same effect. See, also,

Hinchman v. Morris, 29 W. Va. 673, 2 S. E. 863. And in the case of *Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462 (syll. point 3), it is held: "Interlocutory decrees cannot be appealed from, except in cases provided for in section 1, c. 135, of the Code of 1899; and an order referring the cause to a commissioner in chancery to make an account is, in general, not an appealable decree." The decree of December 15, 1897, being an interlocutory decree, the rejection of the bill of review tendered by defendant becomes immaterial.

The exception taken by plaintiff to the deposition of F. C. Carroll, as being irrelevant and improper, under section 85, c. 130, Code 1899, was improperly sustained by the court, and should have been overruled, and the deposition read. The deposition was taken before the commissioner before the making of his report, and was concerning a matter not adjudicated in said decree of December 15th, and did not come within the purview of said section 85. Plaintiff's own deposition fails to support the allegations of his bill. He states that he thinks it was in July, 1897, he and Mr. Scott were talking over the matter, and Scott calculated the interest and principal of the notes due Mrs. Neall to amount to \$2,018 and some cents; that he went over and got Mr. Maxwell to count it up, and he made it \$2,022.80; that he then offered Maxwell the \$2,000 policy, or what interest witness had in it, and counted him out the \$22.80, the amount claimed by Mr. Maxwell that was due to Mrs. Neall. On cross-examination he stated that he didn't remember of ever seeing the insurance policy; never had possession of it; that he knew nothing of Mrs. Neall assigning the same to him, only what Mr. Maxwell and Mr. Keim, the agent of the company, told him; that Mr. Keim told him that it was made over to him in his favor, and witness told Mr. Maxwell what Keim said, and Maxwell said he didn't think it was any use, unless witness held the policy and paid for it; that he had not the money then to pay for it, and told Maxwell he would try and raise the money, and send for it, but failed to do so. He states also that he executed the deed of trust and made the cash payment, he thinks, on the same day. The date of the acknowledgment of the deed of trust is the 20th day of June, 1896. Witness F. C. Carroll testifies that he was the adjuster of the Scottish Union & National Insurance Company employed to adjust the loss; that Dunbrack told witness that Maxwell had asked him to pay this premium, but that he refused to do it, as he did not feel able to carry any insurance; that he also said that, if he wanted any insurance, he would take it out himself, or something to that effect; that Maxwell had told him that unless he paid the premium he was to receive no benefits from the insurance, and that he told witness in the same conversation that he had nothing to do with witness, and that his

attorney had advised him that he could make Neall put his building back, and he should look to Mr. Neall, and not to the insurance company; that he did not intimate to witness during all the conversation that he had any contract with Mrs. Neall, or J. S. Neall, trustee, by which he was to have any benefit from the said insurance policy. Witness states that at two different times after the loss occurred he was at Parsons, and on both occasions visited Mr. Dunbrack, and had quite a long conversation with him, and that during the whole of either conversation he made no claim or intimation that he had any claim against the Scottish Union & National Insurance Company. On the contrary, he admitted that he did not know that the policy was in force at the time of the fire, and stated to others after the fire that he had no insurance; repeatedly saying that he had nothing whatever to do with witness or the company that he represented. W. B. Maxwell testified that he acted as agent for Mrs. Neall in selling the property to Dunbrack; that on or about the 28th of March he had a verbal contract with Dunbrack to sell him the property on the terms set out in the deed, but that he failed to make the cash payment until about the 29th of June; that on the 4th of June he secured for Mrs. Neall the insurance policy in controversy; that some days afterwards, by the direction of either Mr. or Mrs. Neall, he offered Dunbrack to have the said insurance policy assigned to him if he would repay Mrs. Neall the premium paid by her; he flatly refused to pay this premium, and said the matter did not affect him; that he then said to him, if he did not repay her the premium, that he would have the policy so assigned as to operate for Mrs. Neall's benefit in case of loss, and he would not get any benefit from it, and accordingly, at his advice, the policy was assigned as he told Dunbrack it would be; that Dunbrack never at any time offered or promised to pay the premium; on the contrary, he refused to do so. Mr. Dunbrack was again put on the stand, and contradicted what Mr. Maxwell said about his refusing to pay for the policy, and says he went to Mr. Keim to have the property insured, and he informed him that Mrs. Neall had the property insured, and wouldn't give two policies on the same property. "When I came back I told Mr. Maxwell about it, and he told me, yes, that was right—he had—but said, if I would raise him the money, he would have it turned over to me. I told him then I hadn't the money to spare, but, as soon as I could, I would do so. He at this time promised to have it assigned over to me as soon as I raised him the money." At the time this insurance policy was taken out by Mrs. Neall, the contract between her and plaintiff had not been consummated, and she took out the insurance purely on her own account and in her own name; and after the contract was completed, and the deed of conveyance delivered, and also the deed of trust, and after the refusal of plaintiff to repay to

her the premium on the insurance and take an assignment of the policy, she took steps to have the same by assignment, and by the action of the company to place her in position to receive the benefit of the policy as a mortgagee, in case of fire, as she had been divested of the legal title to the property, and could only hold insurance as a mortgagee. In section 449, 2 May on Insurance, it is said: "Where a mortgagee insures his own interest without any agreement between him and the mortgagor, the latter has no claim to have any portion of the loss recovered applied to the discharge of his debt." *Olting McIntire v. Plaisted*, 68 Me. 363. In last-named case, at page 365, in the opinion, it is said: "It is well settled that a mortgagor cannot require a mortgagee to account to him for money received for insurance where there is no contract between them to that effect, and the insurance was procured by the mortgagee for his own benefit, and the premium was paid out of his own money." *Olting Oushing v. Thompson*, 34 Me. 496; *White v. Brown*, 2 Osh. 412; *King v. Insurance Company*, 7 Osh. 1, 54 Am. Dec. 683. Also in *Insurance Company v. Woodbury*, 45 Me. 447, it is held: "If a mortgagee insures his own interest without any agreement between him and the mortgagor therefor, and a loss occurs, the mortgagor is not entitled to any part of the sum paid upon such loss, to be applied to the discharge or reduction of his mortgage debt." See, also, *Carpenter v. Insurance Company*, 16 Pet. 495, 10 L. Ed. 1044. Plaintiff having utterly failed to maintain the allegations of his bill, he clearly had no interest in the policy of insurance.

The decree of the circuit court must be reversed, and this court, proceeding to make such decree as to the circuit court should have rendered, will reverse the decree, dissolve the injunction, and dismiss the plaintiff's bill.

(55 W. Va. 586)

FEELY v. BRYAN et al.

(Supreme Court of Appeals of West Virginia.
April 18, 1903.)

EQUITABLE MORTGAGE—PREFERENCE—
VALIDITY.

1. Any writing charging a debt on property, though not a formal mortgage, is an equitable mortgage or lien.

2. Under section 2, c. 74, Code 1899, if one lend money to a solvent person, with the agreement that a mortgage is to be made on certain property to secure the loan, and later, when insolvent, the borrower makes the mortgage, it is not a good preference as to other debts existing at the date of the mortgage.

3. A transfer or charge by an insolvent debtor, free from actual fraudulent intent as to creditors, preferring a particular debt, is not, as to debts contracted after its recordation, a preference, contrary to section 2, c. 74, Code 1899.

4. In a suit to impeach a preference made contrary to section 2, c. 74, Code 1899, any creditor filing his demand for allowance before

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 152.

a commissioner under a reference to ascertain the insolvent's debts thereby unites in the attack upon the unlawful preference, and is entitled to share in the insolvent's estate.

5. Several creditors with separate demands attack a mortgage as a preference condemned by section 2, c. 74, Code 1899, and a decree adjudges the property to be for the benefit of all the insolvent's creditors, and decrees out of it particular sums to the several creditors. These sums cannot be added to give jurisdiction to the Supreme Court for an appeal by the creditor preferred by such mortgage.

Dent, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by W. A. Feely against S. J. Bryan and others. Decree for defendants, and plaintiff appeals. Dismissed.

J. P. Scott, for appellant. Cunningham & Stallings, for appellees.

BRANNON, J. Bryan and Gillespie had a drug store in Tucker county, and Bryan purchased Gillespie's interest, and to pay for it Bryan, on June 22, 1900, borrowed \$1,100 of Feely upon the agreement that Bryan was to execute a deed of trust or mortgage on the drug store to secure Feely. No mortgage was at the time given, but on October 27, 1900, Bryan made a sealed instrument reciting that he was indebted to Feely in the sum of \$1,100, and saying, "and for the security of said sum I do hereby mortgage and assign" to the said W. A. Feely a soda fountain, some bottles, and the stock of drugs. This obligation was antedated to June 22d. It was acknowledged and recorded October 27th. On February 19, 1901, the drug store stock was levied upon under three executions in favor of Cunningham & Stallings, the S. Wilson Cigar Company, and O. M. Haines for several debts, whereupon Feely obtained an injunction restraining sale under the executions. The court appointed a receiver, and he sold the stock at \$700, and the fund is in court to abide its order. In this suit Cunningham & Stallings, the cigar company, and Haines filed answers, averring that, when Bryan made the mortgage to Feely, Bryan was insolvent, and therefore it operated for the benefit of all his creditors, under section 2, c. 74, Code 1899. Upon the evidence the court held that Bryan was insolvent at the time of making the mortgage, and sent the case to a commissioner to ascertain all debts of Bryan and fix their shares in the fund. He reported a large number of debts, among them debts contracted by Bryan after the loan and after the mortgage. He also reported Bryan was insolvent. Feely excepted to the finding of Bryan's insolvency, and because debts of Haines & Co., Coffman, and James Clark Distilling Company were reported to share in the fund; those debts arising after the recordation of the mortgage. The court decreed that all the debts share pro rata in the fund, and Feely appeals.

Counsel contends that the obligation executed by Bryan to Feely is nondescript, contains no words of grant like a deed of trust, and cannot operate as a lien or mortgage. Under the principle often stated that every express agreement in writing showing intent to make some particular property, real or personal, security for a debt, or assigning or promising to assign it as such security, is an equitable lien or mortgage, this instrument so operates. *Fid. Ins. Co. v. Railroad*, 33 W. Va. 761, 11 S. E. 58; 2 Am. & Eng. Dec. in Eq. 436, 441. I think the evidence clearly shows that the finding of the commissioner and judge of the fact that Bryan was insolvent on the date when the equitable mortgage was executed is correct. But he was not at the date of the loan, at which time he agreed to give a mortgage. What is the effect of this agreement afterwards executed by the mortgage? Does it make the mortgage stand as if made at the date of the loan? If it does, then it is a lawful preference, even under section 2, c. 74, Code 1899, as a mortgage given at the time of a loan is not a preference condemned by it. I admit the rule suggested by counsel that for some purposes equity regards that as done which is agreed to be done, and on this principle the law is that an agreement to give a mortgage for a valid debt is treated in equity as a mortgage. 1 Jones on Mortg. § 163. But we are dealing with a statute, and we must go by it. It says that if a loan be made, or other debt be "contracted at the time such transfer or charge was made," it is not a preference contrary to the statute, but a valid charge. The requirement in letter is that the loan and mortgage must be at the same time. A loan was made under agreement to secure it by mortgage, and was afterwards executed. The act declared that mortgages made in contemplation of insolvency, with the design to prefer one creditor over another, should operate for the benefit of all, and provided that the act should not affect a mortgage to "secure a debt or liability created simultaneously with such mortgage." It was held that the mortgage had no preference, because not made simultaneously with the creation of the debt. *Darnell v. Lewis*, 94 Ky. 455, 22 S. E. 843. See *Bank v. Hunt*, 11 Wall. 391, 20 L. Ed. 190. The court said the language means that the execution of the mortgage and the creation of the debt must be simultaneous. The promise to execute a mortgage in future to secure a debt that day made is not a simultaneous act. Besides, to substitute the promise for the act of executing the mortgage would allow a debtor, in contemplation of insolvency, to make the preference that it was the object of the statute to prevent. See *Ahern v. White*, 89 Md. 409. I confess that my first impression was that, as the loan bettered the estate of Bryan, and as a mortgage would have been good if executed when the loan was made, and as, before any

creditor had fixed lien by execution on Bryan's property, the mortgage was executed, it ought to be good. But, first, there is the letter of the act requiring the loan and mortgage to be contemporaneous; and, second, any other construction would open wide the door to defeat the good designed by the statute by allowing oral evidence of a promise to make a mortgage. It gives fraud and perjury a chance to do their work. We must give the act a construction which will best protect the business world, and it is apparent that safety to business will be promoted by the construction we give. Therefore we hold that said mortgage has no preference over other debts. But we hold the decree erroneous in allowing debts not existing at the date of Feely's mortgage, because the statute says that the insolvent's property shall go pro rata to "all the debts of such insolvent existing at the time such transfer or charge is made." What possible equity can a subsequent creditor have to complain of the mortgage, unless kept off the record? All the debts, so far as the report shows, are dated after the mortgage; but perhaps and likely some of the judgments were on debts antedating the mortgage. The answer alleging they antedated the mortgage was denied.

It is said that there is error in the decree in that it decreed shares in the fund to people who did not attack the mortgage. Only three creditors filed an answer attacking the mortgage, but a number of others were reported as creditors of Bryan by the commissioner. They did not otherwise appear. But it has been held that, when a case is before a commissioner to ascertain debts, a creditor may there informally present his claim, though not a formal party, and thereby he becomes an informal party. He thereby asks relief, and he can appeal. *Hogg's Eq. Prin.* 614; *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 489; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Woodyard v. Polsley*, 14 W. Va. 211; *Bilmyer v. Sherman*, 23 W. Va. 656. Observe that the statute allows him to come in at any time before final decree. By so coming in without petition he subjects himself to the jurisdiction of the court, and will by decree be made to share the burden of costs, whether he agrees to do so or not. So coming in is a sufficient attack on the preference.

The answer attacking the mortgage was filed more than four months after the recordation of the mortgage, and was thus too late; but there was no exception to that matter of it attacking the mortgage. The answer makes no parties, and is not formal as an answer calling for affirmative relief, yet is substantially sufficient as such and, had there been a plea of limitation to that matter of it, or an exception, it would have been error to decree on that matter.

Having come to the conclusion that there is reversible error, I run against the ques-

tion of jurisdiction, as we must have jurisdiction to justify a reversal. No one of the creditors except Feely gets a sum out of the fund amounting to \$100. Added, they amount to more than that sum. Can they be added together for jurisdiction? The debts are distinct, have no unity; but combined they take from Feely more than the sum of \$100. "Several and separate interests of different appellees cannot be united so as to make up the jurisdictional amount, where such parties could not have united their interests if a recovery had been had against them. Neither codefendants nor coplaintiffs can unite their separate and distinct interests for the purpose of giving appellate jurisdiction." "Separate judgments cannot be added to give jurisdiction. Though the legal question may be the same, the judgments are distinct." 2 Cyc. 560, 567; *Henderson v. Wadsworth*, 115 U. S. 276, 6 Sup. Ct. 40, 29 L. Ed. 377. *Henderson v. Wadsworth* applies the rule to both sides. "In suits to enforce separate liens it is the several amounts of each claim, not the aggregate sum of all in one suit, which determine the jurisdictional amount. The appellate court cannot acquire jurisdiction by uniting on an appeal two judgments wholly separate and distinct." 1 Ency. Pl. & Pr. 725. Upon these principles it was held that if several claiming under a trust deed suing the trustee for a settlement obtain a decree directing him to pay each a separate sum, where the decree failed to charge him with an item over \$100, there was no jurisdiction for appeal though the sums would aggregate over \$100. *Fleishman's Adm'r v. Fleishman*, 34 W. Va. 342, 12 S. E. 713. Several judgment creditors brought a suit to sell land to pay them, which was dismissed, and they were refused right to add their judgments. *Umbarger v. Watts*, 25 Grat. 167. If the landowner had appealed in case the judgments had been decreed against his land, the same result would have followed. Wherein is this case otherwise? True, several hundred dollars is taken from Feely, but each creditor has taken his own separate sum from him. It is a contest between him and that creditor as to that sum. The suggestion contra is that it is a fund which is the bone of contention. So would it be as to the land against which several judgments are decreed. In *Bank v. Stout*, 113 U. S. 684, 5 Sup. Ct. 695, 28 L. Ed. 1152, a bank claimed a fund over the jurisdictional amount, and several creditors sued to subject the fund, and several debts were decreed to be paid out of it. On appeal by the bank it was held that it could not combine the several amounts decreed against the fund in order to give appellate jurisdiction. There, as here, the bank denied liability for the fund, claimed it as its own, and the debts decreed out of it damaged it more than the jurisdictional sum if added. The court said: "This suit was not for the whole fund, but only for the complainant's pro rata share. After the suit was begun,

the intervening creditors were allowed to come in each for his separate share of the assets. On their intervention the case stood precisely as it would if each creditor had brought a separate suit for his separate share of the fund. The decree in favor of the several creditors has precisely the same effect, for the purposes of an appeal, that it would have had if rendered in such separate suits." In *Seaver v. Bigelow*, 5 Wall. 208, 18 L. Ed. 595, several creditors with separate debts sought to set aside a deed as fraudulent, and their bill was dismissed, and the court said they had separate demands which could not be added. In *Schwed v. Smith*, 106 U. S. 188, 1 Sup. Ct. 221, 27 L. Ed. 156, creditors sued to set aside a judgment and subject a fund realized by execution under it, and the fund was by decree taken from the party claiming under the judgment. On appeal he was not allowed to aggregate the several sums decreed against the fund for jurisdiction. That is this case. In *Gibson v. Shufelt*, 122 U. S. 84, 7 Sup. Ct. 1066, 30 L. Ed. 1063, will be found a clear discussion of this subject, reviewing and discriminating Supreme Court cases. A debtor assigned property to secure a preferred debt of more than \$5,000, and then for creditors generally, and two of his creditors sued in separate suits to set aside the preference, and a decree gave one of the creditors over \$5,000 and to the other a less sum. On appeal by the preferred creditor it was held that there was no jurisdiction for him as to the party decreed less than \$5,000, but as to the other there was. So, in *Rich v. Lambert*, 12 How. 347, 18 L. Ed. 1017, a libel was filed by several cargo owners against a vessel, and various sums decreed against it; some more, some less, than \$2,000, but aggregating \$10,000. The appeal by the shipowner was dismissed as to those appellees decreed less than the amount for jurisdiction, because no single libellant was decreed the jurisdictional amount. So, in *Oliver v. Alexander*, 6 Pet. 143, 8 L. Ed. 349, where a number of seamen filed a libel against a vessel, and each was decreed a less sum than required for jurisdiction, the case was dismissed, and an addition of the sums refused. It was said that, although the libels were in form joint, yet the decrees were several. So, under our statute involved in this case any number of creditors may unite in a suit to attack a preference; still that does not unify debts that are separate. The joint suit is the only remedy—only procedure—to avoid multiplicity of suits and accumulation of costs. In *Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 235, 1 Sup. Ct. 181, 27 L. Ed. 115, a mortgage was foreclosed on a railroad, and the purchasers took it subject to debts of intervening creditors, and appealed from a decree ordering them to pay various sums amounting in all over the amount for jurisdiction, and the appeal was dismissed as to those who had not sums decreed up to that amount. So, in *Has-*

sall v. Wilcox, 115 U. S. 598, 6 Sup. Ct. 189, 29 L. Ed. 504, a like decision was made where a trustee in a railroad mortgage appealed from a decree in favor of several creditors. The appeal was dismissed as to those recovering less than the jurisdictional sum, and retained as to those recovering more. In *Chamberlin v. Browning*, 177 U. S. 605, 20 Sup. Ct. 820, 44 L. Ed. 906, creditors of Scott claiming under assignment from him sought to prevent attaching creditors from enforcing their attachments, and, failing, appealed; but it was held that, as the relief sought against the attaching creditors was "the defeat of distinct and separate claims of each attaching creditor so far as it affected the real estate of Scott, and as no defendant was asserting a claim which aggregated the amount required to confer jurisdiction upon this court, the case is dismissed for want of jurisdiction." These cases show that each debt is separate, not added. For these reasons we hold that there is no jurisdiction to reverse the decree, though there is error in it. I might have avoided discussion of other matters than jurisdiction had this question occurred to me before writing upon them; but as it is written, though it may be thought to be, for want of jurisdiction, not binding authority, yet the other points decided reflect the opinion of all the members of the court, and therefore will be published.

Appeal dismissed for want of jurisdiction.

DENT, J. (dissenting). The question in controversy here and in the circuit court between Feely and the defendants was as to whether Feely's debt of \$1,100 was entitled to priority over the other debts against the estate of S. J. Bryan. As to the amount and validity of the several debts there was no question, and there was no controversy in regard thereto. The defendants, however, attacked the plaintiff's deed of trust as a fraudulent preference under section 2, c. 74, of the Code of 1899. The circuit court so held, and the plaintiff appeals.

Said section 2 provides that such fraudulent preference "shall be taken to be for the benefit of all creditors of such debtor," thus making it a common source of title to all of them. In the 1st Ed. Plead. & Prac. 721, the law is properly stated to be "where several parties sue jointly for the recovery of money or property claiming under one common right, and the adverse party is wholly unaffected by the manner in which it may be apportioned in case of recovery, it is the aggregate sum of their several claims which determines the amount in controversy." In the present case Feely is wholly unaffected by the manner in which the fund is proportioned among the creditors in case he is defeated. He claims the whole thereof by virtue of his trust deed, and they claim his trust deed is a fraudulent preference as to them, and they, under the statute, are entitled to the common benefit

thereof. The statute permits and compels them to sue jointly, not as a matter of convenience, but because it confers upon them a common benefit and a joint interest. A creditor may not sue separately to get the benefit of a fraudulent preference, as he may sue to set aside a fraudulent conveyance, but his suit is for the common or joint benefit of all creditors. The validity of the preference is the joint matter of controversy, and, in so far as the person preferred is concerned, is the amount of his lien, and, so far as the other or attacking creditors are concerned, is the joint amount of their debts if they are less than sufficient to cover such preference, and, if more than sufficient, then the preference determines the amount in controversy. The true rule is laid down in 2 Cyc. 569: "Where several claim under the same title, the validity of which title is necessarily involved in the determination of the cause, the appellate court will have jurisdiction notwithstanding the individual claim of no one of the plaintiffs exceeds the jurisdictional amount, if the whole amount involved is sufficient. And if the appellees' right to sue and stand in judgment against appellants in a contract by the terms of which contract more than the jurisdictional amount is involved, is denied by appellants, this constitutes the matter in dispute. And where the amount decreed against appellant consists of several sums in favor of various appellees, no one of which sums would come within the jurisdictional amount, and the aggregate of which amount is in excess of the jurisdictional limit, it is held the defendant may appeal." The amount in controversy here is undoubtedly the amount of Feely's preferred lien, its validity as a preference being assailed by those who are jointly interested in its overthrow, and who, if they succeed, are entitled to share in it as a common source of title. The statute does not avoid it, but holds it to be for the joint benefit of all the creditors. *Kuner v. O'Neill*, 39 W. Va. 515, 20 S. E. 589; *Argand Refining Company v. Quinn*, 39 W. Va. 535, 20 S. E. 576; *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797.

On Rehearing.

(April 1, 1904.)

BRANNON, J. Upon rehearing the question of jurisdiction for this appeal has been carefully reconsidered, but we are unable to change the decision that there is no jurisdiction for the appeal. Feely's attorney seems to admit that, if the litigation is not one between Feely and Bryan, there is no jurisdiction, and he therefore seeks to sustain the position that the contest is only between them, not one between the creditors of Bryan; and, assuming this premise, he would apply the ordinary rule between plaintiff and defendant in money demand—in other words, between Feely, creditor, and Bryan, debtor—and say that it is the amount

claimed by a plaintiff creditor against a defendant debtor which gives jurisdiction, not what the plaintiff recovers. But this premise is not correct. This is not a suit between Feely and Bryan. Bryan makes no contention against Feely. There is no issue between them. The contest is purely one between conflicting creditors of Bryan. They fight for the bone. Some of those creditors levied executions on the chattels on which Feely claimed a mortgage, and he filed an injunction against those executions, based on his mortgage; and those creditors answer, and seek to defeat the mortgage, or at least defeat its preference of Feely's debt, and get their proportions. This shows it to be a litigation between the creditors.

I think the authorities cited in the first opinion ample to deny jurisdiction, but I will add some further ones. A boat of the B. & O. R. R. Co. collided with a barge, and the owners of the barge and its cargo sued the boat, and one sum was decreed the owner of the barge, another to the owner of the cargo. The court held that the owner of the boat could not add the two recoveries for jurisdiction. *Ex parte Baltimore & O. Co.*, 106 U. S. 5, 1 Sup. Ct. 35, 27 L. Ed. 78. The distinction between cases where there may and may not be aggregation of sums for jurisdiction is drawn in that case. Suppose any one of the creditors in this case had been denied his debt. He could not appeal. Neither could his adversary. The right ought to be mutual. 2 Cyc. 568; *Tupper v. Wise*, 110 U. S. 398, 4 Sup. Ct. 26, 28 L. Ed. 189; *Hawley v. Fairbanks*, 108 U. S. 544, 2 Sup. Ct. 848, 27 L. Ed. 820. In 2 Cyc. 569, we find that: "Where several claim under the same title, the validity of which title is necessarily involved, the appellate court will have jurisdiction, notwithstanding the individual claim of no one of the plaintiffs exceed the jurisdictional amount, if the whole amount involved is sufficient." That does not apply in this case. That is where the plaintiffs under a common or collective right sue, as in the case of distributees suing for their portions of the personal estate of a decedent. *Shields v. Thomas*, 17 How. 3, 15 L. Ed. 93. Where there is a common demand by several by one and the same title, and the sum recovered goes according to their several rights in distribution, and the adverse party is not interested in the distribution, that is the case. But does that apply to a case where different persons are claiming different debts on different grounds, each of them being adverse to the party a several ground? "Where several plaintiffs claim under the same title, and the determination of the cause involves the validity of that title, and the whole amount exceeds \$5,000, this court has jurisdiction as to all such plaintiffs, though the claim of none exceeds \$5,000; but where the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the rule is the reverse as to claims not

exceeding \$5,000." *N. O. Pacific v. Parker*, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66. In the case of preferences our statute, for convenience and economy, to end all claims in one suit, allows different creditors to use one suit for relief, however diverse their claims may be; but that is matter of remedy, and does not show that they claim under one and the same title. In this case the debts were separate, not born of and supported by a common title. The creditors claimed against and over Feely's mortgage. That mortgage did not originate or sustain their rights. And does not *Fleshman's Adm'r v. Fleshman*, 34 W. Va. 342, 12 S. E. 713, stand contrary to the above citation from 2 Cyc.? In this case each creditor's debt aggrieved Feely only to its amount, and that, too, separately. Each creditor took from the fund only his amount. Feely does lose more than \$100. So does the judgment debtor lose his land when divers judgments, each under \$100, are decreed against it. So the party charged to be a fraudulent vendee. He could not aggregate the debts decreed against him. If he has an appeal, it is not on account of amount, but because the case involves title to land. If there be a suit to annul a fraudulent conveyance, and divers debts are decreed, and one creditor appeals, and succeeds in reversal, it does not affect the decree as to other creditors not appealing, because they are separate debts. In this case the sums decreed to the creditors were not decreed collectively, or because of a common right. Some cases may be found to the contrary. We do not see that *Hicks v. Roanoke*, 94 Va. 741, 27 S. E. 596, is. That was an appeal by a trustee representing a fund. The whole was in him, though afterwards to be distributed. *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. Ed. 141. The case of *Winchester v. Colfelt*, 27 Grat. 777, adds the amounts decreed against the debtor for jurisdiction, but in the later case of *Williams' Adm'r v. Clark's Representatives*, 93 Va. 690, 25 S. E. 1013, the opinion, whilst following that case, condemns it as unsound, and approves *Schwed v. Smith*, 106 U. S. 183, 1 Sup. Ct. 221, 27 L. Ed. 156, cited in the first opinion.

(56 W. Va. 512)

CLARK et al. v. LAMBERT et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

**CONTRACTS—CONSTRUCTION—DEED—AFTER-
ACQUIRED TITLE—BONA FIDE PUR-
CHASER—NOTICE.**

1. Practical construction of contracts is that given to agreements by the parties themselves by acts subsequently done with reference to the contracts. To such exposition of contracts the courts pay high regard, and will effectuate it if they can do so consistently with the rules of law.

2. If one conveys land with general warranty, which at the time he does not own, or the title

to which is defective, but he afterwards acquires good title to the same, such acquisition inures to the benefit of his grantee.

3. Where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all of the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstances affecting the property, of which he had notice.

4. One who claims the protection of a court of equity as a bona fide purchaser must show that he had acquired the legal title before notice or knowledge of facts equivalent to notice.

(Syllabus by the Court.)

Appeal from Circuit Court, McDowell County; J. M. Sanders, Judge.

Action by E. W. Clark and others against G. W. Lambert and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

R. C. & B. McClaugherty and Flournoy, Price & Smith, for appellants. A. W. Reynolds and J. S. Clark, for appellees.

MILLER, J. Appellant George W. Lambert appeals from a final decree made and entered against him and David G. Sayers by the circuit court of McDowell county on the 12th day of December, 1901, in the chancery cause of E. W. Clark and others, trustees, against them. The cause was formerly in in this court upon an appeal (*Clark et al. v. Sayers et al.*, 48 W. Va. 33, 35 S. E. 882), and the decrees then appealed from were reversed, without prejudice to either party; and the cause was remanded to the circuit court, with leave to both parties to amend their pleadings and proof in accordance with the truth, that there might be a fair and final determination of the controversy between the litigants.

The decree complained of here is, in part, that the deed from defendant D. G. Sayers to the defendant George W. Lambert, bearing date of the 24th day of November, 1891, conveying one-third undivided interest in the tract of 3,226 acres of land referred to in the cause, be set aside and annulled as fraudulent, and as a cloud upon the title of plaintiffs to said tract of 3,226 acres of land; that the estoppel arising from the covenants contained in the deed from the defendant D. G. Sayers and others to Joseph I. Doran, dated November 17, 1882, referred to in the cause, be enforced against said D. G. Sayers; that said Sayers shall convey by deed to the plaintiffs, or to such person or corporation as they shall direct, all of the title to one-third undivided interest of the said tract of 3,226 acres of land, the title to which was derived by compromise, purchase, and conveyance from the heirs of Joseph Jackson, Jr.; and that said Sayers and Lambert be perpetually enjoined from asserting or disposing of their claims of title to one-third of said 3,226 acres of land under the said compromise and conveyance from the heirs of Joseph Jackson, Jr., and under the said deed from Sayers to Lambert.

The material facts in the case, briefly

stated, are as follows: By patent of the commonwealth of Virginia, bearing date on the 1st day of December, 1854, there was granted unto George W. G. Brown, Samuel L. Graham, and Joseph Jackson, Jr., a certain tract of land, containing 3,226 acres, lying in Tazewell county, Va. (now McDowell county, W. Va.), on the waters of Sand Lick creek, and on the waters of Spice creek, on the Laurel branch and other small branches, but mostly on Sand Lick creek, all being waters of Tug river, adjoining a tract of Wm. P. Cecil of 662 acres, a tract of James B. Harman of 150 acres, and adjoining a survey of James B. Harman of 131 acres, which tract is bounded as follows: Beginning at two chestnut oaks by a cliff of rocks on the east side of Sand Lick ridge, about 20 yards from the top of said ridge on Spice waters, a corner of Wm. P. Cecil's 662-acre tract, etc. No partition of this tract of land appears to have ever been made by and between the said patentees thereof; but the land was entered on the landbooks, and charged with the taxes thereon in their several and respective names, as follows, to wit, 1,075 acres thereof being charged to each, and assessed with the taxes thereon in his individual name. By conveyances subsequent to said patent, the title of the Brown undivided third interest in said land became vested in Mary Ladd, and the Graham undivided third interest became vested in Joseph Mullins. The land was entered on the landbook, and charged with taxes thereon as follows: Mary Ladd, 1,075 acres; Joseph Mullins, 1,075 acres; and Joseph Jackson, Jr., 1,075 acres.

The Mary Ladd 1,075-acre part was returned delinquent for the nonpayment of the taxes thereon, and sold to said D. G. Sayers. The clerk of the county court of said county of McDowell, by his deed bearing date on the 17th day of September, 1881, executed and delivered to said D. G. Sayers (by the name of David G. Sayers) a deed in which it is, among other things, recited that on the 6th day of November, 1877, at a sale of the real estate theretofore returned delinquent for the nonpayment of the taxes due thereon in the said county of McDowell, said Sayers became the purchaser of a tract of land of 1,075 acres, being one undivided one-third part of 3,225 acres in said county which formerly belonged to, and was returned delinquent in the name of, Mary Ladd, for the nonpayment of the taxes due thereon for the year 1876. The description of the land as given in the said deed is the same as that contained in the patent hereinbefore recited. The deed further recites that the tract of land as described and bounded contains in all 3,226 acres, of which 1,075 acres, being the one undivided third part thereof, was sold and thereby conveyed, be the same more or less. Said deed is recorded in Deed Book No. 5, at page 353, in the office of the clerk of the county court of said county.

By his deed, bearing date on the 22d day of September, 1881, similar in form to the above-mentioned deed, except as to the name of the delinquent owner designated therein, the said clerk also conveyed to said Sayers another tract of 1,075 acres, which formerly belonged to, and was returned delinquent in the name of, Joseph Mullins, for the nonpayment of the taxes due thereon for the year 1878, and was purchased by said Sayers at a sale thereof for said taxes on the 4th day of November, 1879. This deed is also recorded in Deed Book No. 5, at page 355. The entire tract of land is bounded therein, and described as containing in all 3,225 acres, of which 1,075 acres, being the one undivided one-third part thereof, was sold as aforesaid, and thereby conveyed to Sayers. By deed executed by David G. Sayers and wife, Henry Harrison and wife, and John Graham, Jr., to Joseph I. Doran, bearing date on the 27th day of October, 1881, the grantors therein conveyed unto Doran three several tracts of land situated in McDowell county, on the dividing ridge, Horsepen creek, and Big creek, one of them containing 820 acres, being the same tract of land conveyed by the clerk of the county court of McDowell county to Sayers by deed dated August 31, 1881, and recorded in McDowell county in Deed Book No. 5, at page 335; one other of them containing 820 acres, being the same land which the said clerk, by deed dated September 1, 1881, recorded in Deed Book No. 5, at page 332, granted and conveyed unto said Sayers; and the other of them, containing 1,075 acres, being an undivided one-third part of said tract of 3,225 acres, and being the same tract of land which the clerk as aforesaid, by deed dated September 22, 1881, recorded in Deed Book No. 5, at page 355, granted and conveyed to Sayers. The deed then says: "And the said David G. Sayers has heretofore sold an undivided moiety or half part of said three tracts of land to said Henry Harrison, and the said David G. Sayers and Henry Harrison, in and by a certain instrument of writing bearing date the 27th day of August, 1881, agreed to sell said three tracts of land to the said John Graham, Jr., and the said Henry Harrison and wife and John Graham, Jr., have united with the said David G. Sayers and wife in this present deed for the purpose of vesting a perfect title in fee simple in and to said premises in the said Joseph I. Doran." This deed is recorded in Deed Book No. 5, at page 399 et seq.

On the 4th day of March, 1882, by their deed of that date, said David G. Sayers and wife conveyed to J. H. Divine "all the following described real estate lying and being in the county of McDowell, on Sand Lick, a tributary of Tug Fork of Tug river, being one undivided one-third part of 3,225 acres conveyed to D. G. Sayers on the 17th day of September, 1881, by John F. Johnson, clerk of the county court of McDowell county, by deed which is duly recorded in the clerk's

office of said county in Deed Book No. 5, at page 353. Said land adjoins a tract of 662 acres of W. P. Cecil, and a tract of 150 acres of James B. Harman, and for a more particular description of said land reference is made to said deed made by said Johnson, containing 1,075 acres, more or less, and being an undivided third part of said 3,225 acres as aforesaid," etc.

On the 6th day of November, 1882, John F. Johnson, clerk of the county court of McDowell county, by his deed of that date, which was admitted to record on the 28th day of December, 1883, and was recorded in Deed Book No. 7, at page 7, in said clerk's office, granted to said Sayers the tract of 1,075 acres, being one undivided one-third part of 3,225 acres which formerly belonged to, and was returned delinquent in the name of, Joseph Jackson, Jr.

On the 17th day of November, 1882, said Sayers and wife, and Henry Harrison and wife, for the consideration of \$1,612.50, of which \$906.25 was paid in cash, the residue to be paid in 12 months thereafter, and for which balance, to wit, \$806.25, a lien was reserved upon the land, by their deed of that date granted and conveyed to said Joseph I. Doran "all that certain tract, piece, or parcel of land situate on Sand Lick, a tributary of the Tug Fork of Sandy river, adjoining a tract of Wm. P. Cecil of 662 acres, adjoining a tract of James B. Harman of 150 acres, and adjoining a survey of James B. Harman of 181 acres, and bounded as follows, to wit: Beginning at two chestnut oaks," etc. (setting out the boundaries of the 3,226 acres as given in said patent), "being the same tract of land one undivided one-third part of which (was) taken as having been returned delinquent in the name of Mary Ladd for the nonpayment of taxes due thereon for the year 1876, and sold at the door of the courthouse of said McDowell county on the 6th day of November, 1877, to the said David G. Sayers, to whom John F. Johnson, Esq., clerk of the county court of said county, made a deed, bearing date September 17, 1881, since recorded in Deed Book No. 5, at page 353; and another undivided one-third of which was taken, as having been returned delinquent for the nonpayment of the taxes thereon for the year 1878, as the property of Joseph Mullins, and sold at the door of the courthouse of said county on the 4th day of November, 1879, to the said David G. Sayers, to whom the said John F. Johnson, clerk as aforesaid, made a deed, bearing date September 22, 1881, which has since been recorded in Deed Book No. 5, at page 355. And the said David G. Sayers has since sold to the said Henry Harrison one undivided one-half of said undivided two-thirds of said tract of land, but has never made to him a deed therefor, and for that reason the said Henry Harrison and wife now join in the present deed, with the said David G. Sayers, for the purpose of divest-

ing their equitable title to said land." This deed is recorded in Deed Book No. 6, at page 40 et seq.

The said David G. Sayers and Henry Harrison, in and by their said deed, covenanted that they would warrant generally the lands thereby conveyed, that they had the right to convey the same to the said party of the second part, that the said party of the second part should have quiet possession of the said land, that they would execute such further assurances as might be requested, and that they had done no act to incumber the same.

By their deed bearing date on the 24th day of November, 1891, Sayers and wife granted to appellant George H. Lambert, in fee, with covenants of special warranty, one-third undivided interest in all that certain tract of land situate in the county of McDowell, on the waters of Sand Lick creek, Spruce creek, and Laurel branch, but mostly on Sand Lick creek, tributaries of Tug river, containing in quantity 3,226 acres, and being the same tract of land granted by letters patent of the commonwealth of Virginia on the 1st day of December, 1864, to G. W. G. Brown, Samuel L. Graham, and Joseph Jackson, Jr., the tract of land thereby conveyed being the one-third undivided interest in said 3,226-acre tract, and being the same undivided interest in said land which had been conveyed to said Sayers by Francis H. Jackson, Josephine Jackson, and June F. Jackson, children and heirs at law of Joseph Jackson, Jr., deceased, by deed. The deed last above referred to was executed by the said Jacksons to Sayers, bears date on the 21st day of October, 1891, and recites that, whereas there was then pending in the circuit court of McDowell county three several chancery suits instituted by said June F. Jackson, Francis H. Jackson, and Josephine Jackson, respectively, against said Sayers, the object of each of which suits was to set aside, vacate, and annul a certain tax sale of the land thereafter mentioned, at which sale said Sayers became the purchaser thereof, and to annul and set aside the deed for said land which had been made to said Sayers by the clerk of the county court of McDowell county in pursuance of said tax sale (thereby meaning and referring to the tax sale and the tax deed hereinbefore mentioned, bearing date on the 6th day of November, 1882), and that the matters in controversy between the parties in said suits had been compromised. The deed further states that the said Joseph Jackson, Jr., patentee, was the father of the said grantors in the deed, that they derived title to said land from their said father by descent, and that they will warrant specially the said undivided third part of said 3,226 acres so conveyed by them.

There is also in the record a deed made by Joseph Mullins to Joseph I. Doran, bearing date on the 15th day of July, 1884, by which said Mullins granted and released all his claims in and upon said tract of 3,226

acres of land to Doran. The deed contains this clause: "The interest or claim intended to be hereby conveyed, and without any recourse whatever on said Joseph Mullins, being the one undivided third thereof conveyed by Samuel L. Graham and wife to Joseph Mullins by deed of the date of the 27th day of February, 1868. * * * And being the same land mentioned and described, and the same interest of claim conveyed in the deed from D. G. Sayers and wife and H. Harrison and wife to Joseph I. Doran of date of November 17, 1882, and of record in said clerk's office, in Deed Book 6, pages 40, 41, 42, and 43."

The original bill, bill of review, amended and supplemental bill, and bill of revivor filed in the cause by plaintiffs, state all of the foregoing facts and many others. It is shown by the record, and conceded by counsel, that the appellees, plaintiffs below, have title to all of said entire tract (which is in some of the papers described as 3,225 and in others 3,226 acres), except such claim or title thereto as appellant Lambert may have under the said deed of Sayers and wife to him bearing date on the 24th day of November, 1861. The present controversy between the parties seems to be as to the true meaning and legal effect of the said deed of Sayers and wife, and Harrison and wife, to Doran, bearing date on the 17th day of November, 1882.

Appellees contend that this last-mentioned deed conveyed to Doran the Jackson third, or 1,075 acres, of said 3,226-acre tract, while appellant Lambert claims that it did not and does not convey said Jackson third or interest, but that the third conveyed to Doran thereby was and is either the Ladd or the Mullins interest. As before stated herein, on the 4th day of March, 1882, less than four months after the execution of said deed to Doran, Sayers and wife conveyed to Divine the Brown-Ladd interest in the whole tract. It is not likely that Sayers at that time had overlooked the fact that he had executed the deed to Doran as aforesaid. It cannot, with much semblance of reason, be said that the deed last mentioned was intended by Sayers to convey, or that it did convey, the Graham-Mullins interest to Divine. Besides, the deed of Sayers and Harrison and their wives, respectively, and Graham, to Doran, of October 27, 1881, refers to and grants the 1,075 acres conveyed to Sayers by the clerk of the county court by deed of September 22, 1881, which is recorded in Deed Book No. 5, at page 355. Thus, it is fixed beyond question that the interest in the 3,226 acres conveyed by this last-mentioned deed is the Graham-Mullins third. It is also shown by this deed that before its execution Sayers had sold to Harrison an undivided half interest in said three tracts, to wit, 820, 820, and 1,075 acres, respectively, and that Sayers and Harrison had by their writing bearing date on the 27th day of August, 1881, agreed to sell said three

tracts last mentioned to Graham. This explains why said Harrison and Graham joined Sayers in the deed, and it also disposes of the one-half interest of Harrison in one of the two undivided thirds or interests in said tract of 3,226 acres, bought by him from Sayers, hereinafter referred to.

In the deed of Sayers and Harrison and their wives, respectively, to Doran, bearing date on the 17th day of November, 1882, one undivided third of the entire tract is granted to Doran. In order to identify the land thus conveyed, the boundaries of the 3,226 acres are set out in the deed. Then it is stated therein that it is the same tract from which was taken, and sold for nonpayment of taxes due thereon, the Mary Ladd interest or third; that another third, to wit, the Mullins interest, had also been sold for delinquent taxes thereon; and that both of said interests had been conveyed by deeds to Sayers, the purchaser thereof, giving the dates of said last two mentioned conveyances. The interest thus fixed and conveyed by Sayers and wife and Harrison and wife to Doran by their last-mentioned deed is the Jackson one-third interest in the entire tract. This deed, after referring to the sales and deeds and the recordation thereof to Sayers as aforesaid, further recites that said David G. Sayers has since sold to said Henry Harrison one undivided one-half of said undivided two-thirds of said tract of land, but never made to him a deed therefor, and for that reason the said Henry Harrison and wife join in the present deed with the said David G. Sayers for the purpose of divesting their equitable title to said land. The above language indicates that after Sayers had obtained from the clerk deeds for the Ladd and Mullins interests in said land, and before the date of the last-mentioned deed—November 17, 1882—Sayers had sold one undivided half of said two undivided thirds to Harrison. Sayers at that time had also procured his tax deed of November 6, 1882, for the Jackson interest. He had before that date, on the 4th day of March, 1882, sold and conveyed the Ladd interest to Divine, without the joinder of Harrison in the deed therefor to Divine.

The three several interests in the land had not been partitioned, allotted, or designated. At that time—November 17, 1882—but one of said undivided thirds remained unconveyed by Sayers. Harrison had already, with Sayers, conveyed to Doran his undivided half interest in the Mullins undivided one-third of said tract of land. He was entitled to a one-half interest in one other undivided third of said entire tract. There being none other than the Jackson interest remaining unconveyed, Harrison was entitled to his one half interest therein. For that reason, it seems, he joined with Sayers in the deed of November 17, 1882.

By adopting this view, we take the practical construction put upon the whole transaction by the parties themselves. The three tax

deeds to Sayers, the two deeds from Sayers and others to Doran, and the deed from Sayers and wife to Divine are thus made consistent with each other and given full force and effect. No violence is thereby done to the rights of the parties thereto. Practical construction of contracts is that given to agreements by the parties themselves by acts subsequently done with reference to the contracts. To such exposition of contracts the courts pay high regard, and will effectuate it if they can do so consistently with the rules of law. *Hammon on Contracts*, § 399. Sayers derived title to the whole of said entire tract by and through the three several tax deed to him. Whether such title was perfect or imperfect, it is not necessary to decide. While it is shown that Mullins brought a suit against Sayers, attacking the tax deed by which his interest in the land was conveyed to Sayers, and the Jackson heirs also instituted three several suits to set aside the tax deed which granted their interests in the land to Sayers, yet it must be remembered that all of those suits were compromised, and neither of the said tax deeds was canceled, but each was left in full force and effect. The recital in the said deed of Joseph Mullins to Doran, bearing date on the 15th day of July, 1884, that the Mullins interest therein conveyed was and is the same land mentioned and described, and the same interest and claim which was conveyed, in the deed from D. G. Sayers and wife and Henry Harrison and wife to said Joseph I. Doran of the date of November 17, 1882, is not true in fact. The deeds, taken together, do not support the contention of appellant as to that recital. The deed last mentioned, however, is not important in the disposition of the case. As we have shown, the title of Sayers to the whole of the 3,226 acres, and to each undivided third part thereof, was acquired by him through and by the said three tax deeds, neither of which was ever set aside or canceled. The recital in the said Mullins deed made more than three years after the deed of Sayers and others to Doran, confirmatory of Doran's title already vested, being the language of Mullins, could neither divest Doran of any title, or be set up as an estoppel in this suit against his grantees.

As between the original parties, a recital unnecessary to the conveyance will not operate as an estoppel. 2 *Devlin on Deeds*, § 995. A party making a deed is not estopped, as between the original parties to it, by recitals unnecessary to the conveyance. *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498. Recitals in a deed estop all parties and privies, as a general rule, but this rule does not extend to mere description or non-essential averments. In the deed of July 15, 1884, the recital that it was the same interest and claim which was conveyed by Sayers and others by their deed of November 17, 1882, was unnecessary and nonessential to the conveyance by Mullins of his interest

in the land, if he then had any interest therein.

A mistake in the recitals of a deed, referring to a previous deed of marriage settlement between the grantors, may, in equity, be shown by the grantees by introducing in evidence the deed referred to in the recitals. *Bower v. McCormick*, 23 Grat. 310. A recital in a deed only operates as an estoppel in cases in which the declaration of the grantor would be evidence. A recital is not competent to show title in the grantor. *Joeckel v. Easton*, 11 Mo. 118, 47 Am. Dec. 142. An examination of all of the deeds in the record relating to the said lands establishes beyond question that the recital in the Mullins deed was and is an incorrect statement, unfounded in fact.

Reverting to what has been said, it will be seen that Sayers and Harrison, and their wives, respectively, and Graham, by their deed of October 27, 1881, conveyed to Doran the three said several tracts of land, to wit, 820, 820, and 1,075 acres, respectively, lying on the dividing ridge between Horsepen creek and Big creek; the latter tract being the Mullins interest in the 3,226 acres. The consideration stated in the deed is \$3,980, of which \$1,980 was paid in cash, and the balance, \$1,980, was to be paid in 12 months from that date. A lien upon the land was reserved by Sayers and Harrison in the deed, to secure the payment of the unpaid purchase money, to wit, said \$1,980. By their deed of release bearing date on the 23d day of October, 1882, said Sayers and Harrison acknowledged the receipt from Doran of \$1,980, which, with the like amount theretofore paid to them by him, was in full payment for the tract of land conveyed by them to Doran by their deed of October 27, 1881, recorded in Deed Book No. 5, at page 399; and they thereby released and discharged the said Joseph I. Doran of and from all claim and demand under said deed, and especially released and discharged the said land thereby granted of and from the vendor's lien for the balance of purchase money expressly reserved by them in said above-recited deed. On the same day, to wit, on the 23d day of October, 1882, said David G. Sayers and Henry Harrison, by their certain writing signed and sealed by them, and bearing the date last aforesaid, bargained, sold, and conveyed to Joseph I. Doran and his heirs in fee simple, with warranty of title, covenants of quiet possession, and freedom from incumbrance, a certain tract or parcel of land situate in the county of McDowell, containing 1,075 acres, more or less, adjoining the lands of Joseph I. Doran and J. H. Divine, and bounded as follows: "Beginning at part of a tract sold by us to Jos. I. Doran on Sand Lick." It is provided in the writing "that the party of the second part [Doran] shall be allowed one month from the date hereof to dig upon, and explore said lands for minerals, and, in addition thereto, to com-

plete this bargain by paying for the land, one dollar and fifty cents per acre, one half cash, balance in six months," etc. This is followed up by said deed of Sayers and Harrison and their wives, respectively, to Doran, dated November 17, 1882, after Sayers had obtained his tax deed for the Jackson interest in said land.

The said deed of Mullins to Doran of July 15, 1884, was executed for the consideration of \$250, the receipt of which is acknowledged by Mullins in the deed. There is also in the record a receipt of Mullins to Doran, bearing date on the 15th day of July, 1884, which is indorsed on the deed, for said \$250; and also a receipt of Harrison and Sayers to Doran, bearing date on the 16th day of July, 1884, in the words and figures following: "Received of Joseph I. Doran, two hundred and fifty dollars to be a credit on the purchase money for certain lands sold by the undersigned to said Doran, lying in McDowell County, West Virginia. And a lien reserved in the conveyance of said land for part of the purchase money; and this payment we are to credit on the margin of the deed book in which said conveyance is recorded. [Signed] Harrison and Sayers. By H. Harrison."

By their certain deed of release, bearing date on the 29th day of April, 1886, Harrison and Sayers, and their respective wives, thereby, remised, released, quitclaimed, and forever discharged the said tracts or parcels of land, and particularly all those certain three tracts or parcels of land conveyed by Henry Harrison et ux. et al., by deeds dated October 27, 1881, November 17, 1882, and November 17, 1882, respectively, recorded in McDowell county, W. Va., in Deed Book No. 5, at page 399, No. 6, at page 43, and No. 6, at page 40, respectively, situate in said county, "one thereof beginning * * *; the other thereof situate on the waters of Sand Lick creek, and on the waters of Spice creek, on Laurel branch and other small branches, but mostly on Sand Lick creek, all waters of Tug river, adjoining a tract of William P. Cecil of 662 acres; a tract of James B. Harman of 130 acres, and bounded as follows: Beginning at two chestnut oaks by a cliff of rocks on the east side of San Lick Ridge, about twenty yards from the top of said ridge on Spice Creek waters, a corner of W. P. Cecil's 662 acre tract * * * containing 3,226 acres.

* * * So that the said Joseph I. Doran and the South West Virginia Improvement Company, their heirs, successors and assigns, shall and may hereafter have, hold, occupy, and enjoy all and singular the premises now owned by them, respectively, in said above mentioned deeds, particularly described, and every part thereof, with their appurtenances, without any molestation, interruption, eviction of the said Henry Harrison and David G. Sayers, or either of them, or their or either of their heirs, executors, administrators or assigns, or of any other person or persons,

natural or corporate, whomsoever, claiming, or to claim by, from or under, them or either of them, or by or with their or either of their acts, means, consent, or procurement." The above-recited papers show that Harrison was a joint owner with Sayers of the Mullins undivided third of said tract of 3,226 acres of land, and of the proceeds of the sale thereof to Doran; that he was also considered and treated as a joint owner with Sayers of the remaining or Jackson undivided third therein, and of the proceeds of the sale thereof, but was not considered or treated as a part owner of the Brown-Ladd third.

Therefore the facts conclusively established are that Sayers acquired title by his tax deeds and otherwise to all of the tract of 3,226 acres of land; that he sold, but did not convey, to Harrison an undivided half interest in two of the undivided thirds of said entire tract; that Sayers conveyed one of the undivided thirds, to wit, the Ladd interest, to Divine, but Harrison did not join in that deed; that Sayers and Harrison, and their wives, respectively, and Graham, sold and conveyed to Doran the Mullins interest in said land, for which Sayers and Harrison received the purchase money, and executed and delivered to Doran a release of the said vendor's lien on the 23d day of October, 1882; that, there being but one undivided third of the land then unsold and unconveyed, to wit, the Jackson third, Harrison was entitled, as between Sayers and himself, to one undivided half thereof; that Sayers and Harrison then executed the writing to Doran of October 23, 1882, which is an option to Doran to buy the said remaining one undivided third of said land; that said third was and is the Jackson interest; and none other; and that said Jackson interest was and is conveyed to Doran by the deed of Sayers and Harrison, and their wives, respectively, of November 17, 1882. The last-mentioned deed conveyed to Doran all the right, title, and interest which the grantees therein were then entitled to in the said Jackson interest or third of the 3,226 acres of land. On the 21st day of October, 1891, the deed by the Jackson heirs was executed to Sayers. Thirty-four days thereafter, Sayers, by his deed of the 24th day of November, 1891, attempted to convey said Jackson interest to appellee Lambert.

This leads us to a consideration of the legal effect of the covenants in the deed of Sayers and Harrison to Doran of the 17th day of November, 1882. In *Burners v. Keran*, 24 Grat. 42, it is held that if a person conveys land with general warranty, and does not own it at the time, but afterwards acquires the same land, such acquisition inures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question; but it does not operate actually to transfer the estate subsequently acquired. The court cites 4 Kent, Com. 98: "If the conveyance be with general warran-

ty, not only the subsequent title acquired by the grantor will inure by estoppel to the benefit of the grantee, but a subsequent purchase from the grantor, under his after-acquired title, is equally estopped, and the estoppel runs with the land." *Raines v. Walker*, 77 Va. 92. Mr. Justice Story, in *Carver v. Astor*, 4 Pet. 86, 7 L. Ed. 791, says: "In the next place it shows that such estoppel binds all persons claiming the same land, not only under the same deed, but under any subsequent conveyance from the same party; that is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place, it shows that an estoppel which (as the phrase is) works on the interest of the land runs with it into whosoever hands the land comes." In *Myers v. Croft*, 80 U. S. (13 Wall.) 291, 20 L. Ed. 562, it is held that a grantor, not having perfect title, who conveys for full value, is estopped, both himself and others claiming by subsequent grant from him, against denying title; a perfect title afterwards coming to him. *Irvine v. Irvine*, 9 Wall. 618, 19 L. Ed. 800. 19 Am. & Eng. Enc. Law, 1022, citing a long array of authorities in support thereof, says: "In most states the covenant of general warranty is held not only to estop the grantor and his heirs from setting up an after-acquired title, but also actually to transfer the estate subsequently acquired, as if it had passed by the deed in the first instance." Applying the foregoing principles, the conveyance by the Jackson heirs to Sayers inured to the benefit of Doran as against Lambert, unless Lambert's contention in the case be well founded.

Appellant, in his answer to plaintiff's bill, in part says: That he is an innocent purchaser, for valuable consideration, without notice, actual or constructive, of any real or pretended claim of plaintiffs the land in controversy being unoccupied, wild, and uncultivated, and he having had no actual notice in any way, and no constructive notice. He admits "that his codefendant D. G. Sayers, who is his grantor, represented to him that he [Sayers], having compromised with the heirs at law of Joseph Jackson, Jr., had a perfect and indefeasible title to said land, and that respondent, having seen the conveyance to Sayers from the Jackson heirs, dated October 21, 1891, * * * purchased the land." Appellant contends that there is nothing in the deeds, hereinbefore and hereafter referred to, sufficient to put him on notice that the Jackson interest had been purchased by Sayers, or conveyed by him and others to Doran. The tax deeds to Sayers for the Mullins and Ladd interests, and the deeds from Sayers and others to Doran, and from Sayers and wife to Divine, for those interests, respectively, were each on the record in the proper office when Lambert took his deed from Sayers. Lambert admits that said deeds were on the record. In the deed

from the Jackson heirs to Sayers, the tax sale and tax deed to Sayers for that interest are referred to. The tax deed last mentioned was also recorded at that time, as well as the said option, and the subsequent deed of Sayers and Harrison to Doran.

It is further shown by the evidence that Lambert was in the employ of the plaintiffs, or the company for which they are trustees, as their agent; that his employment began in the latter part of 1888, or early part of 1889; that he received a monthly salary for looking generally after their interests, namely, placing tenants on their lands and preventing trespasses thereon; that, before the date of the deed from Sayers to him, he knew of the plaintiff's claim to the said land; that he was told of the claim of plaintiffs about the 20th day of October, 1891, and that he had access to the maps of the lands of plaintiff, on which the land in controversy was shown. On March 1, 1890, Lambert, while acting as the agent of plaintiffs, caused a written lease to be prepared between plaintiffs and one Rose, whereby the Harrison and Sayers and the Divine tracts of land were leased to Rose. It is proved that the Harrison and Sayers tract mentioned in said lease is the land in controversy. The lease recites that the plaintiffs are the owners of said two tracts of land. All of this occurred before Lambert had paid any money to, or completed his said purchase of the land from, Sayers. Possession by Rose, the tenant of plaintiffs, placed on the land by Lambert, was sufficient notice to him to put him upon inquiry as to plaintiffs' claim. *Campbell v. Fetterman's Heirs*, 20 W. Va. 398. There are many other things disclosed by the record relating to the said land sufficient to have put a man of ordinary caution and prudence upon inquiry as to the true ownership of the Jackson interest therein. In *Fidelity Co. v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180, it is held that, where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property, of which he had notice. Notice is actual when the purchaser knows of the existence of the adverse claim, or, perhaps, when he is conscious of having the means of knowledge, and yet does not use them; and it is immaterial whether his knowledge results from direct information, or is gathered from facts and circumstances. 2 Minor, Ins. 978. Whatever puts a man upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. 16 Am. & Eng. Enc. Law, 792, and cases cited. To entitle an innocent purchaser without notice to protection in equity, the text-books do not assert, nor has any case been found

to adjudge, that he must hold under a general warranty deed; but it is no doubt the law that, where a person bargains for and takes a mere quitclaim or deed without warranty, it is a circumstance, if unexplained, to show that he had notice of imperfections in the vendor's title, and only purchased such interest as the vendor might have in the property. 16 Am. & Eng. Enc. Law, 834. The deed of the Jackson heirs to Sayers contains a special warranty only, and the said deed from Sayers and wife to Lambert contains a similar covenant. One who claims the protection of a court of equity as a bona fide purchaser must show that he has acquired the legal title before notice or knowledge of facts equivalent to notice. 16 Am. & Eng. Enc. Law, 839. Under the facts and circumstances of this case as disclosed by the record, we must hold that Lambert was not an innocent purchaser for a valuable consideration of the Jackson interest in said land, without notice of plaintiffs' claim of title thereto and ownership thereof.

For the reasons stated, we affirm the decree.

(119 Ga. 908)

THOMAS COUNTY COM'RS v. HOPKINS.
(Supreme Court of Georgia. March 31, 1904.)

JUDGE—JURISDICTION IN VACATION.

1. A judge of the superior court has no jurisdiction at chambers and in vacation to render a final judgment upon a verdict previously rendered at a regular term of the court.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by T. N. Hopkins against the commissioners of Thomas county. From the judgment both parties bring error. Dismissed.

See 45 S. E. 433.

W. M. Hammond, for Thomas County Com'rs. Theo. Titus, for T. N. Hopkins.

SIMMONS, C. J. A petition for mandamus was filed by Hopkins against the commissioners of Thomas county. A demurrer to the petition was overruled, and a trial had. The jury found for the petitioner, and the defendants moved for a new trial. The motion was overruled, and the movants sued out a writ of error to this court. It was held that the case was prematurely here, as no mandamus absolute had ever been granted. The writ of error was dismissed, leave being given the plaintiffs in error to file their exceptions as exceptions pendente lite. Commissioners v. Hopkins, 118 Ga. 643, 45 S. E. 433. Subsequently the judge rendered a final judgment granting the mandamus absolute, and the defendants sued out another writ of error. The defendants in error filed a cross-bill of exceptions. Upon an examination of the record we find that the judgment below

was rendered at chambers and in vacation, and no order appears reserving the right to render the judgment at such a time. The rendition of a judgment is a judicial act, and must be performed in term, and a judgment rendered in vacation, in the absence of authority so to do, is absolutely void. 1 Black on Judg. (2d Ed.) § 179. The verdict of the jury in the present case was returned during a regular term of the court, and there is no law in this state authorizing the rendition of a judgment in such a case in vacation. The judgment rendered was therefore a nullity, and must be disregarded. It follows that the status of the case is exactly the same as when it was here before. It was then said that, "until a judgment granting a mandamus absolute is rendered, the case is still pending in the court below." No lawful judgment having yet been rendered, the case is still pending in the court below, and this court has no jurisdiction to entertain the writ of error or the cross-bill. Whenever final judgment is rendered, the defendants may except, and assign error upon the exceptions pendente lite. Inasmuch as leave was before granted the plaintiffs in error to file their bill of exceptions as exceptions pendente lite, we now grant leave to the defendant in error to withdraw his cross-bill of exceptions from the files of this court and file it in the court below as exceptions pendente lite.

Writs of error dismissed. All the Justices concurring.

(119 Ga. 906)

SEABOARD AIR LINE RY. et al. v. JONES.
(Supreme Court of Georgia. March 31, 1904.)

APPEAL—GRANT OF NEW TRIAL—COSTS.

1. There was no evidence authorizing a recovery against the Georgia & Alabama Railway, and therefore the court erred in refusing a new trial as to that company.

2. The case being for decision by a court of six justices, and they being evenly divided in opinion as to whether it was erroneous to refuse a new trial as to the Seaboard Air Line Railway, the judgment as to that company stands affirmed by operation of law.

3. Direction is given that the costs of this writ of error be equally divided between the Seaboard Air Line Railway and the defendant in error.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by M. L. Jones against the Seaboard Air Line Railway and others. Judgment for plaintiff, and defendants bring error. Reversed in part.

E. A. Hawkins, U. V. Whipple, and J. Randolph Anderson, for plaintiffs in error. J. H. Hall, Allen Fort & Son, and E. F. Strozler, for defendant in error.

PER CURIAM. Judgment affirmed in part, and in part reversed, with direction. All the Justices concurring.

(119 Ga. 907)

SEABOARD AIR LINE RY. et al. v. JONES.

(Supreme Court of Georgia. April 9, 1904.)

**REHEARING—APPLICATION—WHEN MADE—
—GROUNDS—REMITTITUR—FORWARDING
—RECALLING.**

1. The Supreme Court will, during the term at which a judgment is rendered, and before the remittitur has been forwarded to the clerk of the trial court, when dissatisfied with the judgment, of its own motion order a rehearing of the case.

2. There being no law expressly authorizing the parties to a case to apply for a rehearing, whether such application will be entertained, and, if entertained, what disposition shall be made of it, are questions addressed entirely to the sound discretion of the court.

3. No such application will be entertained in any case after the remittitur has been forwarded to the clerk of the trial court, even though presented during the term, and before the remittitur has reached the office of the clerk of the trial court. See, in this connection, *Cooper v. Brewing Co.*, 88 S. E. 347, 113 Ga. 1.

4. In the absence of a statute regulating the matter, the court may by rule fix the time in which the remittitur shall be forwarded to the clerk of the trial court.

5. Under existing rules, unless otherwise ordered, the remittitur is required to be forwarded to the clerk of the trial court "as soon as practicable after the expiration of ten days from this court's approval of the minutes containing the judgment." Rule 35, as amended February and March, 1900. See 108 Ga. vi, 36 S. E. v.

6. Whether the remittitur shall be forwarded earlier than the time fixed in the above rule is a question addressed to the discretion of the court.

7. The mere fact that the six justices are evenly divided in opinion as to what should be the judgment in a case, and that as a result of such division the judgment of the trial court stands affirmed by operation of law, is no reason for granting a rehearing in a case.

8. A rehearing will be granted on motion of the losing party only when it appears that the court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority, and which would require a different judgment from that rendered.

9. After a judgment of the Supreme Court has been pronounced and entered upon its minutes, and the remittitur issued and transmitted to the trial court, and there received, the Supreme Court loses jurisdiction over the case, and can make no further order having the effect to alter or change the judgment pronounced.

Aliter where the remittitur has been transmitted as the result of a mistake, irregularity, inadvertence, fraud, or the like. *Zorn v. Lamar*, 71 Ga. 85; *Hayes v. State*, 16 S. E. 270, 91 Ga. 43; *Legg v. Overbagh*, 4 Wend. 188, 21 Am. Dec. 115, and notes; 13 Enc. P. & P. 864. See, also, in this connection, *Cooper v. Brewing Co.*, 88 S. E. 347, 113 Ga. 1; *Knox v. State*, 39 S. E. 330, 113 Ga. 930.

10. It follows from the foregoing that the Supreme Court cannot recall its remittitur after the same has been filed in the office of the clerk of the trial court, where it has been regularly issued and transmitted in accordance with the deliberate order and judgment of the court. 13 Enc. P. & P. 865.

11. The application for leave to file a motion for a rehearing in the present case is denied.

(Syllabus by the Court.)

¶ 1. See *Appeal and Error*, vol. 3, Cent. Dig. § 211.

Application for leave to file a motion for rehearing. Denied.

For former opinion, see 47 S. E. 319.

PER CURIAM. Application denied. All the Justices concurring.

(119 Ga. 959)

BUTLER, STEVENS & CO. v. GEORGIA & A. RY. et al.

(Supreme Court of Georgia. March 31, 1904.)

**REFERENCE—AUDITOR'S REPORT—EXCEPTIONS—
SALES BY PLANTERS—PASSING OF TITLE.**

1. The neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the evidence, to point out by appropriate reference to the auditor's brief of evidence, or to attach as exhibits to his exceptions, those portions of the evidence relied on to support the exceptions, renders the report of the auditor of little or no assistance to the court, and is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact and for overruling the exceptions of law.

2. The provisions of Civ. Code 1895, § 3546, are applicable only to planters and commission merchants.

(a) A planter, as used in that section, is one who is engaged in the business of producing crops from the soil; and it is immaterial whether he sows and reaps with his own hand, the hand of a tenant, the hand of a cropper, or the hand of a hired laborer.

(b) A planter may avail himself of the protection of the section above cited in any cash sale of cotton which may be made by him, without reference to whether it was produced by him or acquired from another.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Bill of interpleader by the Georgia & Alabama Railway against the Bank of Unadilla and others. Judgment for plaintiff, and Butler, Stevens & Co. bring error. Affirmed.

Adams & Adams and Travis & Edwards, for plaintiffs in error. E. A. Hawkins, Lawton & Cunningham, W. R. Leaken, Guerry & Hall, T. M. Jelks, Jno. I. Hall, and Whipple & McKenzie, for defendants in error.

COBB, J. 1. The Georgia & Alabama Railway brought a petition in the nature of a bill of interpleader against the Bank of Unadilla, Butler, Stevens & Co., and others, for the purpose of having the title to certain bales of cotton determined. The case was referred to an auditor. Butler, Stevens & Co. filed exceptions both of law and fact to the auditor's report, and the judge overruled all of the exceptions. Error is assigned upon this ruling, so far as it relates to eight exceptions—four classified as exceptions of law, and four as exceptions of fact. Three of the exceptions of fact complain that certain findings of the auditor are contrary to the evidence, and one complains that there was no finding of the auditor on a certain issue: it being contended that, under the evidence, the

auditor ought to have made a finding in favor of Butler, Stevens & Co. on this issue. Three of the exceptions of law are dependent for their determination upon the evidence. In no one of the seven exceptions just referred to is the evidence relied on to support the exception set forth, nor is reference made to the portion of the auditor's brief of the evidence in which such evidence may be found. It is not absolutely necessary that the exception shall set forth all of the evidence necessary to a decision of the question raised, but each exception should at least be accompanied with such a reference to the auditor's brief of evidence as will enable the judge to turn readily to those portions of the brief of evidence which should be examined in passing upon the exception. The object of a reference to an auditor or master is to relieve the court of the labor of examining the mass of evidence, much of which is often irrelevant; and, unless the foregoing rule is observed, the report of the auditor will be of little assistance to the court. This rule is well established in chancery, and we know of no statute, decision, or rule of court in this state which has abolished or modified this salutary requirement. In *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429, it was held: "Exceptions to the report of a master are to be regarded by the court only so far as they are supported by the special statements of the master, or by a distinct reference to the particular portions of testimony on which the party excepting relies. The court does not investigate the items of an account, nor review the whole mass of testimony taken before the master." Mr. Chief Justice Marshall, in the opinion, says: "It may be observed generally that it is not the province of a court to investigate items of an account. The report of the master is received as true, when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptant relies. Were it otherwise—were the court to look into the immense mass of testimony laid before the commissioner—the reference to him would be of little avail." See, also, *Pearson v. Darrington*, 32 Ala. 238; *Jones v. Lamar* (C. C.) 39 Fed. 585; *Farrar v. Bernheim*, 74 Fed. 435, 20 C. C. A. 496; 17 Enc. P. & P. 1052. In *Brown v. McKay*, 51 Ill. App. 295, 299, Mr. Justice Waterman, in referring to exceptions of the character of those under consideration in the present case, says: "These exceptions require the court to search through the mass of evidence to determine if they are well taken. There is a neglect to point out what the evidence is upon the conclusions of the master which the party disputes. Such a practice renders the report of the master of no assistance to the court, and is one which the

court is under no obligation to tolerate." The failure of the excepting party to specify the places in the auditor's brief of evidence where the evidence could be found which was necessary to a decision of the questions raised by the exceptions above referred to was a sufficient reason for refusing to approve the exceptions of fact and overruling the exceptions of law. See *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874.

2. There is an exception of law which raises the legal question as to who is a planter, within the meaning of Civ. Code 1895, § 3546. As this exception is so framed that it can be determined by a mere reference to the auditor's report, and without reference to the brief of evidence, it does not fall within the rule of practice above laid down, and is the only exception which can be properly considered. J. G. Brown, Sr., Hodge & Eubanks, and J. W. Hodge each claims to be a planter, and to have sold a portion of the cotton in controversy to Jelks on cash sale, and that, under the provisions of the section of the Code above referred to, he could assert his title against Butler, Stevens & Co., notwithstanding they were bona fide purchasers without notice from Jelks. The auditor found that Brown was a farmer, and that the cotton sold by him to Jelks was raised by him on his own land, that Hodge & Eubanks acquired the cotton sold by them from their tenants in payment of rent and supplies furnished, except as to two bales which were collected by them in their mercantile business; and that J. W. Hodge was a farmer, and the cotton sold by him to Jelks was raised on land owned by him by tenants, who paid their rent and for their supplies with cotton raised by them on the rented premises. The act of 1854, with the amendments made from time to time, is now embodied in the section of the Code above mentioned, which is as follows: "Cotton, corn, rice, crude turpentine, spirits turpentine, rosin, pitch, tar, or other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer: provided, that in cases where the whole or any part of the property has been delivered to the buyer, the right of the seller to collect the purchase-money shall not be affected by its subsequent loss or destruction." The title of the act of 1854 was, "An act for the protection in certain cases of planters and cotton sellers within the state of Georgia." Acts 1853-54, p. 56. We do not think this act was intended to embrace all sellers of cotton, but that its scope was limited to those sellers embraced within the classes mentioned, viz., planters and commission merchants. It was not passed for the benefit of all cotton sellers, but for the benefit only of those classes of sellers who answered the description of planters and commission merchants. It has been held that one who an-

swered to the description of commission merchant, and who made a sale of his own cotton, was entitled to avail himself of the protection that this act affords. *National Bank v. Augusta Cotton Company*, 104 Ga. 403, 30 S. E. 888. If a commission merchant selling cotton is entitled to the protection of the act, whether he is selling on commission or not, it would seem that a planter is entitled to equal protection, whether he is selling cotton raised by himself, or cotton acquired in any other way. It may be that the case just cited gave too liberal a construction to the act in favor of commission merchants; but, following the line of construction indicated by that decision, it inevitably results that a planter is entitled to the protection in any cash sale of cotton that he may make.

As we have reached the conclusion that all planters are entitled to the protection of this law in all cash sales of cotton made by them, it becomes necessary to determine who is a planter, within the meaning of the act. In *Roberts v. Railway*, 75 Ga. 227, Mr. Chief Justice Jackson, in discussing this act, defined planters to be "those who plant something in the ground, or sow something therein, which produces fruit or increase from this planting and growing from the soil, such as cotton, corn, or rice." It is claimed that this language restricts the definition of planters to those who are themselves actually engaged in the cultivation of the soil; but we do not think the learned chief justice intended the words he used to have this narrow and restricted meaning. "Planter" is defined by the *Standard Dictionary* to be "one who plants; an owner of a plantation." By Webster, as "one who owns or cultivates a plantation." By the *Century Dictionary*, as "one who owns a plantation." From these definitions, we think the true meaning to be given to the word "planter," as used in the act, is one who is engaged in the business of producing crops from the soil; and it is immaterial whether he sows and reaps with his own hand, with the hand of a tenant, the hand of a cropper, or the hand of a hired laborer. Under this view of the law, all of the parties above referred to were planters. All belong to one of the classes protected by the law under consideration, and, belonging to these classes, they had a right to avail themselves of the protection afforded, not only as to sales of the crops made by them, but as to sales of any cotton which they owned.

Judgment affirmed. All the Justices concurring.

(119 Ga. 887)

LATIMER v. IRISH-AMERICAN BANK
et al.

(Supreme Court of Georgia. March 30, 1904.)

EQUITY—TRIAL TERM—CONSENT—RES JUDICATA
—OBJECTIONS TO PLEADINGS—ANSWER—
PARTITION—DEBTS—BILL OF REVIEW.

1. The first term of an equity case is the trial term, when all the parties consent. It follows

that, when such consent is given, the parties have the same rights and liabilities at the first term that they would have in the trial of the case at the second or any subsequent term.

(a) A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which, under the rules of law, might have been put in issue, in the cause wherein the judgment was rendered.

(b) The exception to the foregoing rule, in cases in which the party had a good defense of which he was entirely ignorant, or was prevented from availing himself of his defense by fraud, or accident, or the act of the adverse party, is unavailing, unless these grounds of relief are unmixed with negligence or fault on his part.

(c) Objections to the pleadings on both sides are required to be made at the first term.

2. A defendant in every case may set up in his answer any matter which, under the English rule, should be the subject of a cross-bill.

(a) Where the petitioner in an equitable proceeding for a partition seeks to charge her severed interest with her debts to the defendants, their answer, praying a judgment for their debts, is germane to the petition.

(b) Equity does nothing by halves, but gives complete relief.

3. Although the debts on which the decree was rendered in the equitable partition proceeding were not quite due, the decree will not be reopened on that ground alone; it appearing that the plaintiff in that proceeding set out these debts in her petition for partition without any reference to their not being due, that she made no objection at the hearing of the case on that account, and that the notes evidencing her indebtedness matured before the bill of review was filed, and before any effort was made to enforce the decree as to these debts.

4. The pleadings in the partition case were sufficient to authorize the decree rendered.

5. It was not necessary to the validity of the decree that the answers of the defendants should have been marked "Filed" by the clerk; the answers having in fact been in the hands of the court, and having been considered in making the decree.

6. While inadvertent errors in a decree may be corrected, the general rule is that a bill of review will not lie against a consent decree.

7. There is no specification of any fraud in the procurement of the decree.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by Annie K. Latimer against the Irish-American Bank and others. Judgment for defendants, and plaintiff brings error. Affirmed.

E. H. Callaway, for plaintiff in error. W. K. Miller, D. G. Fogarty, J. O. C. Black, and Wm. H. Barrett, for defendants in error.

TURNER, J. This case comes to this court upon a writ of error sued out by Annie K. Latimer, the plaintiff in the court below, who thus brings under review the judgment of that court dismissing an equitable proceeding instituted by her against the Irish-American Bank and certain other parties defendant. The nature of this proceeding, as well as the allegations upon which she relied for the relief sought, may readily be gathered from the following statement of the case set forth in the brief submitted by her counsel:

"Plaintiff in error brought an equitable petition against defendants in error, for the purpose of setting aside certain judgments rendered against her in a decree in a partition proceeding in Richmond superior court on October 22, 1901. * * * Her petition and the exhibits thereto set forth the following facts: In September, 1901, plaintiff owned a one-fifth undivided interest in the estate of her father, which also covered the trust estate left by her mother. The remaining four-fifths interest in said estates were owned by her brother, W. C. Pollard, and her three sisters, Mrs. Brantley, Mrs. Stuart, and Mrs. Giles. Her brother, W. C. Pollard, her husband, W. E. Latimer, and her brother-in-law, H. B. Stuart, were the administrators upon her father's estate. Latimer, her husband, was heavily involved, owing a large indebtedness, among others, to the defendant banks, who were threatening criminal prosecution. Under these circumstances, plaintiff, at the instance of her husband, her brother, and brother-in-law, during September, 1901, executed the following notes and conveyances, all to be used in paying off and securing her husband's indebtedness: September 16, 1901, to Martin & Bush, \$750, with conveyance of one-fifth undivided interest in father's and mother's estates, as security; September 17, 1901, note to Stuart for \$800, and to Pollard for \$400; September 23, 1901, conveyance to Pollard and Stuart of her one-fifth undivided interests in said estates to secure said notes; September 27, 1901, to Pollard, two notes, one for \$225, the other for \$774.43; and on the same date a third conveyance to Pollard on her one-fifth undivided interest in said estates—all of said notes maturing 60 days after date. Plaintiff received no money on any of said obligations, except the note to Martin & Bush. The money received from them was delivered by her to her husband. All the notes and conveyances executed by her to Pollard and Stuart were immediately transferred by them to Irish-American Bank and National Exchange Bank to secure indebtedness due by Latimer, plaintiff's husband, to these banks, and to prevent his prosecution. On September 28, 1901, an application for partition was prepared by the attorney for the three administrators, and plaintiff, with her sisters, signed the same in person at the instance of said administrators. This petition for partition recited the indebtedness represented by the notes which plaintiff had signed, and the conveyances, and contained a prayer that the indebtedness represented by said notes and the liens of the instruments securing the same should be made a charge against petitioner's separate, segregated interest in said estates, instead of upon the one-fifth undivided interest in the whole, and also contained a consent for a trial at the first term by the judge without a jury. The two defendant banks and Martin & Bush were made parties on account of the charge requested in the lien of their conveyances.

All the defendants acknowledged service September 28, 1901. There was a joint answer by Martin & Bush and the two banks, stating only the amount of their indebtedness, and that they held a lien, and praying for judgment. But the character of indebtedness was not stated, neither the dates nor the maturity were given, and no allegation that it was due, and the answer does not appear to have ever been filed. There was an answer by the three administrators, which, in the last paragraph, stated the amount of indebtedness which Pollard and Stuart claimed against plaintiff, without more. This answer is not marked 'Filed.' Plaintiff never saw or heard of either of these answers until the filing of her present suit. On October 22, 1901, the first day of the October term of the court, nearly a month before the maturity of any of said indebtedness, without any notice whatever to plaintiff, the attorney for the three administrators and the attorney for the two banks took a decree from the judge alone, without the intervention of a jury, partitioning the property, assigning to plaintiff one-fifth of the same, and entering up judgment against her in favor of Martin & Bush and the two banks and Pollard and Stuart, the two administrators, in principal sums aggregating \$3,763.02, which was \$813.59 more than the aggregate amount of the notes which she had executed in September. No further steps were taken in the matter, and no effort made to enforce this decree, or the judgments rendered therein, until January 30, 1902, after the adjournment of the October term of the court, when executions were issued, and plaintiff for the first time knew that said judgments had been entered, when she immediately filed the present petition to set the same aside. Upon the maturity of the notes in November, 1901, after the decree had been rendered, the banks, holding these notes of plaintiff under transfer from Pollard and Stuart, had the same protested."

The court sustained a general demurrer and motion to dismiss the plaintiff's petition, and she excepted. On the argument of the case before this court, counsel for the plaintiff in error contended that the judgments rendered against her in the trial court on the original petition for partition, etc., should be set aside for the following reasons, which are set forth in the brief filed in her behalf:

"(1) Because the notes which she executed and the transfers of her property were obtained from her by her husband, brother, and brother-in-law, who are the administrators on her father's estate, and were transferred to the banks, for the purpose of suppressing criminal prosecutions against her husband, and that all these facts were known to and participated in by the banks. (2) Because the answer of Martin & Bush and the two banks and of the administrators, setting up indebtedness against plaintiff, were so meager and defective that no legal or valid judgment could be rendered upon the same. (3)

Because the petition filed, which was signed by plaintiff and her sisters, was a partition proceeding on its face, and contained nothing to indicate or suggest that judgments would be rendered therein in favor of the defendants, especially on notes not due, and the answers asking judgment were not germane to the same. (4) Because plaintiff had no notice, knowledge, or information of the existence of the pleadings in which judgments were asked for, and no reasonable grounds to suspect that such pleadings would be filed or judgments asked for on notes not due, until after the term at which the judgments were rendered had expired, and therefore she has never had her day in court so far as these judgments are concerned. (5) The judgments were rendered prematurely on October 22, 1901, on notes which did not mature until November 15th, 26th, and 27th thereafter. (6) Plaintiff never consented for a trial at the first term by the judge without a jury of any issue, except those expressly set forth in the petition for partition, which she signed. This consent did not cover the issues raised by the answers of the defendants, on which the judgments were rendered. (7) The pleadings were not sufficient to support the judgments, and the judgments aggregated in amount \$813.59 in excess of all obligations signed by plaintiff."

In the original equitable petition filed by the plaintiff in error, with her sisters, for the partition of the landed estates of her father and mother and for other purposes, it appears, among other things, that these lands were set out and described; that she claimed a one-fifth undivided interest, on which she had executed incumbrances in the nature of security deeds to secure various debts; that these debts were set out as to amounts of principal and interest, were evidenced by notes and conveyances, but the dates and maturity of these obligations were not set out in the petition. She also alleged that certain banking institutions, defendants in that proceeding, to which said debts and securities had been transferred, threatened to complicate the landed estates by selling the undivided interest of the said Annie K. Latimer therein, which it was averred would, if done, result in a sacrifice; that it would be to the interest of all the parties that the interest of Annie K. Latimer should be severed from the rest; and that that interest, thus segregated, should be held liable for the indebtedness charged by her thereon, to which she expressly consented. The prayer of the petition, among other things, asked that her share be alone charged with the indebtedness above referred to, and that such other and further relief be granted as the nature and circumstances of the case might require and to the court might seem meet. Process was also prayed against the defendants named in the proceeding, together with the creditors of Annie K. Latimer; and she added a consent and request that the case be

heard and determined at the first term, to wit, the October term, 1901, by the judge alone, without the intervention of a jury. This petition was signed, in their proper persons, by Annie K. Latimer and her coplaintiffs; also, by W. K. Miller, "Pet. Atty."

To this petition for partition an answer was filed by the creditors of Annie K. Latimer, defendants in error, in which they admit all the allegations contained in the petition; set out their claims as to amount, but not as to maturity; state their liens upon the interest of Mrs. Latimer; and pray judgment against her for the sums stated, and that the judgments be enforced against her interest in the property, in the order and priority stated in the answer.

At the appearance term of the case, a decree was rendered by his honor, Judge Brinson, reciting, in substance, that it appeared to the court that the plaintiffs were entitled to the partition prayed for, and further reciting that all parties were represented and consenting that the case be heard and decided at the first term of the court by the judge alone, without the intervention of a jury. The decree proceeded, fixing the various sums in which the plaintiff in error was indebted to her various creditors, whose liens she had asked to be transferred to her severed or segregated interest in the lands which she had inherited from her parents, for which said several sums judgments were rendered in the decree in favor of the creditors, respectively, the same to be specially enforced against the share of Annie K. Latimer thereafter described. In another portion of the decree, also, the part allotted in the partition to Mrs. Latimer was specially charged with the indebtedness in the said decree found to exist against her, and set out in the petition and answer.

To the statement of the case made by the learned counsel for the plaintiff in error, hereinbefore given, it should be added that in her new bill she prayed that the notes and the deeds to secure them, given to the defendants in error, who were also defendants in the original bill, should be declared void and surrendered to her, and that the part of the lands set apart to her by the decree in the original bill be turned over to her, as her property under said partition, and that the decree rendered on the original bill be reviewed and reformed, by declaring null and void the judgments rendered in favor of said defendants; that injunction issue to restrain defendants from enforcing the executions issued under said judgments, etc.

1. "The trial term for all causes for equitable relief shall be the second term after service has been perfected on all the parties. But parties to proceedings for equitable relief may, by consent, dispose of all equity causes at the first term, if service has been properly perfected." Civ. Code 1895, § 4848. The law, therefore, renders equity causes triable at the first term, in cases where the

parties consent, as was done in this case. Any step which either party could take in the trial of the case could be taken, under these circumstances, at the first term. In other words, the statute and the consent of the parties advanced the trial, with all its incidents, from the second to the first term. It was therefore incumbent on the plaintiff, Annie K. Latimer, in the trial of the original case, to diligently attend it at the first term, by herself or counsel, and to meet every emergency which might grow out of the case. It is too late, after the trial, to complain that she has not been heard. "A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue, in the cause wherein the judgment was rendered." Civ. Code 1895, § 3742. This principle is fundamental, and without it there would be no limit to litigation. Even a third party, "who had full knowledge of the pendency of a case in which he had a direct pecuniary interest, and neither sought to become a party thereto nor made any effort to intervene therein, so as to protect his rights, cannot, after the rendition of a judgment in favor of the plaintiff in such suit, maintain an equitable petition to set such judgment aside." *Fitzgerald v. Bowen*, 114 Ga. 691, 40 S. E. 735.

Having brought her creditors into court, and prayed that their claims should, by the decree of the court, be charged upon her separate share of the property partitioned, it would seem that the appropriate and proper time for Mrs. Latimer to attack these claims on any ground had then arrived. For these reasons, we think she is concluded by the decree rendered on the original bill. Whatever may be the fact as to her complaint that by these debts she assumed liabilities of her husband, and that the proceeds were used to compound a felony, she has passed the time when she could set up these matters in court, and cannot go behind the decree rendered, unless it appears that the court transcended its powers in rendering the decree. *Glover v. Moore*, 60 Ga. 189; *Mashburn v. Gouge*, 61 Ga. 512; *Lewis v. Gunn*, 63 Ga. 542; *Jones v. Harrell*, 110 Ga. 373, 35 S. E. 690. This court has held many times that a judgment is final, unless it can be shown that the party complaining of it had "a good defense, of which he was entirely ignorant, or unless he was prevented from availing himself of his defense by fraud, or accident, or the act of the adverse party, *unmixed with negligence or fault on his part*." (The italics are by Judge Nisbet.) *Bellamy v. Woodson*, 4 Ga. 181, 48 Am. Dec. 221; *Bostwick v. Perkins*, 1 Ga. 136; *Stroup v. Sullivan*, 2 Ga. 279, 46 Am. Dec. 389; *Kenan v. Miller*, Id. 329; *Mullins v. Christopher*, 36 Ga. 534; *Anderson v. Clark*, 70 Ga. 367; *Massey v. Ins. Co.*, Id. 794; *Barksdale v. Greene*, 29 Ga. 418; *Easley v. Camp*, 40 Ga. 698; *Wingfield v.*

Rhea, 73 Ga. 477; *Williams v. Simmons*, 79 Ga. 655, 7 S. E. 133; *Brown v. Brown*, 90 Ga. 312, 25 S. E. 649; *Griffin v. Smyly*, 105 Ga. 475, 30 S. E. 416; *Berry v. Burghard*, 111 Ga. 117, 36 S. E. 459; *Payne v. Bowdrie*, 110 Ga. 556, 36 S. E. 89; *Donaldson v. Roberts*, 109 Ga. 832, 35 S. E. 277; *Owens v. Van Winkle Co.*, 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767; *Sisson v. Pittman*, 113 Ga. 166, 38 S. E. 315. And see, also, Civ. Code 1895, §§ 3984, 3988, 5370; 1 Black on Judg. § 330. In *Lewis v. Gunn*, 63 Ga. 542, this court held that a wife could consent to a judgment as part of a settlement of what she claimed was her husband's debt. For the foregoing array of authorities, as well as other authorities hereinafter cited, we are indebted to the able briefs of counsel for the defendants in error. The list of these authorities could be largely extended.

Furthermore, as to the matter of practice involved in this case, the Code requires that "The judge at each regular term of the superior court shall call all cases on the appearance docket, and hear and decide all objections made to the sufficiency of petitions and pleas, and may by order dismiss plaintiff's petition, or strike defendant's plea, for noncompliance with the requirements of law, unless the defect is cured by amendment." Civ. Code 1895, § 5045. Under the uniform procedure act, this section applies as well to equitable petitions as to other cases. It is also provided in the Code that "pleas and answers may be demurred to, and if new matter is set up by the defendant not controverting the plaintiff's petition, the plaintiff, in proper cases, may be required by the court to meet the same by appropriate written pleadings." Civ. Code 1895, § 5050; *Ward v. Frick Co.*, 95 Ga. 804, 22 S. E. 899. The plaintiff, having failed to take advantage of these statutory remedies, seems to have had her day in court on these questions.

2. But it is insisted that the answers of the defendants to the original bill set up matters not germane, and that the judgments rendered by the court on that bill in favor of the defendants were not authorized by the pleadings. In considering this question, let it be remembered that our Civil Code of 1895 (section 4969) provides that "a petition in the nature of a cross-bill need not be filed in this state," but that the "defendant in every case may set up in his answer any matter which, under the English practice, should be the subject of a cross-bill." Following this reform in the practice in equity cases, it may be regarded as an established rule that matters which were appropriate to a cross-bill under the English practice can now be adopted as regular defenses, and that the complainant is as much bound to take notice of these matters as of any other matters which could be set up in the answer under the former practice. Let it also be remembered that Mrs. Latimer, one of the pe-

tioners in the original bill, set out the various debts on which judgments were rendered against her and her property in the decree, and asked that these debts be charged on her separate interest. There being nothing in her description of these debts implying that they were not immediately enforceable, it no doubt seemed to the chancellor who rendered the decree that there was no reason why the court should not do complete equity by providing the process by which these debts could be collected out of the property on which they were charged. Nor was there anything appearing which rendered a general judgment against Mrs. Latimer inappropriate to the case.

This court, in the case of *Ray v. Home & Foreign Investment Co.*, 106 Ga. 496, 32 S. E. 603, after giving the rules which govern the filing of cross-bills, said: "Applying these rules to the present case, we think the court properly refused to dismiss the answer in the nature of a cross-bill on the ground that the matter set up therein was entirely independent of, or not germane to, the case made by the original petition. The petition sought to enjoin the defendants from exercising a power of sale in a deed given to secure the payment of certain notes. The defendant answered, denying the plaintiff's right to an injunction, and by way of cross-bill asked for a general judgment on the notes, and a judgment setting up a special lien on the land. This was not a new and distinct matter, entirely independent of that set out in the original petition. The subject-matter of the petition and the answer in the nature of a cross-bill was one and the same. The issues raised in each involved the same debt, the same deed, the same land, and the same controversy. The petition sought to enjoin the defendant from collecting the debt by pursuing a remedy given in the deed. The effect of the answer was to abandon the remedy sought to be enjoined, and rely upon a remedy to be given by the court into which the defendant had been drawn by the petition of the plaintiff. A mere statement of the case seems to us to be all that is necessary to show that the answer in the nature of a cross-bill 'did not introduce new and distinct matters not embraced in the original suit.'" Under this apt authority, it would seem that, even if Mrs. Latimer had appeared and objected to the cross-prayers in the answer, her objection might very well have been overruled. So far as the record discloses, she made no objection at all to the part of the answer which was in the nature of a cross-bill.

In the case of *Crowley v. Crouch*, 114 Ga. 137, 39 S. E. 904, this court held: "The ground upon which that part of the judgment of the court excepted to is alleged to be erroneous is that there were no pleadings to authorize the same. There is no merit in this ground. While the petition prayed only for Crouch's removal as trustee, it set out

the will of Mrs. Crouch, and undertook to define his rights as to the property in question. His answer denied the construction put upon the will in the petition, and set up what he contended to be his rights in the property under the will, and then, converting his answer into a cross-petition, he prayed that his rights as life tenant should be protected by the judgment of the court. The court, therefore, properly had before it, not only the question of removal or nonremoval of Crouch as trustee, but also that of passing upon the prayer of his cross-petition." This court has also held: "It has long been the law that, where a court of equity obtains jurisdiction for one purpose, it will retain it until complete justice has been done to all parties"—citing Civ. Code 1895, § 3925; *Mays v. Shivers*, 7 Ga. 238; *Martin v. Tidwell*, 36 Ga. 332. This quotation is taken from *Ray v. Home & Foreign Investment Co.*, 106 Ga. 497, 32 S. E. 606.

In the case of *Carlton v. Insurance Co.*, 72 Ga. 393, after reciting that certain cross-prayers were made by the defendants relating to the fund in controversy, this court said: "The Code makes an answer in the nature of a cross-bill stand as a cross-bill. * * * So that the demurrer was not properly sustained on the ground that it [the answer] is not germane. Nor do we think that the ground is aided by stating that the cause arose for relief after the original bill was filed. It arose by the bill, and is germane to it; nay, it existed before. Knowledge may have come to defendants since the bill was filed. But for the allegations of the bill, it may not have been known or a suit been instituted; but if the bill uncovers facts transpiring before it was brought, and discovers equitable rights to the defendants, why should they not ask relief arising from those facts? Must they bring a separate suit in such a case? Equity does nothing by halves, but gives complete relief. He who seeks it must do it. Code 1882, §§ 3064, 3065; *Walker v. Morris*, 14 Ga. 323; *Martin v. Tidwell*, 36 Ga. 332. And he must do it, we think those cases rule, in the very case in which he himself seeks it, if the relief sought by the defendants be akin to the subject in regard to which he seeks relief for himself."

We therefore think that the case made by the original equitable petition filed by Mrs. Latimer and her coplaintiffs, and the case made by the answers thereto, were akin, were germane to each other, and that the chancellor who rendered the decree in that case might well have held that an objection to the cross-equity set up by the answers could not be sustained. Can it be assumed that the court, when asked to charge a debt upon specific property, by a debtor who in his petition sets out the debt and discloses no reason why it should not be paid, nor asserts that it is not due, would refuse, on the prayer of the creditor, also to decree a pay-

ment of the debt? Would the court by one proceeding charge the debt on the property, and then hold that a subsequent proceeding would be necessary to obtain a judgment on the debt, under the circumstances stated? We think not.

3. In the present bill, assailing the decree rendered in the former case, it is complained that the debts set out in the original bill were not in fact due until nearly a month after the decree was rendered; and it is to be assumed that if the chancellor had been informed, by the pleadings or otherwise, that the debts of the plaintiffs to the defendants were not due at the hearing of the partition proceedings, he would, in the exercise of his equitable powers, have given such a direction in the decree as would protect Mrs. Latimer against a premature enforcement of the judgments. Recurring to the question (which we have already considered) as to its being the duty of Mrs. Latimer to attend during the progress of her case and watch all of its incidents and emergencies, is it not true that she is herself at fault in not having disclosed in her original petition the fact that these debts had not matured, if she wished to insist that the judgments prayed for by the defendants should not be rendered because the debts were not yet due? Might not the court have assumed that she had no defense to the cross-prayers set forth in the answers of the defendants? Certainly, if she had any objections to urge against the granting of these prayers, she was guilty of negligence in not making known such objections before the court rendered its decree.

Our attention has been called to two cases (*Sanner v. Sayne*, 78 Ga. 467, 3 S. E. 651, and *Dye v. Garrett*, 78 Ga. 471, 3 S. E. 692) in which judgments rendered by the court without a jury were arrested, because it appeared that suit had been instituted upon a series of notes, one only of which appeared on its face to be due. But in each of those cases the plaintiff relied for a recovery upon a special contract, alleged to have been made at the time the notes were given, to the effect that, if default should be made in the payment of any one of the notes, all other notes of the series remaining outstanding should at once become due; and this court merely held that, as the suits were not based upon an unconditional contract in writing, the judge of the trial court was without jurisdiction to render judgment without the intervention of a jury on such of the notes as had not on their face reached maturity. In other words, it was held that the judge had no power, under the Constitution of this state (Civ. Code 1895, § 5848), to render a judgment in a case of that nature without the verdict of a jury, notwithstanding there may not have been filed any issuable defense under oath or affirmation. In neither of these cases was there any consent by the parties that the judge should hear and determine the

issues involved without the intervention of a jury. In view of all these considerations, we do not think that the court below could, on this ground alone, reopen the decree in the partition proceedings. The debts are now due.

4. What has been heretofore said is a sufficient reply to the complaint that the pleadings in the original case were not sufficient to support the judgments rendered in favor of the defendants. Mrs. Latimer and her coplaintiffs were responsible for the filing of the equitable petition in that case. The defendants, by their answers, admitted all the facts set forth in the petition. Where a petition recites the rights of the defendants thereto, we know of no rule of practice which requires their answers to be fuller than the case which the plaintiff makes, except as to cross-prayers for the relief to which they are entitled. The creditors of Mrs. Latimer, who were made parties defendant to her equitable petition, confessed the case she stated, and based their prayers upon that case. The administrators of the estates in which she claimed an interest, who were also made parties defendant, likewise admitted the right of Mrs. Latimer and her coplaintiffs to the relief sought by them, and set forth, by way of an answer in the nature of a cross-bill, only such rights as they, in their capacity as the legal representatives of the estate, could justly assert against the plaintiffs.

It was also complained, on the argument before us, that the judgments rendered by the chancellor in the decree on the original bill and answers aggregated in amount \$813.50 in excess of all obligations signed by Mrs. Latimer. If we understand this complaint, it grows out of the fact that the defendant administrators, who were called on by the plaintiff's petition to render an account of their administration, asked a judgment against Mrs. Latimer for her proportion of certain advances made by them in excess of the receipts realized by them in managing the estates which they represented. In the answer filed by these administrators, they specially prayed judgment against the plaintiff for these advances; and, this being so, we think it was entirely proper for the chancellor, when the accounting prayed for by the plaintiff was taken, to allow the administrators to assert their claim against the estates for the amount expended by them in excess of their receipts, and to make this claim a charge against the lands sought to be partitioned. Certainly this prayer and allowance were germane to the case made by the plaintiff's petition.

5. On the argument before this court, counsel for the plaintiff in error also directed our attention to the fact that the answers made by the defendants in the original case had not been marked "Filed." All that seems to be required of a defendant, under the statute regulating the practice in such cases, is that he shall appear at the return term of the

cause and make his defenses in writing, signed by himself or by counsel. Civ. Code 1895, § 5052. Whether the clerk of the court did or did not make an entry of filing on the answers of the defendants to the petition to which Mrs. Latimer was a party plaintiff is a matter which cannot affect the validity of the decree rendered in that proceeding, if these answers were actually before the court and in its custody at the time the decree was made. These answers were not only in court, but were considered by the judge who rendered the decree, as appears from the decree itself.

6. While inadvertent errors in a decree may be corrected, the general rule is that a bill of review will not lie against a consent decree. *Hargraves v. Lewis*, 7 Ga. 119; *Cunningham v. Schley*, 68 Ga. 105, 113. The reasons for this rule are pithily stated in law Latin: "Consensus tollit errorem. Volenti non fit injuria."

7. And there is no specification of any fraud in the procurement of the decree.

Judgment affirmed. All the Justices concurring, except LAMAR, J., disqualified.

(119 Ga. 385)

ROUNTREE v. RENTZ, Mayor.

(Supreme Court of Georgia. March 30, 1904.)

MUNICIPAL BONDS—ISSUANCE—INJUNCTION.

1. After a judgment validating an issue of municipal bonds, rendered in accordance with the terms of the act approved December 6, 1897 (Acts 1897, p. 82; Van Epps' Code Supp. § 6074 et seq.), an injunction will not lie to restrain the sale of the bonds on the ground that the notice of the election to authorize their issuance was not published the number of times required by the statute.

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. D. Evans, Judge.

L. H. Rountree against George Rentz, mayor, to restrain the sale of bonds. Judgment for defendant, and plaintiff brings error. Affirmed.

Herrington & Lee, for plaintiff in error.
F. H. Saffold, for defendant in error.

CANDLER, J. The bill of exceptions complains of the denial of a petition for injunction to restrain the sale by the city of Swainsboro of bonds issued for the purpose of defraying the expense of building a schoolhouse. The case was tried in the court below on an agreed statement of facts, which was as follows: "On October 7, 1901, the mayor and council of the city of Swainsboro enacted an ordinance providing for an election to be held on November 7, 1901, authorizing the issuance of \$12,000 bonds to build and equip a schoolhouse for Swainsboro. The election was held in pursuance of the ordinance, and resulted in a vote of 83 for bonds and 10 against bonds; more than two-thirds of the qualified voters of said city having voted for

bonds. Within the time prescribed by law, the mayor and council of the city of Swainsboro notified B. T. Rawlings, solicitor general of the Middle Circuit (which judicial circuit embraces Swainsboro) of the result of said election, and said solicitor general, in terms of the statute, filed a proceeding to validate said bonds, complying in every particular with said statute; and on December 23, 1901, his honor B. D. Evans, judge of the superior courts of the Middle Circuit, passed an order validating said bonds—said order specifically set out in the answer." On hearing the petition for injunction, the plaintiff offered to prove that the advertisement of the notice of election was inserted in the newspaper only twice, instead of once a week for four weeks, as provided by the statute. "The defendant admitted the truth of the evidence offered, but objected to the admissibility of the same, on the ground that plaintiff could not go behind the judgment of validation." With this view the court concurred, and held that the judgment of validation "is res adjudicata of the question raised, and is conclusive as to all matters involved."

From the foregoing it will be seen that the sole question for our determination is as to the conclusiveness upon the taxpayer of a judgment, rendered in accordance with the provisions of the act approved December 6, 1897 (Acts 1897, p. 82; Van Epps, Code Supp. § 6074 et seq.), validating county or municipal bonds. In our opinion, this question is absolutely settled by the decision of this court in the case of *Epping v. Columbus*, 117 Ga. 280, 43 S. E. 803, where it was said. "The act of 1897 . . . provides a method of ascertaining, before the bonds are issued and the debt incurred, whether the municipality or county can lawfully incur a debt of the amount sought to be incurred, and for the purpose for which it is to be incurred, and whether the assent of the qualified voters has been obtained in the manner required by law. A judgment of the superior court validating an issue of bonds concludes the municipality, its citizens, and every one else, on all the questions above referred to, as well as on all other questions which the Constitution and laws require to be determined before authority is granted to a municipality to incur a debt. One who holds a bond stamped as validated in compliance with the provisions of the act of 1897 has a right to presume not only that the municipality had authority to incur the debt for the purpose for which the bond was issued, but also for the amount represented by the bonds issued, as well as that the consent of the qualified voters had been obtained to the issue in the manner prescribed by law." In the present case it was agreed that all the proceedings leading up to the judgment of validation were regular, and that the law in regard thereto was complied with in every respect. It follows, therefore, that

no taxpayer can go behind that judgment and obtain an injunction against the issuance and sale of the bonds on the ground that the notice of the election to authorize the bonds was not published as required by law. If that question could be raised now, it could just as well be raised 20 years after the issuance of the bonds, and when they became due. To allow this to be done would be absolutely to set at naught the statute under which the validation proceedings were had. The evident purpose of the statute was to set at rest, once and for all, by the medium of a judicial determination before the bonds are issued, all question as to the regularity and legality of the proceedings had prior to the rendition of that judgment. The advantage thus gained in securing for municipal and county bonds a ready sale at favorable prices is obvious, and that the act of 1897 was passed for the special purpose of facilitating the sale of such bonds when issued can scarcely be doubted. The wisdom of a policy which has a tendency to encourage small and struggling municipalities to rush blindly into debt in order to erect expensive public buildings and to secure metropolitan comforts and conveniences is open to grave question, but that is not germane to the present discussion. Swainsboro wants a fine schoolhouse, and has voted an issue of bonds for the purpose of satisfying that want. The General Assembly has provided a method by which the legality of the bonds and the regularity of the proceedings by which their issuance was authorized may be, by a solemn judgment, forever settled. This method, it is agreed, has been pursued in the present case in terms of the law; and the plaintiff cannot now call in question the validity of the election by reason of the alleged failure to advertise it in the manner required by the statute.

Judgment affirmed. All the Justices concur.

(119 Ga. 337)

PALMER BRICK CO. v. CHENALL.

(Supreme Court of Georgia. March 30, 1904.)

INJURY TO EMPLOYÉ—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR—QUESTION FOR JURY—ACTION—PLEADING—DEMURRER.

1. The maxim *res ipsa loquitur* is applicable, under certain circumstances, in suits by a servant against his master for damages resulting from the latter's negligence. *Simmons, O. J.*, dissenting.

2. The maxim is however, rarely applicable in such cases, and only where the manner of the occurrence producing the injury or the attendant circumstances are such that the jury could reasonably infer that the occurrence could not have taken place unless the master was lacking in diligence as to instrumentalities, place of work, or fellow servants.

3. Whether such an inference shall be drawn is a question exclusively within the province of the jury, who are to determine whether the cir-

cumstances are such as to authorize the inference; and the circumstances must show that the occurrence was of such an unusual and extraordinary character that an inference of negligence would arise, which would overcome the presumption of law in favor of the master that he had furnished proper instrumentalities, a safe place to work, and competent fellow servants.

4. In any case the inference is slight, and especially is this true where the suit is by a servant against his master; and the jury should disregard the inference in every case where there is the slightest evidence which would either adequately explain the happening of the occurrence upon some other theory than the negligence claimed, or which would satisfy the minds of the jury that the master was not negligent, notwithstanding the explanation of the master does not sufficiently account for the occurrence itself.

5. A petition claiming damages for negligence, which contains only general allegations of negligence, will be dismissed on special demurrer unless so amended as to set forth one or more specific acts of negligence.

6. It follows from the foregoing that when a petition sets forth general allegations of negligence, which are followed by an averment of a specific act of negligence, there can be no recovery by the plaintiff, unless the specific act of negligence is established to the satisfaction of the jury.

7. In a suit of the character above indicated, evidence of the circumstances attending the transaction which resulted in the injury, and constituting the *res gestæ* of the occurrence, may be properly admitted, although such evidence may show other acts of negligence on the part of the defendant than the one alleged. But such evidence will not authorize a recovery unless the specific act of negligence alleged is established to the satisfaction of the jury.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Saint Chenall against the Palmer Brick Company. Judgment for plaintiff, and both parties bring error. Reversed on main bill of exceptions, and affirmed on cross-bill.

Smith, Hammond & Smith, for the Palmer Brick Co. Burton Smith and George Gordon, for Saint Chenall.

COBB, J. This is the second appearance of this case. See *Chenall v. Palmer Brick Company*, 117 Ga. 106, 43 S. E. 443. At the last trial the plaintiff recovered a verdict, and now the defendant complains that the court erred in refusing to grant it a new trial.

1-4. When the case was here before, there was a distinct ruling to the effect that the maxim *res ipsa loquitur* would be applicable in an action by a servant against a master. While we are aware that this is a proposition upon which the courts are not by any means agreed, and the older rulings are generally to the contrary, still there are many decisions by American courts holding that, under given circumstances, this maxim is applicable in cases of the character referred to; and the trend of American authority seems to be now in that direction, even if the current is not already that way. See 2 *Labatt's Master & Servant*, § 834, and citations in note 8. While

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 351.

the maxim is applied with great caution in any class of cases, greater caution must be exercised in determining its application in a suit by a servant against a master, on account of the burden resting upon the servant, as well as the presumptions which exist in favor of the master. A servant who sues his master for damages on account of alleged negligence takes upon himself the burden of showing not only due care on his own part, but also that the master was negligent. Except in a case where the master sued is a railroad company, the servant cannot, under any circumstances, call to his aid any presumption of law which will have the effect to relieve him from establishing the existence of negligence by proof of facts requisite for that purpose. On the other hand, the master has in his favor two presumptions of law: First, that he has discharged his full duty to his servant in regard to instrumentalities, place of work, and fellow servants; and, second, that the servant has assumed all of the usual and ordinary hazards of the business. Before the servant can recover, he must overcome, by proof of the facts necessary for that purpose, these two presumptions that the law raises in favor of the master. The servant is required to prove negligence, but he may carry this burden of proof which the law imposes upon him like any other litigant, and may satisfy the requirements of the law either by direct or circumstantial proof. If he can, by the proof of a series of circumstances, establish that he has exercised due care and that the master was negligent, he may rely upon the circumstances for a recovery, even in the absence of any direct proof on the subject of his own conduct, or that of his master. The maxim *res ipsa loquitur* is simply a rule of evidence.

The general rule is that negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injury complained of, or the attendant circumstances, may sometimes well warrant an inference of negligence. It is sometimes said that it warrants a presumption of negligence, but the presumption referred to is not one of law, but of fact. It is, however, more correct and less confusing to refer to it as an inference, rather than a presumption, and not an inference which the law draws from the fact, but an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw. In the trial of an action by a servant against a master, where it has been shown that the servant was in the exercise of due care, and the manner of the injury or the attendant circumstances are such that injury could not have resulted unless the master had not been negligent in some respect in which the law required him to be diligent for the servant's safety, then the jury might be authorized to infer that the master had been negligent in respect of the matter which was the basis of the suit, and would be authorized to base

a finding upon such an inference, in the absence of an explanation which would be satisfactory to them; and it is not necessary that this explanation should satisfy them as to the cause of the injury, but an explanation which satisfies them simply that the master has exercised all the diligence which the law requires of him would be sufficient to rebut the inference of negligence resulting from the happening of the occurrence, although the cause thereof might still be involved in an unsolvable mystery. Under our system, where every question of negligence is left for determination by the jury, even in cases where the maxim under consideration is applicable, the judge should not charge the jury that there would be an inference of negligence from a given state of facts, but should instruct them, in clear and unequivocal terms, that negligence must be proven, and it is for them to consider whether the manner of the occurrence and the attending circumstances are of such a character that they would, in their judgment and discretion, be authorized to draw an inference that the occurrence could not have taken place if due diligence on the part of the master had been exercised. And they should also be instructed that, while they are not required by the law to draw any inference of negligence from the matter, still it is within their province to determine whether the circumstances are such that such an inference might be properly drawn. If, in a given case, the jury see proper to draw an inference of negligence from the manner of the occurrence or the attendant circumstances, the drawing of this inference is not necessarily to result in a finding in favor of the plaintiff. It imposes upon the jury the duty of making further inquiry as to whether this inference has been overcome by a satisfactory explanation. If the jury have drawn the inference of negligence, and there is evidence which satisfies their minds, notwithstanding such inference of negligence, that the occurrence was really brought about by the negligence of a fellow servant, the inference is overcome, and the jury should find in favor of the defendant. So, if there is evidence that the master has fully discharged the duty which the law requires of him in reference to his servant, although he has not satisfactorily accounted for the occurrence, the inference should go for naught, and the finding should be in favor of the defendant. The application of the maxim *res ipsa loquitur* does not change one iota of the law of master and servant, but simply affords in some rare cases a means of proof to which the servant may resort to carry the burden which the law imposes upon him in a case where he sues his master for negligence. In these cases, which are of rare occurrence—for the maxim only applies in cases which do not ordinarily and usually happen—the maxim affords to the servant an opportunity to claim at the hands

of the jury an inference drawn from facts which he may rely upon as proof of that which the law requires him to prove. The inference is only *prima facie*, is generally slight, and is easily overcome. The inference should be drawn by the jury only in extreme cases, and should be disregarded by them in every case where it reasonably appears that the evidence that the master has not been guilty of negligence as to instrumentalities, place of work, or fellow servants. The inference goes the moment it appears that a defect in machinery complained of is a latent defect that the master could not have discovered by the exercise of ordinary care. In cases like the *Nelms Case*, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; the *Railey Case*, 112 Ga. 288, 37 S. E. 360; the *Baxley Case*, 114 Ga. 720, 40 S. E. 730; the *Stewart Case*, 115 Ga. 624, 41 S. E. 981; the *Portner Case*, 116 Ga. 171, 42 S. E. 408; and the *Reynolds Case*, 117 Ga. 47, 43 S. E. 456—which were cases in which the defect was latent, and the master could not have discovered it by the exercise of ordinary care, or the defect was patent, and the servant had equal means with the master of ascertaining the same, the maxim *res ipsa loquitur* could have no application. In the case of *Keith v. Iron Company*, 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296, which involved the falling of an arch, the maxim *res ipsa loquitur* might or might not have been applicable, according to the circumstances existing at the time of the fall; but, even if applicable, it would not in that case have availed the plaintiff, for the reason that, if the inference of negligence arose, it was immediately removed when the fact appeared that the plaintiff was injured as the result of the negligence of a fellow servant.

5-7. A petition claiming damages for negligence, which contains merely general allegations of negligence, is subject to special demurrer, and, upon the hearing of such a demurrer, should be dismissed, unless so amended as to set out one or more specific acts of negligence. *Russell v. Central of Georgia Ry. Co.*, 119 Ga. 705, 46 S. E. 858. It would follow from this that if a petition sets forth general allegations of negligence, followed by allegations setting forth specific acts of negligence, the plaintiff is not entitled to recover, unless it be shown to the satisfaction of the jury that the defendant has been negligent in one or more of the particulars alleged. What would be the right of the plaintiff if the defendant should see proper to go to trial upon a petition which contained mere general allegations of negligence, with no specific act of negligence set forth therein, is not material to the present discussion. Without reference to that question, it is certain that, if the plaintiff alleges a specific act of negligence, no recovery can be had, unless this act of negligence is established, without reference to other averments of negligence in the petition which are general in their

nature. *Georgia R. Co. v. Oaks*, 52 Ga. 410 (5); *Central R. Co. v. Nash*, 81 Ga. 581, 7 S. E. 808 (2); *Central R. Co. v. Hubbard*, 86 Ga. 624, 12 S. E. 1020 (4). While all the circumstances of the transaction under investigation which constitute the *res gestæ* of the occurrence are admissible in evidence, and in this way evidence of acts of negligence not alleged may be received for consideration by the jury, still this is solely for the purpose of determining whether the specific acts of negligence alleged in the petition have been established. No matter how much evidence there may be of acts of negligence admitted under the operation of this rule, there can be no lawful recovery unless one or more of the specific acts of negligence set forth in the petition have been established to the satisfaction of the jury. The other acts of negligence admitted as a part of the *res gestæ* of the transaction may be looked to, to throw light on the question as to whether the specific acts of negligence relied on have been established; but, no matter how well established such other acts may be, the jury are not authorized to find in favor of the plaintiff unless at least one of the specific acts alleged has been proved to their satisfaction. *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48.

In the present case the petition alleged that the plaintiff was under the direction of one Montgomery, a boss in the employment of the defendant, "who ordered him to assist in the repair of a brick kiln." He "was directed to go inside of the kiln, which was undergoing repairs, to get certain bricks which were therein, and carry them to the masons who were at work on the outside of the said kiln." While at work within the kiln, the top of the same fell upon plaintiff, injuring him. The paragraphs of the petition which allege negligence on the part of the defendant are as follows:

"(10) Defendant was negligent in this: that it furnished an unsafe place in which plaintiff was required to labor.

"(11) The kiln which fell upon the plaintiff was constructed in a careless and negligent and unworkmanlike manner, and was unsafe and likely to fall at any time, and all this defendant well knew or should have known.

"(12) Defendant was negligent in this: that it maintained said kiln in an unsafe and dangerous condition, knowing it to be so, and in that it required plaintiff to work in such an unsafe and dangerous place.

"(13) The supports upon which the top or arch of the kiln had been built had been removed too soon, and time had not been allowed for the work to 'set,' and this too early removal of said supports caused the said arch to settle, crack, and fall."

Paragraph 10 is simply a general allegation that the defendant was negligent in furnishing the plaintiff with an unsafe place to work. Paragraphs 11 and 12 contain no specific al-

legation of negligence, but are simply general averments to the effect that the unsafety of the place was the result of the carelessness and negligence of the defendant, both in the construction and maintenance. In none of the three paragraphs mentioned is there a specific act of negligence alleged either as to construction or maintenance. If the petition had contained no other allegations than these, it would have been subject to special demurrer, and would have been dismissed, unless some specific act of negligence had been alleged, relating either to the construction or maintenance of the place at which the plaintiff was put to work. The only specific act of negligence alleged in the petition is in paragraph 13, which is that the supports upon which the top or arch of the kiln had been built were removed too soon, and as a result of this removal the arch fell. While, under the rule above referred to, all evidence relating to the circumstances under which the arch fell would be admissible, and in this way other acts of negligence might be brought before the jury, still none of this evidence would authorize a finding in favor of the plaintiff, unless it appeared that the arch fell as a result of the supports having been removed too soon. Upon this specific act of negligence the plaintiff has seen fit to plant his case, and he cannot complain if the defendant insists that the case shall be determined solely upon the issue which he has tendered. If the jury should determine that the circumstances under which the arch fell were of such an unusual nature that they would be authorized to infer that the falling was due to negligence on the part of the master, such inference would establish only *prima facie* that the defendant was negligent in the manner specifically alleged in the petition; and if it appeared from the evidence that the falling of the arch was not due to the specific act of negligence alleged in the petition, but to something else, whether negligence or not, the inference of negligence arising from the application of the maxim *res ipsa loquitur* would be unavailing to the plaintiff as the basis of a recovery. The application of the maxim in cases where it may be applied will result in an inference of negligence, upon which a recovery may be based, but this inference is simply that the defendant is negligent in the respect alleged. The inference takes the place of direct proof, and as direct proof, as a basis of recovery, would be limited to the specific act of negligence alleged, so the inference, under the operation of the maxim, would be in like manner limited; and, the moment that the jury are satisfied that the defendant is not negligent in the respect alleged, the inference of negligence resulting from the circumstances of the occurrence can no longer be looked to as the basis of a recovery.

As some of the rulings of the trial judge were not in entire accord with the views

above presented, the judgment must be reversed. As some of the assignments of error are of such a character as to require a reversal on other grounds than that the evidence was not sufficient to withstand a nonsuit, we do not now express any opinion as to whether the plaintiff is entitled to recover on the evidence appearing in the present record. On the evidence as presented in the former record, it was held that the jury were authorized to return a verdict in favor of the plaintiff. It is contended that the evidence in the present record is materially different from what it was before. This may be true, but we cannot know that on another trial the evidence will be the same as it is in this record; and the case is therefore remanded, to be disposed of on another trial in accordance with the law as applicable to the facts as they then appear.

In the cross-bill of exceptions, complaint is made of certain instructions of the judge to the jury. As there is no special assignment of error upon any of these instructions, it is necessary to determine only whether they contain sound abstract propositions of law. Apparently they do, and we will not inquire whether they are adapted to the facts of the case.

Judgment on main bill of exceptions reversed; cross-bill affirmed. All the Justices concurring.

SIMMONS, O. J. I concur in the judgment, but dissent as to the proposition stated in the first headnote.

(119 Ga. 733)

BANKS et al. v. McCANDLESS et al.

(Supreme Court of Georgia. March 29, 1904.)

EVIDENCE—ADMISSIONS—CONVEYANCE OF TITLE.

1. While admissions by one in possession are not good as against a bona fide purchaser for value from him, yet so long as a debtor remains in possession of property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestæ* of the fraud, if any, may be considered as in progress, and his declarations, though made after he has parted with the formal paper title, may, by reason of the continuous possession which accompanied them, be given in evidence for the creditor against the claimant.

2. A plaintiff in a trover case is within the protection of the statute against fraudulent conveyances, even before judgment; and a surety on the defendant's bail bond in the trover case, who pays the judgment recovered by the plaintiff, is entitled to the same protection.

(a) The rights of creditors should be favored by the courts, and every remedy and facility afforded them to detect, defeat, and annul any effort to defraud them of their just rights.

3. It is not apparent to this court that the jury found contrary to the charge of the court, as contended by the plaintiff in error.

4. Under the evidence and pleadings, the charge of the court as to whether "John L. Con-

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 351, 359, 363, 365.

ley rid himself of his property for the purpose of becoming indebted" to the defendants in error, "or of creating the liability and preventing its collection," was not error.

5. The court below did not err in refusing a nonsuit, or in refusing to direct a verdict for the plaintiff in error; nor can the reviewing court say that the verdict rendered was contrary to the evidence or contrary to law, as averred in the motion for a new trial.

(Syllabus by the Court.)

Appeal from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by E. S. McCandless, administrator, and others, against James Banks, administrator, and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Westmoreland Bros., for appellants. Arnold & Arnold, Burton Smith, and L. Z. Rosser, for appellees.

TURNER, J. John L. Conley was the administrator of the estate of Jonathan Broad, deceased, and became indebted to that estate in a large sum by reason of his appropriation of its assets, and was removed from his trust. McCandless became the administrator de bonis non of the same estate. An action of trover was brought against Conley by Marcellus E. Thornton for certain personal property, in which action bail was required, and A. E. Buck and another became sureties for Conley on the bond given by him in that suit. A judgment was rendered in that action against Conley and his sureties, and an execution issuing under that judgment was paid off by Buck and his co-surety. The co-surety having been reimbursed, Buck became the assignee of the execution by virtue of his payment of the balance due upon it, and in this way became the creditor of Conley. John L. Conley having died, James Banks was appointed administrator of his estate. Against Banks, as such administrator, McCandless, as administrator de bonis non of the Broad estate, and Buck filed an equitable petition to subject to their claims certain lands to which Morris J. Conley, who was also made a party defendant, asserted title. The contention of the plaintiffs was that these lands had belonged to John L. Conley at the time of his death, and that Morris J. Conley, his brother, had acquired them in pursuance of a fraudulent scheme designed to defeat the rights of creditors. The prayer of the petition was that the conveyances made to Morris J. Conley be declared null and void as to the plaintiffs, and that the property be subjected to the payment of their demands, etc. Pending this litigation, Buck died, and his executrix, Mrs. Buck, was made a party plaintiff in his stead. On the trial of the case now under review, the jury returned a verdict in favor of the plaintiffs, finding that the deeds to the lands in controversy were null and void. The defendant Morris J. Conley moved for a new trial on various grounds, which the court below declined to grant, on condition that the plaintiffs would write off

from the recovery some 25 acres of the lands covered by the verdict. This condition was complied with by the plaintiffs, whereupon Morris J. Conley excepted to the refusal to grant him a new trial, and brought the case to this court.

1. It is sufficiently obvious that the contest in this case involves the statute of 13 Eliz. c. 5, now embodied in Civ. Code 1895, § 2695. It is familiar law that "the rights of creditors should be favored by the courts, and every remedy and facility afforded them to detect, defeat, and annul any effort to defraud them of their just rights." Civ. Code 1895, § 2678. This court has said that "the true law, everywhere and at all times, delighteth in the payment of just debts." *Robert v. Tift*, 60 Ga. 571. The court below, in endeavoring to administer these legal principles, admitted the testimony of two witnesses that John L. Conley, after the date on which the deeds alleged to have been fraudulently made purport to have been executed, and while in possession of the lands covered by these deeds, made certain declarations to the effect that he was the owner of the lands. The motion for a new trial complains of the admission of this evidence, and it is urged that proof of these declarations was not competent. One of the vital issues in the case was whether John L. Conley had actually conveyed the lands to his brother, Morris J. Conley, at the time the deeds bear date. One of them, covering the major portion of the lands described in the verdict, recited a consideration of only \$10, and, though purporting to have been executed in 1883, was not recorded until 1890. It was insisted by the plaintiffs that there were various other indications of fraud in connection with the execution of this conveyance which supported their contention that at the time John L. Conley made the declarations above referred to he was holding possession in his own right, and had not, in fact, made any deed to Morris J. Conley to the lands in controversy. In view of this contention, and of the evidence offered by the plaintiffs in support of it, we think the declarations of John L. Conley were admissible for the purpose of showing the capacity in which he held possession of the lands. The defendant Morris J. Conley claimed that he had become the owner of the land in 1883, and had leased it to Eliza T. Conley, the wife of John L., and that accordingly it was not competent for the plaintiffs to prove his declarations, made long thereafter, as to his ownership of the property. It was therefore a material inquiry whether or not, subsequently to the time the defendant Morris J. Conley claimed to have become the owner, John L. Conley, who remained in possession, held it in his own right or under and through his wife, as the lessee of Morris J. Conley. Was he holding in his own right? The evidence objected to illustrated this question. This court announced a similar conclusion in *Ozmore v.*

Hood, 53 Ga. 114, which was a claim case, involving the title to a tract of land which was in the possession of the person whose declarations were admitted. This court held that the sayings of the defendant in execution, while in possession, or of any other person in possession of the land, are evidence for the plaintiff in execution to show that the defendant, or such third person, was not the tenant of the claimant. In the case of *Oatis v. Brown*, 59 Ga. 711 (3), this court held that: "So long as a debtor remains in possession of property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the res gestæ of the fraud, if any, may be considered as in progress; and his declarations, though made after he has parted with the formal paper title, may, by reason of the continuous possession which accompanied them, be given in evidence for the creditor against the claimant." And this decision was literally followed in the case of *Williams v. Hart*, 63 Ga. 201 (4). We accordingly hold that the trial judge did not err in admitting in evidence the declarations of John L. Conley.

2. The inculpated deed from John L. Conley to his brother, Morris J. Conley, bears date July 12, 1883. The bail bond in the trover suit instituted by Thornton was given in June of that year. It is insisted in the motion for a new trial that though a judgment was had in the trover suit at a later date, yet at the date of the deed the plaintiff in the trover case did not stand to Conley as a creditor, under the statute of 13 Elizabeth, and that Buck, who subsequently paid a balance due on the execution issued on that judgment, did not, at the date of the deed just mentioned, occupy the relation of a creditor to John L. Conley, within the meaning of that statute. And it is complained that the court erred in charging the jury as follows: From the "date when the bail bond was given, the principal and sureties were bound to Thornton for the payment of the eventual condemnation money; and when a verdict was rendered finding that John L. Conley had been guilty of a conversion of Thornton's property, and a judgment was taken against John L. Conley and his sureties on the bail bond, and when execution issued upon such judgment, and Buck paid off a balance due on such execution, he was entitled to control such execution as Thornton could have done before it was paid off, for his (Buck's) reimbursement; [and] if, after the giving of such bail bond, John L. Conley made a conveyance or conveyances to his brother, Morris J. Conley, for the purpose of delaying or defrauding Thornton, or the sureties on his bond, as, to any liability on such bond, then Buck would be a creditor, within the meaning of the law, who could attack such deed, and his executrix, standing in his place, would have the same right." By the terms of the famous English statute (13 Eliz. c. 5) "for the avoiding and abolish-

ing of feigned, covenous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practiced in these days than hath been seen or heard of heretofore; which feoffments," etc., "have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued"—it was "declared, ordained and enacted that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such gulleful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, expressing of use, or any other matter or thing to the contrary notwithstanding." See 4 Bac. Abr. 401. Although this statute is strict, and even penal, the courts have long adopted a liberal construction of its provisions. "These statutes," said Lord Mansfield, "cannot receive too liberal a construction, or be too much extended in suppression of fraud." The statute of 13 Elizabeth was meant to prevent deeds "fraudulent in their concoction," declared Lord Ellenborough. As early as *Twyne's Case* (2 Coke, 219) it was resolved that, "because fraud and deceit abound in these days more than in former times, . . . all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." See *Wait, Fraud. Conv.* (3d Ed.) §§ 18-20. The North Carolina Supreme Court, in construing this statute, remarked that its provisions were so plain that "he that runs may read." *Savage v. Knight*, 92 N. C. 497, 53

Am. Rep. 423. The liberal rule of construction was adopted at an early day in this state by our judges, in a case in which they held that "statutes against fraud, when they operate upon the offense, are to be liberally construed, so as to avoid the fraudulent transaction." *Cumming v. Fryer*, Dudley's Rep. 183. Our statute (Civ. Code 1895, § 2695) declares that "the following acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void"—followed by an enumeration of the acts. This court, in the case of *Westmoreland v. Powell*, 59 Ga. 256, held that though the words "and others," following the word "creditors," did not appear in the Code then of force, in that section in which the provisions of the statute of 13 Elizabeth were intended to be embodied the omission did not have the effect of limiting the operation of that statute upon fraudulent conveyances. In view of this decision, the compilers of our present Code deemed it proper to insert in the section just cited the important words which had in the former Codes been omitted. It is also to be noted that this court further said, in discussing that case, that "the statute of 13 Elizabeth, in so far as it embraced tortfeasors in its provisions," was still of force in Georgia; and the court accordingly held that a transfer by Westmoreland of property, made after he had committed an assault upon Powell, and with a view to defeating the collection of damages for such assault, was void. In other words, this court held that a person having a claim for unliquidated damages, because of an injury tortiously committed upon him, was, though not in a technical sense a creditor, nevertheless within the protection of the statute. In our present Code (section 2695) the relation of debtor and creditor is thus defined: "Whenever one person, by contract or by law, is liable and bound to pay to another an amount of money, certain or uncertain, the relation of debtor and creditor exists between them." This definition is much broader than is generally supposed, and would seem to include a liability for a wrongful conversion of property, for which trover would lie. "In a multitude of cases it has been repeatedly adjudicated that a party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors. * * * A surety is a creditor from the time the obligation is entered into, or the bond signed;" and a "person whose claim arises from a tort, such as libel or slander, is a creditor. The date the tort or injury was committed governs in determining the creditor's status, where the conveyance was made in pursuance of a fraudulent design to defeat the judgment which might be recovered upon it. * * * So a transfer to defeat a claim for deceit, * * * breach of promise to marry, seduc-

tion, bastardy, and assault and battery, may be annulled. And a wife may attack alienations intended to defeat claims for alimony. In *Pendleton v. Hughes* [65 Barb. 136], the defendants, at the date of the fraudulent alienation, had in their possession a 5-20 U. S. bond belonging to the plaintiff, which they afterward converted. The court held that plaintiff was equitably entitled to protection against the fraudulent transfer to the same extent as though the defendants had been indebted to her in that amount at the time of the fraudulent alienation." See *Wait, Fraud. Conv.* (3d Ed.) § 90, and the numerous cases cited in support of the text. Under these authorities it seems clear that Thornton, the plaintiff in the trover suit, was entitled to the protection of the statute; and under these same authorities it would seem that a surety on the bond given by Conley in the trover suit would also, as an original proposition, be entitled to this protection. But be this as it may, by an express provision of our law a surety who has paid the debt of his principal is subrogated, both in law and in equity, to all the rights of the creditor. Civ. Code 1895, § 2986. And it may be added that, without regard to this general rule of subrogation, the executrix of Buck undoubtedly had the right to proceed with the execution against John L. Conley, by virtue of the assignment thereof to Buck, in the same way as the plaintiff in execution, Thornton, could have done. For the reasons above stated, we have reached the conclusion that the charge of the court on this subject was not erroneous.

3. The court charged the jury as follows, with regard to the right of McCandless, as administrator, to attack the conveyances made by Conley: "If Conley became administrator of Broad in 1881, and gave bond as such, no actual indebtedness to the estate arose from such fact alone. Indebtedness to the estate arose upon misappropriation, or devastavit, as it is termed in law, of the assets of the estate by the administrator; and the estate would rank as an actual creditor from the date of such devastavit or misappropriation, and not from the date of the administration or the giving of the bond." It is complained that the verdict of the jury was contrary to this charge. We do not wish to be understood as entirely approving this charge, but, as no question touching its correctness is presented by the record before us, we make no ruling as to whether or not it was altogether sound. Suffice it to say that the jury might well have found, under the evidence submitted for their consideration, that the deed purporting to have been made on July 12, 1883, was not in fact executed until after the devastavit occurred. It cannot, therefore, be said that their verdict was contrary to that charge.

4. Complaint is made in the motion for a new trial that the court committed error in giving the following instruction to the jury:

"If the plaintiffs were not actual creditors at the time of these conveyances, but there was a prospective or possible liability, did or did not John L. Conley rid himself of his property for the purpose of being indebted to them, or of creating the liability and preventing its collection?" The complaint made of this charge is that it had no application to the case on trial. We think that, under the pleadings and the evidence in the case, the jury had a right to reach the conclusion that John L. Conley had stripped himself of all of his property with a view to avoid any liability accruing after, as well as before, the making of the conveyances alleged to have been fraudulent as to creditors.

5. When this case was here before (115 Ga. 48, 41 S. E. 256), this court held that the "judgment of nonsuit as to Banks, administrator, and Morris J. Conley was erroneous." And in no view of the evidence adduced at the last trial can it be said that the court below erred in refusing to direct a verdict in favor of the defendant Conley. In the formal grounds of the motion for a new trial, it is insisted that the verdict of the jury was contrary to law, contrary to the evidence, etc. On substantially the same evidence in behalf of the plaintiffs, introduced on the former trial above referred to, this court in effect held that they made out a prima facie case. As to the case being made out to this extent, at least, the plaintiff in error is concluded. It is true that on the last trial he undertook to meet the case of the plaintiffs by counter evidence. Whether or not this was done successfully was a matter peculiarly within the province of the appointed tribunal—the jury. The jury saw the witnesses and observed their tone and manner, and had before them, transpiring in their presence, all the significant incidents of the trial. Some of these matters were incapable of transmission to this court. The jury, therefore, had better facilities for weighing the questions of fact than this court can possibly have. In the exercise of their appropriate functions, they found a verdict for the plaintiffs. We cannot, from merely reading the transcript, come to a different conclusion from that reached by the jury.

This case has been the occasion of many interesting conflicts. It had numerous branches, including trover and bills in equity. It is a well-trodden field. Every part of the ground has been fought over. First there was a demurrer, which was overruled; then there was a trial at which a nonsuit was had; and this court, on exceptions to that judgment, held fast to the judgment on the demurrer, and decided that, rather than a nonsuit, the evidence warranted a verdict. A verdict has now been had by men of the vicinage, upon practically the same evidence for the plaintiffs, and a fair-minded and excellent judge, who presided at the trial, and had heard the evidence also on a former trial, and reviewed it again on this motion

for a new trial, has given his approval to the conclusions of the jury. We agree with him. The case is now stratified, and will serve hereafter only to reward the diligence of those who dig deep for legal precedents.

Judgment affirmed. All the Justices concurring.

(119 Ga. 789)

GILLELAND & DILLINGHAM v. LOUISVILLE & N. R. CO.

(Supreme Court of Georgia. March 29, 1904.)

CARRIERS — SHIPMENT OF STOCK — PLEADING — AMENDMENT — HARMLESS ERROR — DIRECTING VERDICT.

1. A declaration sounding in tort, seeking to recover from the defendant, as a common carrier, for the breach of its duty to furnish a suitable car for the transportation of live stock, cannot be amended by setting up as the basis of recovery a special contract between the parties for the equipment of the car.

2. The admission of immaterial evidence will not be held cause for a new trial, unless shown to have been harmful to the complaining party.

3. The undisputed evidence showed that a contract for the shipment of live stock was entered into between the plaintiffs and the defendant; that one of the plaintiffs, acting for his firm, objected to the car furnished by the defendant, and refused to allow the stock to be shipped in it under the terms of the contract; that the stock were unloaded from this car, but were afterwards reloaded on it, and shipped to their destination; that the plaintiff, who was accompanying the stock, knew, or had opportunity to ascertain, that they were being transported on the car to which he had objected; that while en route with the stock he reaffirmed the contract, claiming and accepting a benefit under it; and that the stock were injured in transit by reason of the omission of precautions which, under the contract, devolved upon the plaintiffs. *Held*, that there could be no legal recovery, and that it was not error to direct a verdict for the defendant.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Gilleland & Dillingham against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Culberson, Willingham & Johnson, for plaintiff in error. King, Spalding & Little, for defendant in error.

CANDLER, J. This was an action against a railroad company for damages to a shipment of horses, the negligence alleged being that the defendant "put and shipped said horses in a car which was wholly unfit and defectively equipped for the shipment of horses." The court directed a verdict for the defendant. To this ruling, to the refusal to allow an amendment to the declaration, and to the admission and rejection of certain evidence, the plaintiffs except.

1. The original declaration sounded in tort, and sought to recover on the defendant's common-law liability as a carrier, for failing to provide a suitable car for the transporta-

tion of the live stock. The amendment which was rejected set up that "the defendant railroad company made a special charge of two dollars against these plaintiffs for fitting and equipping said car, over and above its regular charge for carrying the horses." The effect of this amendment would have been to change the suit from an action in tort to one for damages for breach of a special contract for the equipment of the car. It was properly refused by the court. *Cox v. Richmond R. Co.*, 87 Ga. 747, 13 S. E. 827.

2. We find no error in the admission of evidence as to the conductor's record concerning the condition of the stock in transit, or as to the rules and regulations of the defendant company. Even if this testimony was not technically relevant, it was not of sufficient materiality to injuriously affect the plaintiffs' rights, and its admission will not be held ground for a new trial. For reasons which will more fully appear in the next division of this opinion, we hold that it was not error to refuse to allow a witness to "testify that there was not the depth and quantity of sawdust bedding in the car that the defendant's witnesses had sworn there was."

3. The horses were shipped from Shelbyville, Ky., to Atlanta, under a special contract of affreightment between the plaintiffs and the defendant, the consideration of which, flowing to the plaintiffs, was the grant of a greatly reduced rate of freight, and free transportation to the shipper between the two points named. This contract recited that "the shipper has examined and found in good order and condition the car or cars provided by said carrier for the transportation of said animals, and hereby accepts the same and agrees that they are, as thus provided, suitable and sufficient for said purpose; and said shipper will at his own expense provide such bedding or other suitable appliances in said car or cars as will enable said animals to stand securely on their feet while in the same." According to the testimony of Dillingham, one of the plaintiffs, who looked after the loading and shipment of the stock in Shelbyville, and who executed the contract on behalf of his firm, the contract was signed by him before he had an opportunity to examine the car in which the stock were to be shipped. When he saw the car he objected to it, and refused to allow the stock to be shipped in it except at the carrier's risk. The agent of the railroad company "said he would try to fix it so they would go through all right," and the horses were turned out of the car, presumably for the purpose of either putting the car in a condition satisfactory to Dillingham, or of loading them on another car. Dillingham saw the stock no more until just before he left Shelbyville, when they were in the same car they had been in before, and that car was in the train on which he was to ride. He had no opportunity then to examine the car. His journey took him first

from Shelbyville to Louisville. After leaving Shelbyville he ascertained that there was a mistake in the pass that had been given him to permit of his accompanying the stock. He testified: "When I got down to Louisville I found I didn't have any pass. I then went to the Louisville & Nashville Railroad, showed them the contract, told them I had some stock, showed them the pass was not right, and they corrected it and gave me a pass to Nashville." How long he remained in Louisville before continuing his journey to Atlanta does not definitely appear, but the witness swore that from the time he left Shelbyville until he reached Atlanta he had no opportunity to examine the stock or ascertain the condition of the car in which they were loaded. Upon arriving in Atlanta the stock were damaged as set out in the petition, and it was then discovered that the floor of the car was not so prepared as to give the animals a proper foothold.

The court did right to direct a verdict for the defendant, as, under the evidence, there could have been no legal recovery by the plaintiffs. There is no contention that the injuries sustained by the horses were occasioned in any other way than through the failure to have upon the floor of the car bedding or slatting of such a character as to give them a firm foothold and enable them to stand securely; and, by the terms of the contract into which the plaintiffs entered, the equipment of the floor of the car for this purpose was a task which devolved entirely upon them. But it is contended that when Dillingham ordered that the horses be taken out of the car in Shelbyville, and declined to let them be shipped in a car in the condition in which it was, the contract was annulled, and from that moment the common-law relation of carrier and shipper existed between the parties. While it is true, according to Dillingham's testimony, that he refused to agree that the stock should be shipped in the car in which it was at first loaded, except at the railroad's risk, he himself makes it equally clear that before leaving Shelbyville he saw that they had been reloaded in the same car, and that upon arriving in Louisville, far from repudiating the contract, he reaffirmed it by demanding, upon the strength of it, that the mistake in his pass be corrected, and that he be given free transportation to Nashville in accordance with its terms. The contract was reasonable, and was supported by an ample consideration, to wit, the reduction of the rate of freight by one-half. See, in this connection, *Central R. Co. v. Glascock*, 117 Ga. 938, 48 S. E. 981. Having thus ratified it and accepted a benefit under it, he must stand by its provisions. As before stated, it is not disputed that the injuries sustained by the stock were due to the failure to so prepare the floor of the car as to enable them to stand securely while the train was in motion. That was a duty which, under the con-

tract, devolved upon the plaintiffs, and it follows that they cannot recover from the railroad company for the damage done.

Judgment affirmed. All the Justices concur.

(119 Ga. 873)

SAUNDERS v. MILLER.

(Supreme Court of Georgia. March 30, 1904.)

SEDUCTION—ACTION FOR DAMAGES—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. The evidence objected to was irrelevant, but, while the court should not have allowed the question, the answer given by the witness was such as to render its effect harmless to the complaining party.

2. Where a verdict and judgment have been obtained by the plaintiff in an action for damages for the seduction of the plaintiff's daughter, the defendant is not entitled to a new trial on the ground of newly-discovered evidence by reason of the fact that subsequently to the trial of the civil action he was tried under an indictment charging him with the seduction of the plaintiff's daughter and found guilty of fornication.

3. The evidence was conflicting, but that for the plaintiff, as to seduction, brought the case within the ruling of this court in *Cherry v. State*, 38 S. E. 341, 112 Ga. 871, and the verdict was warranted.

(Syllabus by the Court.)

Error from Superior Court, Bullock County; B. D. Evans, Judge.

Action by A. J. Miller against Glenn Saunders. Judgment for plaintiff. Defendant brings error. Affirmed.

R. Lee Moore and A. M. Deal, for plaintiff in error. J. A. Brannen and Hinton Booth, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 824)

DADE COAL CO. v. PENITENTIARY CO. NO. 2 et al.

SAME v. PENITENTIARY CO. NO. 3 et al.
(Supreme Court of Georgia. March 30, 1904.)

CONVICTS—LEASE—APPORTIONMENT—FORFEITURE—RIGHT OF ACTION.

A., B., C., D., and E. were members of a corporation, X., whose sole asset consisted of a lease of convicts for a limited period. The charter of X. named no capital stock, and none is alleged to have been fixed by action of the members. The company itself engaged in no business. By agreement between the corporators, and with the consent of the executive and penitentiary departments, the convicts were distributed in certain proportions between the members, who thereafter severally paid the hire to the state, and were treated by it as lessees in the proportion assigned each. After such partition the camp of A. was abolished by order of the Governor, the convicts then in its possession were taken away, and no further assignment was made to it. The convicts so taken were assigned, not to the corporation, but to B., C., D. and E., the other members of the original corporation, X. *Held*:

1. Regardless of the rights of others or of the public to complain thereof, such partition, and availing itself of the benefits thereof, estopped

A. from denying that it became a lessee, and as such subject to all the provisions of the act of 1876 (Acts 1876, p. 40).

2. The consent of the state, the company, and each of its incorporators to the segregation of the joint or corporate interest under the lease amounted to a partition which vested A. with title in severalty to its proportion of the former undivided interest in the lease.

3. Such partition vested A. not only with the then present, but with the future, rights under the lease.

4. The action of the Governor in abolishing the camp of A. amounted to a forfeiture of all its rights under the original and sub lease.

5. A. had no cause of action against X., or against B., C., D., and E.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Actions by the Dade Coal Company against Penitentiary Company No. 2 and its stockholders, and against Penitentiary Company No. 3 and its stockholders. Demurrers to both petitions were sustained, and plaintiff brings error. Affirmed.

The Dade Coal Company brought suit against Penitentiary Company No. 2 and its stockholders, and another suit against Penitentiary Company No. 3 and its stockholders. The allegations in the two cases were in many respects identical, and both, being controlled by the same principle, were argued together. In the suit against Company No. 2 it was alleged that petitioner is a corporation; that defendant is a corporation; that petitioner, the Chattahoochee Brick Company, and W. B. Lowe are the owners of all the capital stock of Company No. 2, petitioner owning 12½ per cent., the brick company 50 per cent., and Lowe 37½ per cent. of said stock; that on June 21, 1876, the Governor entered into a lease with Company No. 2, whereby it was entitled to receive from the state a certain proportion of the convicts sentenced to the penitentiary; that for many years, by agreement among the several stockholders of Company No. 2, and with the consent of the penitentiary department of the state, a division of the convicts awarded under the lease was made between the stockholders in proportion, to their holdings; that on July 23, 1896, petitioner was deprived of the use and control of any of the convicts awarded to Company No. 2 as aforesaid, and those then in its custody were, under the order of the Governor, taken away from it and delivered to Lowe and the brick company, the other stockholders in No. 2; that in 1896, 1897, and 1898 other convicts were assigned to Company No. 2 by the state authorities, and others will be up to April 1, 1899, when the lease expires; that petitioner is the owner of a coal mine, and the labor of the convicts is valuable; that Lowe and the brick company, though receiving the benefit of their labor, have paid nothing to petitioner or to Company No. 2 therefor; that the removal of the convicts did not in any wise affect its rights to the capital stock held by it in Company No. 2, nor deprive it of the right to

an accounting; and that since the convicts were taken and delivered to the other stockholders their labor has been valuable to such stockholders. The petition was demurred to on many grounds, and the petitioner thereupon amended by alleging that it has from the beginning been the uniform and fixed policy of the stockholders of Penitentiary Company No. 2 to distribute the convicts assigned to it under the lease among its stockholders in proportion to the stock held by each. This plan or policy has been recognized and approved from the beginning by the state through its executive and penitentiary departments. Convict camps were established by executive order for and on behalf of said several stockholders, and such camps continuously recognized as legal, and each stockholder has from time to time paid to the state a part of the rental due under the lease proportionate to his or its holding. The stockholders being few in number, and the Penitentiary Company being without assets other than the lease aforesaid, and without camps or facilities for working or employing the convicts, the plan or policy of dividing out the convicts among the stockholders as above set out has always been pursued, and each stockholder has always paid directly and individually the expenses, including hire of the convicts, as assigned and employed by him or it. Said Penitentiary Company has never operated as a company, and has never in fact and true intent been a going concern, but each and all of the profits accruing to it, or which would ordinarily have accrued to it, have always, until the time set out in the original petition, been received directly by the stockholders in proportion to their holdings. The brick company and Lowe control Penitentiary Company No. 2, the right of action for the accounting is in the latter company, and it would be vain to seek redress at the hands of the officers and stockholders, whose interests are antagonistic to that of plaintiff. The Dade Company prayed for an accounting, and for a judgment for its proportion of the value of the labor of the convicts. Similar allegations were made in the suit against Company No. 3 and its stockholders; the main differences being that in it the Dade Coal Company claimed to own 81½ per cent. of the stock, having paid \$20,000 therefor. Part it bought from C. B. Howard, and the balance it purchased through Joseph E. Brown from W. D. Grant. Said Grant was the owner of stock in Company No. 3, and, with others, gave a bond as required by the act of 1876. On April 23, 1894, said Grant sold said stock to Joseph E. Brown for the Dade Coal Company, and John W. Murphy, James W. English, and T. J. James, who, as a part of the contract of sale, obligated themselves to procure the release of said Grant from the bond given to the state, and, if that could not be done, to save him harmless on account of that bond and the convicts. Attached to the petition was a copy of the

agreement by which Grant sold his stock to Brown, English, Murphy, and James. There is no allegation as to how the stock was transferred by them or either of them to the Dade Coal Company, but there is an allegation that Company No. 3 did not pay the state the rent for 1894, 1895, 1896, and 1897, and that the executors of Joseph E. Brown were compelled to pay \$4,035 on account of Company No. 3, no part of which has been refunded, except \$539.61 returned by James. There was the same amendment as that set out in the petition against Company No. 2, with a further amendment that when the camps were abolished and by virtue of said order the convicts were taken away from the plaintiff and delivered to the stockholders of Company No. 3. There were separate demurrers on the grounds that there was a misjoinder of parties defendant; that there was no cause of action; that there was no jurisdiction of the court to review the action of the Governor in taking the convicts away from the plaintiff and delivering them to the other alleged stockholders; that there was no right of action in plaintiff to recover for the proceeds of the labor of the convicts; that the petition does not show who the contracts alleged to have been made were made with, nor the terms of such contracts; and, as to the allegations in suit against Company No. 3, that there was no sufficient allegation as to what No. 3 owed for hire, or that the executors have any such interest in No. 3 as to entitle them to recover from defendant, besides other special demurrers not necessary to be considered, in the light of the opinion. The court sustained the demurrers and dismissed both petitions. The Dade Coal Company sued out separate bills of exceptions, which were heard together in this court by agreement of parties.

Julius L. Brown and Anderson, Anderson & Thomas, for plaintiff in error. Ellis, Wimbish & Ellis, D. W. Meadow, and J. L. Hopkins & Sons, for defendants in error.

LAMAR, J. (after stating the foregoing facts). The lease act of 1876 (Acts 1876, p. 40) is exceedingly indefinite as to the rights and status of those composing the Penitentiary Companies. It is manifest, however, that the General Assembly did not intend to create ordinary corporations with the right to transfer shares so as thereby to turn over the management of the convicts to any one who would buy stock. Only "bona fide citizens of Georgia" were authorized to become members. The names of such citizens applying for the lease were to be entered upon the minutes of the executive department. If their bid was accepted, the lease was then made to them, and thereupon ipso facto they became a corporation, with no right to sublet, and no indication of any right to sell shares, stock, or other evidence of membership. The charter named no capital stock, and consequently was silent as to the shares

or the number or par value thereof. If, by virtue of its power to make rules and by-laws, any such provision could have been made by the action of the members, there is no allegation that any capital was ever named, that any was ever paid in, or that any scrip was ever issued. The company did no business of any sort, had no camps or prisons, and it is expressly alleged that, except the lease, it had no asset. While, therefore, it is charged that the Dade Coal Company owned $12\frac{1}{2}$ per cent. of the stock of Company No. 2, and $31\frac{1}{4}$ per cent. in No. 3, it is evident, from the petition as a whole, that this cannot refer to stock in the ordinary sense. It can only mean that, not on account of an amount contributed, but by an agreement among the members, the Dade Company was to receive a certain proportion of those assigned under the lease. The company had no assets. It did no business of any sort. It did not even receive the convicts from the state, or pay the hire to the state. But after the agreement as to the proportion that each member was to receive, they organized separate camps or prisons, to which the convicts were sent. The hire was paid, not by Company No. 1 or No. 2, but by the one in control of such camp, who was recognized by the state authorities as a lessee, and to whom all the laws applicable to the original companies were applied. The state enforced against such camps all the regulations for securing humane treatment, and other requirements of the act. And whatever may be the rights of the public, certainly the members of the company who made this arrangement, and who for years took advantage of the provisions thereunder, cannot, in litigation between themselves, be heard to dispute its validity.

Whatever may have been the right of the members under the original lease—whether that of stockholders, tenants in common, partners, or what not—the consent division was equivalent to a partition, under which thereafter the interest was held in severalty. If this division was the equivalent of the issuance of a stock certificate, then, when there was a forfeiture of that interest, it was equivalent to a forfeiture of the stock. There is no suggestion that this division was temporary, and had to be renewed from year to year. Under one division each member received not only those on hand that year, but by virtue thereof an equal proportion during the continuance of the lease. That this partition represented the present and future right thereunder is illustrated by the case in which such interest is said to have been sold by W. D. Grant, one of the original members of Company No. 3. It was not and cannot be claimed that, having sold his stock, he retained any interest in the labor of the convicts, or, having sold his interest in the convicts' labor, he had any interest in the stock. Interest in the lease and in shares of stock were convertible terms. Loss of stock

was loss of lease. Forfeiture of lease was the same as forfeiture of the stock. When the state, under the provisions of the act of 1876, forfeited the several interest, the Dade Company lost its interest in the lease as completely as a co-tenant whose lot assigned on partition, if sold under a tax *f. fa.*, would lose the land and the future increase of the land. When the interest was forfeited, it did not thereupon revert in Companies Nos. 2 and 3, so that what the Dade Company lost as a sublessee it regained, in whole or in part, as a corporator. But the result was to put the state in as complete control of this forfeited part as it would have had of the whole, had either of the original leases been forfeited as an entirety. After the forfeiture the state had the right to make a new lease or a new assignment to any one selected by the Governor. The petition shows that this was done, for it alleges that plaintiff was deprived of the use and control of said convicts, as hereinbefore set out, under and by virtue of the orders of the Governor of the state of Georgia, and by virtue of said orders said convicts were taken away from plaintiff and delivered to the stockholders of said Penitentiary Company. In the light of this allegation, it is evident that the Dade Company had no cause of action against Companies Nos. 2 and 3, or those called "stockholders" thereof. The act of which it complains was not that of the company, but of the state. The title of the stockholders was acquired, not through Companies Nos. 2 and 3, but from the state directly.

The mere fact that a corporation has no capital stock does not necessarily deprive the members of their proportionate rights in the corporate property. But when there is no capital stock—when the character of the corporate enterprise has in it elements of personal trust, making the personnel of the members important, with no right to sell or sublet, as here—the case is to be governed by rules altogether different from those applicable to an ordinary stockholder and his company. It is more nearly subject to the analogous principle governing that form of corporation in which the interest of a member before dissolution consists only in the right to use the corporate property or to engage in corporate purposes. If he fails to attend the meetings or to avail himself of the corporate privileges, he has no cause of action against the company, or those who participated more actively than he. If, during the continuance of the organization, his membership is severed by death, resignation, expulsion, or other form of forfeiture, he loses all of his corporate rights. *Mason v. Atlanta Fire Co.*, 70 Ga. 604, 48 Am. Rep. 585; *Cummings v. Hollis*, 108 Ga. 402, 33 S. E. 910; *Schwartz v. Duss*, 187 U. S. 8, 23 Sup. Ct. 4, 47 L. Ed. 53. This disposes of the controlling question in both cases, and makes it unnecessary to consider whether the Dade Coal Company was a "bona fide

citizen of Georgia," which, under the act of 1876, could be a corporator in Company No. 2, or whether it, by purchase, had the right to become a member of No. 3. The allegation that the executors of Joseph E. Brown had paid \$4,085 on account of rent due by Company No. 3 set out no cause of action. It failed to show that the estate was requested to make such payment, or to indicate how or why the payment was made, so as to make Company No. 3 responsible therefor. There is no allegation that the estate owned stock in No. 3, or even in Dade Coal Company. It is inferable, however, that these payments may have been made on account of the agreement to hold W. D. Grant harmless on the obligation assumed by him in the bond. If so, there are no sufficient allegations to show that the latter had a cause of action against No. 3, or to subrogate the estate thereto, if there was any.

Judgment affirmed. All the Justices concurring.

(119 Ga. 946)

BROOKE v. AUGUSTA WAREHOUSE & BANKING CO.

(Supreme Court of Georgia. March 31, 1904.)

LANDLORD AND TENANT—DISTRESS WARRANT—RETURN—ERROR—WAIVER—OBJECTIONS TO EVIDENCE.

1. Where, after levy, the progress of a distress warrant is arrested by counter affidavit denying that the sum distrained for is due, the warrant becomes mesne process, and the proceeding is converted into a suit for the rent. *Chisholm v. Lewis*, 66 Ga. 729; *Elam v. Hamilton*, 69 Ga. 736. Such counter affidavit is a plea to the merits. See *Hawkins v. Collier*, 28 S. E. 632, 101 Ga. 145 (2), and cit. "After a plea to the merits a defendant can make no objection to the manner by which he has been brought into court." *Pool v. Perdue*, 44 Ga. 458; Civ. Code 1896, § 4981. It follows that where a distress warrant was, by mistake of the magistrate issuing it, made returnable to the January term, 1902, of a city court having cognizance of the matter, when it should have been made returnable to the January term, 1903, of such court, and the defendant, after levy, filed a counter affidavit, and the warrant and counter affidavit were returned to the proper term of such court, a motion of the defendant, then and there made, to dismiss the warrant upon the ground of such mistake as to the term to which it was returnable, was properly overruled.

2. A complaint that the court erred in admitting, over the objection of the movant, certain parol testimony when there was higher written evidence of the fact, is not meritorious when it does not appear from the motion itself that there was such better evidence.

3. While there was some evidence tending to show that the contract between plaintiff and defendant was one of bailment, there was ample evidence to authorize a finding that it was one of rental.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Augusta Warehouse & Banking Company against George W. Brooke. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, for plaintiff in error. C. Henry Cohen, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except LAMAR, J., disqualified.

(119 Ga. 876)

MCCARY v. PRITCHARD et al.

(Supreme Court of Georgia. March 30, 1904.)

ACTION ON NOTE—PLEA—DEMURRER—PAROL CONTRACT—FRAUDULENT MISREPRESENTATIONS—OPINION EVIDENCE—DAMAGES.

1. Where, in a suit by the payee of a promissory note against the makers thereof, the defendants pleaded that the note was given to the plaintiff for part of the purchase money of an insurance agency business sold by him to them, and that the consideration of the contract between the parties had failed to an extent equal to the amount represented by the note, because the plaintiff "represented to defendants that he had made certain profits out of said business for the three years previous to said purchase, and said purchase was based upon the amounts alleged to have been made, but said representations, as defendants have since discovered, were untrue," a demurrer to the plea upon the ground that it fails "to set forth how much profits plaintiff represented he had made, * * * or how much damage had resulted to defendants" by reason of the alleged misrepresentations of the plaintiff, should have been sustained.

2. Where there is nothing in the pleadings to show that the contract between the parties was in writing, the question whether a plea seeks to contradict or vary a written contract cannot be raised by demurrer.

3. The amended answer of the defendants did not show "on its face that no damage could have resulted to" the defendants on account of the alleged misrepresentations of the plaintiff, and was therefore not demurrable upon this ground.

4. Fraudulent misrepresentations as to a material fact, made by one party to a written contract for the purpose of inducing the other party to enter into it, may be proved by parol.

5. It was erroneous to allow a witness to state to the jury his opinion as to the amount of damages which the defendants had sustained in consequence of the misrepresentations of the plaintiff in reference to the property at the time he sold it to the defendants.

6. When testimony is objected to as a whole, and some portion of it is admissible, it is not erroneous to overrule the objection.

7. Where a purchaser of property is entitled to recover for damages sustained by him in consequence of his reliance upon false and fraudulent representations of the vendor in reference to matters affecting the value of the property, the measure of damages is the difference between the actual value at the time of the purchase and what the value would have been if the property had been as it was represented to be by the seller.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. P. Taliaferro, Judge.

Action by J. A. McCary against H. L. Pritchard and others. Judgment for defendants, and plaintiff brings error. Reversed.

Rawlings & Howard, for plaintiff in error. Marion Turner, Hardwick & Hyman, and James K. Hines, for defendants in error.

FISH, P. J. J. A. McCrary brought suit in the city court of Sandersville against H. L. L. J., and Mary J. Pritchard for the sum of \$200.48 principal, and also interest and attorney's fees, upon a promissory note for \$250, dated April 5, 1902, and due October 1, 1902, upon which there was a credit of \$49.52, dated September 15, 1902. The defendants filed an answer, which was demurred to. Pending the demurrer they amended their answer, and the plaintiff then demurred to the answer as amended. Except as to one paragraph of the original answer and a similar paragraph of the amendment, the court overruled the demurrers, and the plaintiff filed exceptions pendente lite. Upon the trial there was a general verdict for the defendants. The plaintiff made a motion for a new trial, which was overruled, and he excepted.

1. Error is assigned in the bill of exceptions upon the overruling of the demurrer to the original answer and the overruling of the demurrer to the answer as amended. In the original answer, the defendants admitted giving the note sued on, but alleged that it was given to the plaintiff solely for the purchase of a certain fire insurance business which he had been conducting in the city of Tennille for several years, the sale consisting in the transfer of the agency for certain fire insurance companies, all books, stationery, etc., belonging to such agency, and the good will of the plaintiff; that the business was purchased by the defendants for the purpose of continuing the same at the city of Tennille, which the plaintiff knew; and the plaintiff, "as part of the contract of sale and consideration for said note, represented to defendants that he had made certain profits out of said business for the three years previous to said purchase, and said purchase was based upon the amounts alleged to have been made, but said representations, as defendants have since discovered, were untrue." The answer further alleged that the defendants "purchased said insurance business for said purpose, trusting in the representations of the plaintiff"; that the price agreed upon was \$450, "defendants paying plaintiff \$200 cash and giving the note sued upon for the balance, upon which note they paid \$49.52 before learning of the facts herein set out." There was also a paragraph in the answer in reference to an offer by the defendants to rescind the contract, and also an offer of compromise, both of which it was alleged the plaintiff refused; but these things are not material in the consideration of the questions involved here. The answer concluded as follows: "Wherefore defendants allege the consideration for said note has completely failed, and that they have paid plaintiff \$49.52 more than said business was worth, and pray judgment against plaintiff for that amount, and of this defendants put themselves upon the country."

We think it is very clear that this answer

was subject to the objection, raised by the demurrer, that it wholly failed "to set forth how much profits plaintiff represented he had made in the past three years, * * * or how much damage had resulted to defendants" by reason of the misrepresentation of the plaintiff as to the amount of such profits. The allegations that the plaintiff had represented to defendants that he had made certain profits out of the business for the three previous years, and that these representations were untrue, was too general, vague, and uncertain to withstand the demurrer. It will be observed that it was not alleged that the consideration for the contract of purchase had wholly failed, but the effect of the answer was that it had partially failed to an amount equal to the sum for which the note was given. The plea afforded no basis whatever for a comparison between the profits actually made by the plaintiff from the business and the profits which he represented to the defendants he had made; and such a comparison was necessary in order to ascertain whether there was, in the contract of purchase, a failure of consideration, and, if so, to what extent the consideration had failed. The allegation that the plaintiff had represented that he had made "certain profits," and this representation was untrue, was about as uncertain as any allegation could be. Suppose the plaintiff had admitted this allegation of the plea to be true, what sort of a verdict in favor of the defendant could there have been rendered upon this admission? In a suit for a rescission of a contract alleged to have been procured by fraud such an admission might authorize a verdict in favor of the party seeking the rescission, but under a plea of partial failure of consideration the jury would be unable to determine from such an admission to what extent the consideration for the contract had failed. The defendants did not ask for a rescission of the contract, but relied upon their plea of partial failure of consideration to defeat a recovery upon the note given for only a part of the purchase money. Certainly the plaintiff was entitled to know what representations the defendants expected to prove he had made to them as to the profits of the business for the three previous years, and what they expected to prove the profits of the business for this period actually were. The court erred in not sustaining the demurrer to the original answer, as the amendment failed to cure this defect therein.

2. The amendment alleged that the plaintiff, at the time the contract was entered into, represented to the defendants "that he did not allow any rebates to any of his patrons, or divide commissions with any of them"; that this was untrue, as the defendants had since discovered that the plaintiff "did have such contracts for divisions of commissions with several of the patrons of said business, which contracts [would] entail on * * * defendants a loss of thirty dollars

per annum," and materially and seriously impair the value "of the article sold to these defendants, for the following reason: If defendants continue to comply with the agreements and contracts of plaintiff on this subject, the value of the business sold them by plaintiff will be entirely destroyed, because of the fact that all of the insurance companies represented by McCrary and the agencies of which were transferred to these defendants * * * have rules and regulations prohibiting such division of commissions, and will discharge and remove these defendants as their agents if they divide commissions; on the other hand, if these defendants decline to divide commissions with their patrons, in accordance with the precedent established by plaintiff, then the patrons of these defendants will place their business with other agents and other insurance companies, thereby injuring and damaging the business of these defendants to an amount at least as great as the amount sued for by the plaintiff in this suit." While we think that this amendment to the original answer was plainly open to demurrer, we do not think it was subject to the demurrer which was offered by the plaintiff. It certainly was not demurrable upon the ground that it sought to contradict and vary a written contract which the defendants admitted was entered into by the parties. This was not matter for demurrer, for there was nothing in the original or amended answer which admitted that the parties had entered into a written contract concerning the matters in controversy, other than the contract evidenced by the promissory note sued on, and the note contained nothing which the facts alleged in the amended answer, if proved, could be said to contradict or vary. The note did not even express a consideration other than "value received." A contract was referred to in the plea, but whether it was written or oral did not appear. That there was a written contract did appear from the evidence introduced upon the trial, but not from any admission in the pleadings of the defendants. Hence the point sought to be made by the demurrer was not one which could be raised on the face of the pleadings. See *Tift v. Wight*, 113 Ga. 681, 39 S. E. 508.

8. Nor was the amended answer subject to demurrer upon the ground that it showed "on its face that no damage could have resulted to" the defendants on account of the alleged misrepresentations of the plaintiff, because it alleged that it was "contrary to the rules of insurance companies to allow rebates to patrons," and therefore, as the answer did not allege "that plaintiff had made contracts with any of the patrons which bound these defendants to" continue to allow rebates, "defendants were not bound to allow said rebates, and no loss or damage could result." The fact that there was nothing in the answer which showed that the defendants were bound to continue to con-

duct the business in the same way in which they alleged the plaintiff had conducted it, did not show that no damage could have resulted to them if the plaintiff had made the misrepresentations alleged. They might not have been bound to continue to conduct the business as they alleged the plaintiff had conducted it, and yet we can well see how they could have been damaged whether they did continue to do so or refused to follow his alleged practice in this respect. In either event, the value of the thing bought might be less than it would have been if it had been as the plaintiff represented it to be. Whatever else may be said of the amended answer, it did not show "on its face that no damage could have resulted" to the defendants from the alleged misrepresentations of the plaintiff. We simply decide that the amendment to the answer was not subject to demurrer upon the grounds taken.

4. In the motion for a new trial it was alleged that the court erred in admitting, over the objection of the plaintiff, the testimony of one of the defendants as to the alleged fraudulent misrepresentations of the plaintiff at the time the contract was entered into. The objection made to the admission of this testimony was that its effect would be to alter and vary the written contract. Fraudulent misrepresentations as to a material fact, made by one party to a written contract for the purpose of inducing the other party to enter into it, may be proved by parol. *Janes v. Mercer University*, 17 Ga. 515; *Ham v. Parkerson*, 68 Ga. 831; *Barrie v. Miller*, 104 Ga. 312, 30 S. E. 840, 69 Am. St. Rep. 171.

5. Under repeated rulings of this court it was erroneous to allow one of the defendants, while testifying as a witness, to give to the jury his opinion as to the amount of damages which he and his codefendants had sustained in consequence of the alleged fraudulent representations of the plaintiff. *Woodward v. Gates*, 38 Ga. 206; *Brunswick R. Co. v. McLaren*, 47 Ga. 547; *Central Railroad Co. v. Kelly*, 58 Ga. 107; *Smith v. Eubanks*, 72 Ga. 280; *Central Railroad Co. v. Senn*, 73 Ga. 705; *Foote & Davies Co. v. Malony*, 115 Ga. 985, 42 S. E. 413.

6. Error was also assigned in the motion for a new trial upon the admission of a quoted portion of the testimony of one of the defendants, which was objected to as being hearsay, irrelevant, and relating to matters which could not affect the parties to the contract involved in the case. This testimony was not hearsay, and as some of it, under the amended answer of the defendants and in connection with other testimony introduced by them, was not irrelevant, and it was objected to as a whole, we find no error in overruling the objection offered to its admission.

In the motion for a new trial complaint was made of certain instructions which the court gave to the jury for their guidance—in

the event they found that the plaintiff had made the alleged false and fraudulent representations to the defendants—in estimating the damages which the defendants had sustained. Without taking up the grounds of the motion complaining of these instructions and passing upon them, as the case is to be tried again, we will simply lay down what we think is the true measure of damages in such a case. If the defendants were induced, by false and fraudulent representations on the part of the plaintiff, to purchase the insurance agency business, and the value of the business was materially less than it would have been if the representations of the plaintiff had been true, then the measure of the damages sustained by the defendants would be the difference between what would have been the value of the business if it had been as the plaintiff represented it to be and its value as it actually was. This rule is in accordance with the principle recognized by this court in *Millirons v. Dillon*, 100 Ga. 656, 28 S. E. 385, in which it was held that, where one has been induced to purchase property by means of a false and fraudulent representation by the seller that the thing sold had certain qualities, the measure of damages in an action for the fraud and deceit thus practiced by the seller would be the difference between the value of the thing sold at the time of delivery and what would have been its value if the representation made by the seller had been true. While it may not have been necessary to lay down the rule as to the measure of damages in such a case in order to decide the precise questions then before the court, the fact that it was laid down shows what this court, as then constituted, considered to be the correct rule in cases of this character. An analogous ruling was made in *Berry v. Shannon*, 98 Ga. 459, 25 S. E. 514, 58 Am. St. Rep. 813, in which it was held that: "Where an animal which could be of no use or value except for a particular purpose was bought upon a warranty by the seller that it was serviceable for that purpose, and at the time of the sale it was in fact either partially or totally worthless in that regard, the buyer, in an action against him for the price, was entitled to an abatement of the purchase money equal to the difference between the agreed price and the actual value, as reduced by the defective quality of the animal;" and that "this is true whether, in disposing of the animal to a third person, the buyer lost anything or not." The courts of this country are in conflict as to the rule for measuring the damages in a case between a defrauded purchaser and a defrauding vendor, the majority holding the rule to be as we have above announced, while the minority, including the Supreme Court of the United States, hold that the difference between the real value and the amount which the purchaser was induced to pay measures the damages. In a standard work on dam-

ages it is said the party guilty of the fraud "is to make good his representations as though he had given a warranty to that effect. He is to make compensation for the difference between the real state of the case and what it was represented to be. Thus, in case of sales where there is a fraudulently false representation of quantity, quality, or title, the measure of damages is the difference in value between that which is actual and that which was represented to exist." 4 Suth. Dam. (8d Ed.) § 1171. In the same work the following comment is made upon the general rule upon the subject which prevails in the federal and some of the state courts: "The general rule above stated is based on the assumption that the amount paid is the measure of the value as fixed by the parties; but a purchaser does not buy to sell again at the same price, and to compel him arbitrarily to accept compensation by that standard is to deprive him of such benefit of his purchase as the state of the market would have enabled him to realize if there had been no fraud. As said by Mr. Justice Gray [in *Morse v. Hutchins*, 102 Mass. 440]: 'To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract.' The amount paid is evidence of the value, but on principle and according to the general course of decision it is not conclusive of the value as it was represented to be." Id. § 1172, p. 3410.

Judgment reversed. All the Justices concurring.

(119 Ga. 855.)

FRANKLIN v. SOUTHERN RY. CO.

(Supreme Court of Georgia. March 30, 1904.)

INTERPLEADER—WHEN GRANTED—GARNISHMENT—EXEMPTION—WAGES OF BRAKEMAN.

1. Before one occupying the situation of a stakeholder can call upon adverse claimants of a fund in his hands to interplead, he must satisfactorily show to the court that their claims have such a "foundation in law as will create a reasonable doubt" as to his safety in undertaking to determine for himself to whom the fund belongs; for the "old rule that the stakeholder is entitled to be removed beyond the shadow of a risk, and that in order to entitle him to the protection of the court it is only necessary to establish that suits have been brought or that claimants have threatened to bring them, no longer prevails." While, under the modern practice, it is not incumbent upon a stakeholder "to decide, at his peril, either close questions of fact or nice questions of law," yet, where he is in possession of all the facts, and no question of law is involved which is, in view of repeated adjudications by the courts upon which he may with safety rely, longer debatable,

¶ 1. See *Interpleader*, vol. 29, Cent. Dig. §§ 8, 9.

a petition for interpleader interposed by him cannot be regarded with favor, and should be denied. See MacLennan on Interpleader, pp. 181, 182, 184; Civ. Code 1895, § 4896.

2. The daily, weekly, and monthly wages of a "brakeman," employed by a railway company to discharge the duties usually incident to the kind of service performed by persons following his calling, are, under the provisions of section 4732 of the Civil Code of 1895, exempt from the process of garnishment, beyond any reasonable doubt, in view of the construction placed upon the language of that section in numerous cases heretofore decided by this court, wherein the question arose whether or not the wages of employes who perform like services are exempt from garnishment.

3. It follows that the court below erred in ordering the defendants to this proceeding to interplead, for the plaintiff railway company based its prayer for the relief sought solely on the ground that it ought not to be subjected to the hardship of determining, at its peril, whether or not the wages of its brakeman could be reached by the summonses of garnishment served upon it at the instance of certain parties who professed to be his creditors; and though the summonses issued from different courts, and were sued out by different parties, the plaintiff had no just cause to apprehend that it could not, by exercising its legal right to set up the defense that the wages of its employé were exempt, successfully defeat the attempt on the part of his creditors to subject the fund in its hands to the satisfaction of their demands.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Southern Railway Company against Fred Franklin and another. Judgment for plaintiff, and Franklin brings error. Reversed.

Lowndes Calhoun, for plaintiff in error.
J. D. Bradwell, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concurring.

(119 Ga. 865)

HART et al v. MANSON et al.

(Supreme Court of Georgia. March 30, 1904.)

PLEADING—EVIDENCE—JUDGMENT—NULLITY—RES JUDICATA—AUDITOR'S REPORT—EXCEPTIONS.

1. The petition as amended was good as against any of the grounds of the demurrer filed to it, and the court did not err in overruling the exceptions to the report of the auditor so holding.

2. There was no error in admitting the evidence which was the subject-matter of the second exception of law to the auditor's report. In the light of all the evidence, the relation of the attorney whose conduct was in question to the entire transaction was such as to render admissible in evidence all that he said and did in regard thereto.

3. A judgment which is void for any cause is a mere nullity, and may be so held in any court when it becomes material to the interests of the parties to consider it. Civ. Code 1895, § 5369.

4. While the judgment of a court of competent jurisdiction is conclusive between parties and privies as to the issue which it decides, it is not so as to third persons. There was ample evidence to warrant the auditor in finding in favor of the charge of fraud and collusion between the parties to the judgment attacked.

5. The exceptions to the auditor's report, both of law and fact, were submitted to the judge, to be passed on in vacation without the aid of a jury. While some of these exceptions are called by counsel "exceptions of fact," and others "exceptions of law," in reality all of them, except those which have been passed on in the preceding notes, involve findings of fact. The trial judge has patiently gone through a great mass of evidence, which has been, in the main, reduced to narrative form, but to brief which apparently no effort has been made; and he has reached conclusions in which we, after like laborious efforts, find no error of which the plaintiffs in error can justly complain.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; E. J. Reagan, Judge.

Action by Z. T. Manson, ordinary, for use, and others, against J. M. Hart and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

J. W. & J. D. Humphries, W. M. Wright, and C. T. Roan, for plaintiffs in error. W. L. Watterson and J. F. Golightly, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 941)

ROONEY v. SOUTHERN BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. March 31, 1904.)

ACTION—ABATEMENT—APPOINTMENT OF RECEIVER—CONTINUANCE—BUILDING ASSOCIATION—USURY—INCORPORATION—MORTGAGE FORECLOSURE—FOREIGN STATUTES—PRESUMPTIONS.

1. Except on dissolution, the fact that a receiver has been appointed for a corporation does not abate a suit then pending in its name.

2. Whatever might be the rights of the defendant under a plea in abatement or on motion to make parties, he cannot obtain a continuance on the ground that a receiver has been appointed for the plaintiff.

3. A company not such in fact cannot, by calling itself a building and loan association, acquire the privilege of charging more than the rate of interest lawful in ordinary contracts between borrower and lender.

4. Where one takes stock and makes a contract with a company whose name prima facie imports that it is a building and loan association, the burden is on him to show that under the charter and laws of the state where created it is not such in reality.

5. The mere fact that there are different classes of stock, with different rights and liabilities of the stockholders, does not necessarily destroy the company's character as a building and loan association.

6. The defendant's plea was properly stricken, because it not only failed to aver that the different classes of stock were in existence at the time he made the contract and became a member, but it also failed to show that such differences and inequalities were of a nature to destroy the building and loan feature of the company.

7. Where a contract on its face is with a building and loan association, and to be governed by the laws of Alabama, but there is no proof of the statute of that state as to usury or building and loan associations, there will be no

presumption that the contract was usurious or otherwise illegal under the laws of that state.

8. The plaintiff made out its case for more than the amount of the verdict by the introduction of the defendant's written promise to pay. The evidence alleged to be secondary, even if such, was helpful to the defendant, and reduced the amount of plaintiff's verdict.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Southern Building & Loan Association against James Rooney. Judgment for plaintiff, and defendant brings error. Affirmed.

The Southern Building & Loan Association of Huntsville, Ala., sued James Rooney, of Richmond county, Ga., on a sealed note dated at Huntsville, Ala., July 24, 1895, whereby he promised to pay the company "at its office in Huntsville" \$2,500, with interest at 5 per cent. per annum, payable monthly, and a premium of 5 per cent. per annum, payable monthly, for a loan under an application dated July 10, 1895, on 50 membership shares. He transferred the shares as collateral for the payment of the loan. This indebtedness was likewise secured by a deed to real estate in the city of Augusta. Attached to the petition was a copy of the by-laws of the company, reciting, among other things, that the object of the association is to afford the shareholders safe and profitable investment; that all contracts and securities shall be construed by the laws of Alabama; a statement of the terms and conditions of membership, the method of borrowing on the shares, and the amount of monthly payments, fines, etc. The defendant by plea admitted the making of the contract, payments thereon for some years, and the default, but set up that the debt was infected with usury. There was a verdict in favor of the plaintiff, which was set aside by the judgment of the Supreme Court reported in 115 Ga. 400, 41 S. E. 648, because of error in admitting interrogatories which had been improperly executed. On the second trial the defendant amended his pleas, all of which were allowed, except the third, wherein he set up "that plaintiff is not a building and loan association as known to the laws of Georgia," because (a) all payments made by the stockholders, borrowers or nonborrowers, do not go into a common fund, but are divided under a system whereby holders of shares of the same face value receive a larger amount of the common profits than do other stockholders; (b) there is not an equality of burden and rights, some stockholders having a less burden and a greater right than others; (c) there are two kinds of stock—"prepaid" and "installment"—on which different sums are paid, with a difference in the amount that may be borrowed, and difference in the distribution of the profits, these differences being set out in detail. "Wherefore defendant says that plaintiff

could make no genuine building and loan contract as known to the laws of Georgia."

Salem Dutcher, for plaintiff in error. Wm. H. Barrett, for defendant in error.

LAMAR, J. On the call of the case the defendant moved to continue, on the ground that the plaintiff had been put into the hands of a receiver, who was authorized to intervene in the present suit, supporting the same by certified copies of the order of the Circuit Courts of the United States in Alabama and Georgia. The defendant, by a plea in abatement, or motion to make parties, might have raised the question as to whether the case could be prosecuted in the name of the plaintiff, or in its name for the use of the receiver, or by the receiver alone. But this could not be done by a motion to continue. The appointment of the receiver did not abate the suit. *Branch v. Augusta Glass Works*, 95 Ga. 579, 23 S. E. 128. There need be no danger of paying to the wrong party. According to *Griffin v. Mutual Life Insurance Co. (Ga.)* 46 S. E. 870, the defendant by appropriate proceeding may obtain a proper receipt from the one entitled to the money. But here the evidence as to the appointment of a receiver was not offered on the trial, and there is therefore nothing properly in the record to indicate that the company is not in a position to receive and control its own funds, or to prosecute suits in its own name.

The former record in this case (115 Ga. 400, 41 S. E. 648) raised the question as to the validity of the "fully paid," "prepaid," and "installment" stock. The verdict then was for the plaintiff, and, except in the admission of interrogatories improperly executed, this court held that "the principles of law involved in this case have been ruled in favor of the company, and no error appears to have been committed by the trial judge." The same issue as to the "prepaid" and "installment" stock was again presented by an amended plea, more elaborate in detail, but involving the same legal principle. It is almost a case for the application of the doctrine of the "law of the case" or "res adjudicata." But, as the two pleas are not identical, we will deal with the errors assigned. The note sued on is dated at Huntsville, Ala., is made there payable, and according to its terms it is to be construed as an Alabama contract. The plea nowhere alleges that the contract was usurious according to the laws of that state. The record contains no copy of its statute concerning interest and usury, though it may be proper to say that a contract identical in form with that sued on has been held to be valid in *Sou. B. & L. Ass'n v. Rector*, 98 Fed. 171, 38 C. C. A. 686. Compare *Smith v. Sou. B. & L. Ass'n*, 111 Ga. 811, 35 S. E. 707. On general principles there would be no presumption that the parties had made an il-

legal contract, but rather that the transaction was valid according to the foreign law by which it was to be governed. *Craven v. Bates*, 96 Ga. 80, 23 S. E. 202; *Pomeroy v. Ainsworth*, 22 Barb. 120. Nor would the result be different on the presumption that the common law prevails in Alabama, for by it the rate of interest on money was not limited. *Smith v. Muncie Bank*, 29 Ind. 158; *White v. Friedlander*, 35 Ark. 55; *Union Bk. v. Dottenheim*, 107 Ga. 609, 34 S. E. 217. There might be an extreme case in which a contract made and to be performed in a foreign state was on its face clearly usurious according to the law of the forum, and where the court, in aid of the state's public policy, might hold that, in the absence of proof of what was the foreign statute, it would presume that the laws of the foreign state were similar to those of the forum on the subject of usury. Such a ruling is suggested in *Hubble v. Morristown Co.*, 95 Tenn. 585, 32 S. W. 965 (3); *Leake v. Bergen*, 27 N. J. Eq. 360; *City Bank v. Bidwell*, 29 Barb. 332. But there is no room for the application of any such principle here, because the contract on its face was with a building and loan association, and presumptively valid under the laws of Alabama as well as of Georgia. The defendant, however, seeks to attack this apparent validity by pleading that the plaintiff was not a building and loan association, inasmuch as it issued different classes of stock under which there was inequality of liabilities and profits. The plea was properly stricken. In the first place, it failed to aver that this inequality existed at the time of the making of the contract; for, if the company was doing a building and loan business when the contract was made, a new scheme, and the issuance of various classes of stock thereafter, might give the defendant, as a stockholder, the right, on an accounting, to the profits to which he was entitled according to the original plan. But subsequent action by the corporation would not have the effect of converting a nonusurious into a usurious contract.

Mutual participation in profits and losses is undoubtedly the basic principle on which contracts between this class of associations and its members have been saved from the consequences attaching to other usurious loans. While there has been some doubt expressed as to the right to issue paid-up or preferential stock, still the authorities in the main tend to sustain the legality thereof, provided the scheme is not shown to be oppressive to one class and unduly advantageous to another. *Thompson on Building Associations*, §§ 124-133. They recognize that the demand for money by the members may be so great as to make it necessary, by borrowing, or selling paid-up stock, to put the company in funds to lend to those who prefer to pay in monthly installments, and that such inequality in the amount contributed may entitle the paid-up stockholder to a

preference on dissolution, and to fixed dividends while the company is a going concern. Besides, the defendant's plea does not aver that the issuance of different classes of stock was in violation of the charter, or of the statutes of Alabama; nor does it show the money value of the difference, nor whether the amount of the profits accruing to the "paid-up" stock was relatively greater than that on installment stock. Certainly there was nothing to indicate such a want of equality as to destroy the company's character as a building and loan association, and convert its transactions into a class like those between ordinary debtor and creditor. The rights of members do not have to be identical unless the conditions are identical. *Bosworth v. Sumter Real Estate Co.*, 100 Ga. 60, 28 S. E. 154. If the issuance of this paid-up stock was without authority, that would not prevent the corporation from still existing as a building and loan association, nor would it affect its contract obligations, unless the members showed that the scheme was such as to destroy the corporation's character as a building and loan association. *Smith v. Sou. B. & L. Ass'n*, 111 Ga. 811, 35 S. E. 707 (3). See, also, *Burns v. Equitable B. & L. Ass'n*, 106 Ga. 183, 33 S. E. 856 (2), where there was common stock and coupon stock.

A mere name cannot be used as a cloak under which the law against usury can be evaded. If the plaintiff is not a building and loan association in fact, it cannot, by calling itself such, acquire the privilege of charging more than the lawful rate of interest. But its name *prima facie* imports that it is such. *Smith v. Southern B. & L. A.*, 111 Ga. 811, 35 S. E. 707. The burden was on the defendant to meet this presumption. The plea does not negative the idea that it was chartered as such, nor does it aver that the defendant did not receive the benefits to which he was entitled as a member of such during the years he was not in default. He and all the other members contracted to pay a high rate of interest, but they also contracted to receive their share of these very payments. If, through misfortune or mismanagement, the association went into the hands of a receiver, that did not relate back so as to invalidate what was a legal contract when made. There was no motion for a new trial, but a direct bill of exceptions, in which the evidence, objections to evidence, colloquies between counsel, arguments to the court, and his rulings thereon, are set out. In addition to the points hereinbefore discussed, the exceptions relate mainly to the admission of testimony by the officers of the company, over the defendant's objection, that this evidence was as to cash items of payments, and facts knowledge of which must necessarily have been derived from the books, and that the witnesses could not testify from the ledger, but only from the books of original entry. On the face of the bond

the plaintiff promised to pay \$2,500 with 5 per cent. interest and 5 per cent. premium from July 24, 1895. The other primary evidence, in the shape of the deed, the note, the stock scrip, and the by-laws, entitled the plaintiff to principal, interest, premiums, and, on default, to fines and attorney's fees. The defendant's original answer admitted the date of his default. On this primary evidence, therefore, the plaintiff was entitled to a verdict, and the burden was on the defendant to make his own proof as to the credits to which he was entitled. It is true that the plaintiff attempted unnecessarily to make this proof for the defendant by the cashier and other officers. If it was secondary, it was harmless, because it caused a reduction in the amount which the plaintiff would otherwise have been entitled to recover. If we concede that the testimony would have been incompetent to debit the defendant, here it was helpful, and not harmful, in that it went to establish a credit.

Judgment affirmed. All the Justices concurring.

(119 Ga. 918)

VIZARD v. MOODY.

(Supreme Court of Georgia. March 31, 1904.)

EVIDENCE — OBJECTIONS — WAIVER — HUSBAND AND WIFE — PARTNERSHIP — FIRM DEBTS — ASSUMPTION OF LIEN — MORTGAGE — SALE — NOTICE.

1. Where the defendant in an action of ejectment admits in his plea the execution by him of an instrument which forms a part of the plaintiff's abstract of title, it is not a good objection to the admission of the instrument in evidence that its execution has not been proved. The same principle governs as to proof of the execution of a deed when the maker of the deed appears in court, and testifies that he signed the instrument and that the deed is his.

2. In this state a married woman may engage in business as the partner of her husband, and may pledge her separate property for the payment of the partnership debts.

3. A married woman who buys property which is incumbered may assume the payment of the incumbrance in order to secure a clear title to the property, and she will be bound by such an assumption of the lien on the property.

4. A deed to lands located in Georgia was executed in Mississippi in January, 1900, but was attested by only one witness. In February, 1901, the maker acknowledged the deed in Mississippi before two witnesses, one of whom was a notary public, who attached his seal to his attestation. *Held*, that the instrument was entitled to record in Georgia, and was admissible in evidence in a trial involving title to the land conveyed.

5. Where the maker of a deed of trust to secure a debt expressly contracts that, in the event of default in the payment of the debt, the trustee may sell the land at public outcry before the door of the courthouse of a named county in another state, the sale of the land in such state in compliance with the terms of the trust deed is not void; and this is true, though the instrument be in the nature of a mortgage, and a sale thereunder quasi judicial in character.

6. Where the execution of a deed or mortgage has been admitted or proved, it is not a ground

to exclude it from evidence that it is not under seal.

7. Where a deed of trust to secure a debt directed that, in the event of default in the payment of the debt, the trustee should sell the property, "after advertising said sale for ten days by publication in some newspaper published in" a named county, advertisement in a weekly paper in the county named for three successive issues next preceding the date of the sale was a compliance with the direction; it appearing that the first advertisement was more than 10 days prior to the date of the sale.

8. The letters excluded from evidence were admissible as throwing light on the real nature of the transaction between the parties which gave rise to the action of ejectment; and there was before the court sufficient evidence that the writings were executed by the defendant to enable the jury, by a comparison of signatures, to pass upon the issue raised by the contention as to the execution.

(Syllabus by the Court.)

Error from Superior Court, Glynn County: T. A. Parker, Judge.

Action by A. Vizard against S. A. Moody. Judgment for defendant, and plaintiff brings error. Reversed.

Atkinson & Dunwoody, for plaintiff in error. Kay, Bennet & Conyers and Gale & Butts, for defendant in error.

CANDLER, J. This was a suit in ejectment and for mesne profits. Different branches of the same litigation have been before this court twice (115 Ga. 491, 41 S. E. 997; 117 Ga. 67, 43 S. E. 426), but the questions now presented are entirely different from those made on the former trials. The plaintiff, a nonresident, claimed title under two instruments—one a deed of trust in the nature of a mortgage, signed by the defendant and her husband, D. H. Moody, purporting to convey the property in dispute and other property, some of which was located in Alabama and some in Mississippi, to Mason as trustee for the plaintiff, to secure an indebtedness therein set out; and the other a deed from Woods, substituted trustee appointed in accordance with the terms of the instrument first mentioned to succeed Mason, resigned, conveying the property to the plaintiff. Both these instruments were, on objections which will hereafter be set out, ruled out by the court, as was also certain other evidence offered by the plaintiff. The court awarded a nonsuit, and to the ruling, as well as to the rejection of the evidence referred to, the plaintiff excepted.

1-3. The objections offered to the introduction of the conveyance from the defendant to Mason, trustee, were: (1) That the execution of the instrument was not proved; (2) that it shows on its face that it is a deed or mortgage upon the estate of a married woman, and given as security for the debt of another; and (3) that it recites the assumption of the debt of one Walters and his wife, but does not show upon what consideration such debt was assumed. We are satisfied that none of these objections is meritorious. It is a complete answer to the first that in

¶ 2. See *Husband and Wife*, vol. 26, Cent. Dig. § 226.

her plea the defendant admitted the execution of the instrument for the purposes therein set out; and this averment in her plea was invoked on the trial by the plaintiff. See Civ. Code 1895, § 5188; *Wood v. Isom*, 68 Ga. 417. Nor is there any merit in the second objection set out above. It appears that Walters and wife were operating a turpentine farm in Mississippi, and were indebted to the plaintiff, Vizard, who was their factor, to the amount of more than \$3,000. The defendant and her husband, desiring to purchase this farm, agreed to assume the debt of the Walterses to Vizard, and accordingly the turpentine farm and its appurtenances were turned over by the Walterses to a partnership composed of the defendant, her husband, D. H. Moody, and her son, J. D. Moody, doing business under the firm name of S. A. Moody & Co. It was also agreed that Vizard should advance to the Moodys \$2,000 additional at stated intervals; and as evidence of the assumption by the Moodys of the debt of the Walterses, and of the contemplated advance of the additional sums by Vizard, notes were given by the Moodys to Vizard for \$5,000; and as security for this sum, and for such further advances as might be made, the deed of trust under consideration was executed. This instrument authorized the trustee, upon default in payment of the debt to secure which it was given, to sell the property therein described, after first advertising the sale for 10 days by publication in some newspaper published in Jackson county, Miss., the sale to be made at public outcry before the courthouse of that county in the town of Scranton. There was evidence from which the jury could have found that the debt of the Walterses which was assumed by the defendant and her husband was a lien on the property sold to her firm. This court has repeatedly held that a married woman may be a partner in business with her husband, and that in such event her individual property is liable for the partnership debts. *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 25 S. E. 915, 58 Am. St. Rep. 842; *Scofield v. Jones*, 85 Ga. 816, 11 S. E. 1032; *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740. There is no reason why a married woman who buys property with a lien on it may not assume such lien; and this court has held that payment of a debt so assumed can be enforced against her without contravening the law embraced in Civ. Code 1895, § 2488. While a wife may not ordinarily assume the debts of her husband, it is well settled that, when she purchases property from him which is incumbered, she must, in order to secure an unincumbered title, pay off any debts created by him which are a lien upon the property purchased. *Daniel v. Royce*, 96 Ga. 566, 23 S. E. 496; *Taylor v. American Freehold Co.*, 106 Ga. 238, 32 S. E. 158; *Lowenstein v. Meyer*, 114 Ga. 711, 40 S. E. 728. We therefore conclude that none of the objections offered to the

deed of trust were sufficient to warrant its exclusion from evidence.

4. Default was made in the payment of the debt due by the Moodys to Vizard, and, in accordance with the terms of the deed of trust, Woods, the substituted trustee, advertised the property for sale in the *Scranton Chronicle*, a weekly newspaper published in Jackson county, Miss., and in due time exposed it for sale, when it was bid in by Vizard. The deed from Woods to Vizard was also excluded from evidence, the objections to it being that its execution had not been proved; that it was not executed in the presence of two witnesses, one of them an officer; and that it was not shown that Woods had authority to make the deed. Again we think that the objections made did not afford a sufficient ground for excluding the evidence offered. Woods himself was present at the trial, and testified to the execution of the deed. Certainly, as between him and Vizard, this was sufficient proof of execution. Civ. Code 1895, § 5244, par. 5. It appeared, however, that the deed, which was dated January 1, 1900, was at first attested by only one witness, and that the date of the attestation was one day after that of the signature. Subsequently, on February 19, 1901, Woods acknowledged his signature to the deed before two witnesses, one of whom was a notary public, who attached his seal of office to his attestation, and, thus attested, the deed was admitted to record in Glynn county, Ga., where the land in dispute is located. The acknowledgment before the two witnesses, one of whom was a notary public attaching a seal, cured whatever defect there was in the first attestation of the deed, and there was certainly no objection to its admission on the score of the sufficiency of the proof of its execution. Acts 1900, p. 52 (*Van Epps' Code Supp.* § 6184). The point as to the authority of Woods to make the deed is fully settled by the deed of trust, which was excluded from evidence. If that instrument was properly rejected, the point may be well taken; but as we hold that it should have been admitted, and as it contained the fullest proof of Woods' authority to act, there is nothing in the argument advanced.

5. In the brief of counsel for the defendant in error it is insisted, however, that for various reasons, which do not appear to have been urged on the trial in the court below, the deed of trust from the defendant to Mason, trustee, and the deed from Woods, substituted trustee, to the plaintiff, were inadmissible, and were therefore properly rejected by the court. The broad ground was taken that, regardless of technical questions as to the admissibility of the evidence, the instruments conveyed no title to the plaintiff, and, even had they been admitted, the same result, to wit, a judgment of nonsuit, would have been inevitable. In this view we do not concur. It is urged with considerable

plausibility that, as the deed of trust executed by the defendant was in reality a mortgage, a sale under it was in the nature of a judicial sale, and could not legally be held elsewhere than in the county where the land was located. In the absence of an express agreement as to the place of sale contained in the deed of trust itself, this argument would be not without force; but we fail to see how the defendant can get around the fact that she expressly contracted that, in the event of default in the payment of the debt, the property should be sold in Jackson county, Miss. Her power to make this contract is not questioned, and we are constrained to hold that she is now bound by its terms.

6. It was also argued that the two instruments which were excluded from evidence were inadmissible because they were not under seal. This point we do not think is well taken. The attachment or recital of a seal in the execution of a writing conveys the idea of a greater degree of solemnity than is observed in the execution of an instrument not under seal, and by statute a greater period of limitation is allowed within which to bring suit on contracts executed in this manner; but the omission of a seal cannot affect the intention of the parties to the instrument, and a deed is none the less a deed because it is not under seal. See Civ. Code 1895, § 3602. Especially is this true when the grantor, as in the present case, is present in court, and by a solemn oath acknowledges the writing as his deed or by sworn pleadings admits the execution of the instrument for the purposes which it recites.

7. The deed of trust executed by the Moodys provided that, in the event of default in the payment of the debt to secure which it was given, the trustee should sell the property "after advertising said sale for ten days by publication in some newspaper published in said Jackson county, Miss." Advertisement of the sale was published in a weekly newspaper in the town of Scranton three times—on the 16th, 23d, and 30th days of December, 1899—and the sale was had on January 1, 1900. It is now argued by counsel for the defendant in error that there was no compliance with the provisions of the trust deed as to advertisement, and that notice of the sale should have been published every day for 10 days before the sale. It does not appear from the testimony whether there was a daily newspaper published in Jackson county, Miss., at the time this sale was had, or not, but the inference to be drawn from the evidence is that there was not. At all events, the trustee was not limited to any particular newspaper in the publication of the notice of the sale; and if he selected a weekly newspaper, as he had full power to do, it was a sufficient compliance with the terms of the trust deed if he advertised the sale in every issue of that paper appearing during the 10 days next pre-

ceding the day of the sale. *Washington v. Bassett* (R. I.) 10 Atl. 625, 2 Am. St. Rep. 929; *Armstrong v. Scott*, 3 G. Greene, 433.

8. The plaintiff also offered in evidence certain letters alleged to have been received by him from the defendant, the object of the evidence being to show that Mrs. Moody was a member of the firm of S. A. Moody & Co., and initiated the proceedings leading up to the execution of the trust deed to Mason, trustee. This evidence was also ruled out by the court, on the ground that it was irrelevant, and that the signature to the letters had not been proven to be that of the defendant. Here, again, we think the court erred. The letters were clearly admissible as tending to throw light on the real nature of the transaction between the parties, and were vitally relevant to the contentions of the plaintiff. A foundation was laid for their introduction by the introduction of other writings admitted to have been executed by the defendant, and her signature to the affidavit attached to her plea was before the court; and, if the genuineness of the signature to the letters offered was disputed, it was for the jury to say, from a comparison of the signatures, what was the truth of the issue. Civ. Code 1895, § 5247.

We conclude from the foregoing that the court below erred in each of the rulings on the admission of evidence of which complaint is made. Had this evidence been admitted, as it should have been, the plaintiff would have had a prima facie case, and a nonsuit could not legally have resulted.

Judgment reversed. All the Justices concur, except COBB, J., disqualified.

(119 Ga. 758)

JOSSEY v. BROWN et al

COLLIER v. SAME.

(Supreme Court of Georgia. March 29, 1904.)

WILL—CONSTRUCTION—VESTED ESTATE—CONDITIONS PRECEDENT—PERPETUITIES—DESCRIPTION OF BENEFICIARY—DOWER—WAIVER—ADOPTION—RIGHTS OF ADOPTED CHILDREN—BILL OF EXCEPTIONS.

By a will probated in 1850 the testator devised, in trust for his unmarried daughter, L., certain slaves and land for life, with remainder to her children, if any, "and if she should die and leave children, and they should not be raised and they should die, then in that case the man that she should marry to have one third, and the other two thirds to be equally divided between all my grandchildren." The daughter married. Her husband died. She did not remarry, and died without ever having had a child. Held:

1. Words which in a deed would create a condition may in a will be construed as a limitation.

2. Generally, where a prior estate is made to depend upon any prescribed event, and the second estate is to arise upon the determination of that event, the vesting of the prior estate is not to be taken as a condition precedent, but upon its failure the second estate takes effect.

3. Such construction generally accords with the intention of the settlor, for when he declares that the property is to go from one beneficiary to another, and thence to still others, he has

indicated that each of those named are preferred over his heirs or the other objects of his bounty.

4. Where there has been the creation of a line of successive estates, the elimination of any intermediate interest accelerates the time for the vesting in possession of those subsequent thereto.

5. Here the birth of children was not a condition precedent to the right of the husband to take under the will.

6. The gift over to the husband was not conditional on the birth of children, but was subject to a limitation by which it might never be enjoyed if the wife had a child who reached maturity.

7. The gift over to the husband, having to take effect within 21 years after the death of the wife, was not void as an attempt to create a perpetuity.

8. Where there is a devise to an unmarried woman, and, on failure of children to attain 21 years, then over to the husband, the first person answering the description of husband is entitled to take.

9. There was no such uncertainty of the person who was to take as husband as to prevent his interest from being devisable or descendible.

10. Whether the estate devised to him was a contingent remainder and descendible to his heirs as they existed at the time of his death, under Civ. Code 1895, § 8101, or an executory devise descendible to those answering the description of heirs at the time of the death of the life tenant, is immaterial here.

11. There is nothing in the record to indicate that the wife waived her dower in the husband's general estate or elected to take a child's part.

12. In the absence of such proof there is no presumption that she ever had any vested estate in this or other realty of the husband.

13. On the face of the record the husband's interest in the property in controversy descended to his adopted children, who, by statute, were entitled to inherit from him.

14. Orders of adoption are for the benefit of the child, affect his status, are in the nature of judgments in rem, and cannot be collaterally attacked.

15. All presumptions are in favor of the regularity of the proceeding, and of the jurisdiction of the superior court passing the order of adoption.

16. In the absence of evidence to the contrary, it will be presumed that the order of adoption was by a proper court, and that "the judge satisfied himself of the truth of the facts stated in the petition, and that the father and mother of the adopted child had notice of the application," even though the record fails to show the residence of the child, of the petitioner, or of the parents of the child adopted.

17. Where a decree was signed February 2, 1903, and the bill of exceptions, dated April 2, 1903, recites that it was presented before the adjournment of the February term and within 60 days from the judgment complained of, the same will not be dismissed upon the ground that it was not certified in time. Civ. Code 1895, § 5539.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Bill by John S. Jossey against J. M. Brown and others and by Minnie Collier against the same defendants. From the decrees rendered, John S. Jossey and Martha Collier bring error. Reversed.

On January 6, 1856, Reuben Brown made his will, giving therein a large number of slaves and valuable real estate to his un-

married daughter, Lucinda. She soon after married John H. Jossey, who died about 1875, leaving no children except those adopted. His wife, Lucinda, did not remarry, and died February 18, 1901, without ever having had born to her any child. The case involves the determination of the question as to what disposition shall be made of real estate passing under the following provision in the will of Reuben Brown: Said property described in the will including the land aforesaid, "I give to my daughter Lucinda M. Brown, for her own separate support and the support and her family; and the property nor its increase is to be made subject to the debts of no person she may marry, it nor its proceeds, but to go wholly to her support her and her children and family. The above property I give to my daughter Lucinda M. Brown, for her own benefit and separate support, it and its increase for her and her children and family, at her death it and its increase to go to her children and be equally divided between them; and the above property, it nor its increase nor proceeds, is not to be made subject to the debts of no persons that she may marry; and if she should die and leave children, and they should not be raised and they should die, then in that case it is my will that all the property that I have given to my said daughter Lucinda M. Brown be put together and the man that she should marry have one third of it and its increase, and the other two thirds to be equally divided between all my grandchildren. And all the property and money that my daughter shall receive of my estate is to go in the way that I have left the above; and having the utmost confidence in my three worthy friends, Z. E. Harmen and John H. Thomas, and Nathan Phillips, I do constitute them as my lawful trustees to the property that I have bequeathed to my daughter Lucinda M. Brown and to her children." In 1859 a bill was filed by John H. Jossey and his wife, Lucinda, to construe the will of Reuben Brown. From the original record of that case, reported in 28 Ga. 285, it appears that Judge Cabaniss, of the superior court, held that the rule in Wild's Case did not apply; that there was no provision in contemplation of an indefinite failure of issue; that under the act of 1821 (Cobb, 169) Lucinda did not take an estate tail, but an estate for life for the benefit of herself and the support of her children; that after the death of Lucinda the property was to go to the children absolutely, if they should arrive at maturity; that, if there were no children born, or if those born did not reach maturity, the limitation over in favor of the husband was not void as being an effort to create a perpetuity; that there was a good devise to the wife for life, with a contingent remainder to the children in fee, and the gift over to the husband was good as an executory devise, and, if the contingency of a child never happened, the devise

to the husband was to take effect upon the death of the wife—citing, in support of this last proposition, *Lee, C. J., in Gulliver v. Wickett*, 1 Wils. 105. There was a general affirmation, but this court said, "The heirs at law of Reuben Brown not being parties to the bill, we decline expressing any opinion as between them and the husband and grandchildren." *Jossey v. White*, 28 Ga. 272. By undated orders, signed by Judge Cole, of the Macon circuit, it appeared that on the petition of John H. Jossey an order was passed declaring that John Hamilton's name should be changed to John S. Jossey, and he declared the adopted son of John H. Jossey, and made capable of inheriting from said John H. Jossey. By another proceeding, brought in Bibb superior court by John H. Jossey, the name of Martha Davis was changed to Mary Eliza Jossey, and she was declared the adopted child of said John H., and made capable of inheriting from said John H. Jossey. After the death of Lucinda Jossey the property is alleged to have been taken possession of by her administrator, and certain grandchildren of Reuben Brown, remaindermen, named in the extract of the will above quoted, instituted proceedings for the recovery of the land. Other descendants of Reuben Brown intervened, as did also Martha Collier and John S. Jossey, the adopted children of John H. Jossey. The chancellor construed the will, and in effect decreed that John S. Jossey and Martha Collier, adopted children of John H. Jossey, were not entitled to any interest in the property. They each filed exceptions to the ruling made, and the only question presented by both records is whether, as adopted children of John H. Jossey, they took the one-third devised to the husband of Lucinda under the will of Reuben Brown.

Cabaniss & Willingham, E. G. Cabaniss, Jr., R. L. Berner, and J. B. Williamson, for plaintiffs in error. *J. E. Hall, T. E. Patterson, and O. H. B. Bloodworth*, for defendants in error.

LAMAR, J. (after stating the foregoing facts). Stripped of all unnecessary verbiage, the devise here was in trust for Lucinda for life, with remainder to her children, if any; and, if none, or those born died before reaching maturity, then over to any man with whom Lucinda might intermarry. The heirs general of Reuben Brown insist that the birth of children was a condition precedent to John H. Jossey's right to take under the will. We find some cases where, on the special words of the instrument, and giving effect to the testator's evident intention, it was held that the devise over was dependent on a contingency, which, never having happened, the remainder could not take effect. *Moorhouse v. Wainhouse*, 1 Bl. Rep. 638; *Fearne*, 365, 236; *Andrews v. Fulham*, 1 Wils. 107; *Grascot v. Warren*, 12 Mod. 128;

Davis v. Norton, 2 P. Wms. 390; *Sheffield v. Lord Orrery*, 3 Atk. 22; *Oetjen v. Diemmer*, 115 Ga. 1005, 42 S. E. 388. But the decided weight of authority is in favor of the proposition that the remainder over takes effect, the estate in favor of the children being considered as a limitation, rather than a condition precedent. In other words, the birth of children and their death before maturity was not a condition to Jossey's right to take, but his interest was rather subject to a limitation by which it could not vest in possession if a child was born who attained maturity. In many cases words of condition and contingency are to be construed as words of limitation. *Stathan v. Bell*, 1 Cowper, 40. And words which in a deed would create a condition may in a will be construed as a limitation. Note to *Simpson v. Vickers*, 14 Vesey, Jr. 347. "Wherever the prior estate is made to depend upon any prescribed event, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition precedent, but upon its failure the second estate must take place." *Doe v. Brabant*, 3 Br. 393. These rules of construction are not merely technical, but generally accord with the intention of the settlor; for when he declares that the property is to go from one beneficiary to another, and on certain terms thence to still others, he has indicated that each of those named is preferred over his heirs or the other objects of his bounty. It is not like a chain, where everything depending thereon falls with the destruction of any prior link, but rather the creation of a line of successive estates, in which the later are accelerated in time of enjoyment by the elimination of any intermediate interest. Compare 1 Jarm. Wills, *764; *Mathis v. Hammond*, 6 Rich. Eq. 121. There are a number of adjudicated cases of high authority sustaining this view. In *Horton v. Whittaker*, 1 Durnf. & East, 346, the testator recited that his sister M. was well provided for during the life of her husband, W., and therefore would not, unless she happened to survive W., want any assistance to enable her to live. He thereupon devised lands to trustees in trust that during the life of M. they should pay the rents to his other sisters, E. and B., and after the death of the husband, W., in case the testator's sister M. should then be living, then to the use of E., B., and M., severally, during their respective lives, with remainders to their sons, successively, in tail, with cross-remainders between the sisters on default of issue of their body, respectively. Held, that the condition of the married sister, M., surviving her husband, W., did not extend to any of the limitations subsequent to her estate for life. *Fearne*, 235. Where there was a devise to a wife for life, and after her death to the child with which she was then supposed to be eniente, and, if such child should die before 21, then the property to be divided between the wife and certain other persons named, the question was

versed. As some of the assignments of error Lord Harcourt held that it was, even though no child was born, and the death of the child under 21 never happened. And in another case in which the same will was under consideration, Lee, C. J., held that the limitation over was good; that the devise to the infant, being ineffectual, was out of the case; that the law was the same whether the devise preceding the limitation over was originally void, or became so by nonexistence of the infant; that, since the law allows such limitation over, it allows the waiting for it; that it was one of those executory limitations which depend on some contingency. *Fearne*, 511; *Andrews v. Fulham*, 1 Vesey, Sr. 421. While under this same will a distinction was made between an estate for years and an estate in fee (Id. t. p. 511), it was again construed in *Gulliver v. Wickett*, 1 Wils. 105, where Lee, C. J., said that there was a good devise to the wife for life, with a contingent remainder to the child in fee; and, if the contingency of a child never happened, then the last remainder was to take effect on the death of the wife. Bearing in mind the principles announced by these cases, having regard to the fact that the testament was prepared by an unskilled draftsman, and construing it as a whole, it is clear that Reuben Brown did not contemplate a partial intestacy, but intended to make a complete disposition of his property; that, in the order of nature, he expected his daughter to have children, but he realized that, even if she did, they might not attain majority. His scheme, therefore, was to give to the daughter for life (*Jossey v. White*, 28 Ga. 265), and after her death to her children, if any, but, if they died before reaching maturity, then one-third to her husband, who was thus preferred over testator's heirs. The estate thus created in favor of her husband was subject to a limitation by which it would be defeated by the birth of children and their attaining maturity. Any interest conveyed to John S. Jossey necessarily had to vest in possession within 21 years after the death of Lucinda. The devise over was therefore not void as an attempt to create a perpetuity. Civ. Code 1895, § 3102. There were no children born to Lucinda, and therefore no vesting of the intermediate estate between that to her for life and that over to the husband. It is claimed, therefore, that he took a contingent remainder, and that his wife and children, who were his heirs at the time of his death, inherited this contingent remainder by virtue of Civ. Code 1895, § 3101. On the other hand, it is contended that this will, having been probated in 1850, is to be governed by the law as it existed prior to the adoption of the Code; that according to the language of the will the estate limited to Jossey was to take effect after the base or determinable fee in the children; that a fee could not be limited on a fee in a deed; that the limitation over could only be good by way of executory de-

vise; and that executory devises and possibilities of reverter descend to those answering to the description of heirs when the estate falls in at the death of the life tenant—being here the adopted children. *Payne v. Rosser*, 53 Ga. 662; Civ. Code, 1895, §§ 3082, 3099; *Matthews v. Hudson*, 81 Ga. 120, 7 S. E. 286, 12 Am. St. Rep. 305; *Phinizy v. Few*, 19 Ga. 66; *Groce v. Rittenberry*, 14 Ga. 233; *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014. We find it unnecessary, in the present state of the record, to determine whether the interest of John H. Jossey descended to his wife and adopted children who were his heirs at the time of his death, or only to the adopted children who were his heirs at the time of the death of Lucinda. There is nothing to show whether, after his death, the wife made an election between dower and a child's part. In the absence of such proof there is no presumption that she ever had any vested estate in this or other realty of her husband. *Snipes v. Parker*, 98 Ga. 522, 25 S. E. 580 (2); *Farmers' Banking Co. v. Key*, 112 Ga. 301, 37 S. E. 447, and cit.

The defendants in error further contend that, even if the birth of children was not a condition precedent, still there was an uncertainty as to who the husband would be, and therefore the case is within the rule in Civ. Code 1895, § 3101, which provides that, "If the contingency be as to the person, and that person be not in esse at the time when the contingency happens, his heirs are not entitled." The heirs of Brown contend that the testator's purpose was to provide first for the children, and, in the event of their death before maturity, for the husband who was their father—not for a husband who was not so related to them; and that there was an evident uncertainty as to the person, since Lucinda might have married a second time, and had children by the second husband. Possibly so, but when the will was drawn it was equally possible that there might have been children by the first marriage and none by the second, or there might have been children by both marriages; and this double uncertainty as to which husband was to take, and what interest they should take in case there were children by both marriages or none by either, emphasizes the wisdom of the rule, which, in aid of the early vesting of estates, declares that in the case of gifts to unmarried women for life, with remainder to the husband, the first who answers to the description is to be considered to have been intended by the testator as the recipient of his bounty. See *Radford v. Willis*, 7 Ch. App. 10; Civ. Code, 1895, § 3104.

The petition for the adoption of John Hammond by John H. Jossey was presented to the superior court of Bibb county. It recites the name of his mother, but does not show whether she was alive or dead. The petition to adopt Martha Davis was also presented to the superior court of Bibb county, and shows that the mother and father of the child were

dead. The orders declaring these two children the adopted children of John H. Jossey and making each capable of inheriting from him, are both undated. The agreed statement of facts recites that it is admitted that these orders were allowed between 1851 and 1870—presumably to cover the period between the death of the testator and the death of John H. Jossey. Inasmuch as the statute authorizing courts to pass such orders was not approved until March 6, 1856, this uncertainty in the date might have been fatal to the rights of the plaintiff in error, but for the fact that this court takes judicial cognizance that Judge Cole, by whom they were signed, was judge of the Macon circuit only during the period between 1865 and 1878. Civ. Code 1895, § 5148; *Ponder v. Shumans*, 80 Ga. 506, 5 S. E. 502. In the case of *Martha Davis*, both parents being dead, no notice was necessary, and in the case of *John Hamilton* the presumption in favor of the regularity of the proceedings and the jurisdiction of the court must prevail in the absence of any evidence whatever to show that the court had no jurisdiction, and that no notice was given, or that there was any person entitled to notice in life at the time. Such orders fix the status of the child, are in his interest, and cannot be collaterally attacked. Certainly, after the lapse of so long a time, every presumption must be made in favor of the validity of these orders. It must be borne in mind that the statute does not provide for process, nor for the form of service, but only that the judge must be satisfied of the truth of the facts of the petition, and of the further fact that such father or mother had notice of the application. Civ. Code 1895, § 2497.

Judgment reversed. All the Justices concurring.

(85 W. Va. 576)

ROGERS v. MILLER et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

CO-TENANCY—ADVERSE POSSESSION.

1. Syllabus in case of *Cochran v. Cochran*, 54 W. Va. —, 46 S. E. 924, approved and applied. (Syllabus by the Court.)

Appeal from Circuit Court, Gilmer County; John M. Hamilton, Special Judge.

Bill by Elza A. Rogers against Amelia B. Miller and others. Decree for plaintiff, and defendants George M. Rogers and W. W. Brannon appeal. Affirmed.

R. F. Kidd, W. B. McGeary, and W. W. Brannon, for appellants. Linn & Brannon and L. H. Barnett, for appellee.

McWHORTER, J. On the 30th day of August, 1881, Ourrence B. Conrad, by deed of that date, in pursuance of a contract entered into with Elial G. Rogers on the 8th day of October, 1874, which contract was assigned and transferred to the parties of

the second part mentioned in said deed, John D. Estor Rogers, Francis Luther Rogers, and George M. Rogers, son of Elial G. Rogers, and Mary Ann Rogers, wife of Elial G. Rogers, and her minor children, of the second part, in consideration of \$332.10, with its interest, conveyed to the said parties of the second part a tract of land on the right-hand fork of Mike's Run, a branch of Sand Fork of Little Kanawha river, in Gilmer county, containing 162 acres, described by metes and bounds; 90 acres of the said tract (also described by metes and bounds separately from the whole tract, and upon which 90 acres the said Elial G. Rogers and his family then resided) to John D. Estor Rogers, Francis Luther Rogers, and George Melvin Rogers, "and the residue of the above-described tract of land, containing about 72 acres, is hereby granted and conveyed to the said Mary Ann Rogers and her infant or minor children." Immediately after the execution of the deed from Conrad, the said John D. Estor, Francis Luther, and George Melvin Rogers entered into possession of the 90 acres so conveyed to them; and said Elial G. Rogers, with his wife and the younger children, removed from the 90 acres and took possession of the 72 acres so conveyed to Mary Ann and her minor children. While the deed from Conrad for the 162 acres was dated August 30, 1881, it was not acknowledged and delivered until the 15th of March, 1882. Immediately after the last-mentioned date the parties all entered into possession of their respective tracts as stated. At the date of the deed of August 30, 1881, Francis Luther Rogers and George Melvin Rogers were under the age of 21 years, but the former had passed his twenty-first birthday on the 19th day of February, 1882, about a month before the deed was executed and recorded. Various deeds were made for interests in the 72 acres by those entitled to and in possession of them until finally Elza A. Rogers had the title of all claiming interest in said 72 acres excepting the interest of Amelia Miller, who had sold her interest on the 23d day of June, 1900, to the said Elza Rogers, and had been paid her price for it; but her husband had failed to join in the conveyance, and her deed was therefore void. On the 30th day of October, 1901, the said Amelia and her husband, Miles Miller, by deed conveyed to W. W. Brannon, with general warranty, one undivided sixth interest in said residue of 72 acres, described in her deed as the "one undivided sixth interest in a certain tract of sixty-three and $\frac{61}{100}$ acres, being the interest of the said Amelia B. Miller in the residue of a tract of 160 acres conveyed by C. B. Conrad to Francis Luther Rogers and others," and referring to the deed of record. On the 3d day of May, 1902, George M. Rogers and his wife, Mattie Rogers, granted and conveyed to said W. W. Brannon "the one undivided half of their interest, whatever it may be, in all the oil and

gas in, on, or under said" tract of land described as about 70 acres, "being the remainder of a tract conveyed by C. B. Conrad to Francis Luther Rogers and others." At the May rules, 1902, Eliza A. Rogers filed his bill in the clerk's office of the circuit court of Gilmer county against Amelia B. Miller and Miles Miller, her husband, and W. W. Brannon, and after the filing of demurrers and answers to the bill, at the September rules, 1902, the plaintiff filed his amended bill, making new parties and new allegations, alleging the making of the deed by George M. Rogers and his wife to said Brannon for an interest in the oil and gas in the said residue of the 160 acres described in said deed as about 70 acres; alleging that said Brannon at and before the conveyance by said George M. Rogers to him had full notice of the rights of the plaintiff under said conveyance, and that the said Brannon took his conveyance chargeable with said notice, and subject to all of plaintiff's rights at law and in equity; alleging that said 72 acres was susceptible of being partitioned in kind, and that he had a right to have the same partitioned; and praying that the court pass upon the validity of said Brannon's deed from Amelia B. Miller, and, if held invalid, to cancel the same, and, if not, to direct partition of the said land in kind, giving this plaintiff seven-eighths thereof and to the said Brannon one-eighth, canceling the deed from George M. Rogers and his wife to said Brannon as a cloud upon plaintiff's title, and decreeing to plaintiff against the said Miles Miller a recovery of \$55, with its proper interest thereon, being the amount paid Miles Miller and Amelia, his wife, by plaintiff, for her interest in said land; and for further relief.

The defendants Amelia Miller and W. W. Brannon and George M. Rogers filed their demurrers and answers, denying the material allegations of the bill and amended bill. Depositions were taken on behalf of the plaintiff and of the defendants Brannon and George M. Rogers, and filed in the cause, which came on to be heard on the 5th day of June, 1903, upon the bill and amended bill, answers and the replications to the answers, and the depositions, when it was adjudged that the plaintiff had established title to seven-eighths of the undivided one-half of the 72 acres of land, and was entitled to partition thereof between himself and the defendants Amelia B. Miller and W. W. Brannon, the owners of the undivided one-eighth of the said land, and that the said deed from George M. Rogers and his wife to W. W. Brannon bearing date the 2d day of May, 1902, purporting to convey one undivided one-half interest claimed by George M. Rogers in said land, constituted a cloud upon plaintiff's title, which the plaintiff was entitled to have removed, and canceled said deed, and appointed commissioners to make partition of the land if they should find it susceptible of partition without prejudice to the rights of the

parties, and assign to plaintiff seven-eighths thereof according to quantity, quality, and value, and assigning to the defendants Brannon and Amelia B. Miller, jointly, the remaining one-eighth—the said Brannon in his answer claiming only one-half interest of said Amelia B. Miller; and if they should find it impracticable to partition the same between the parties according to their respective rights with the reservation of the gas and oil in and under said land, and find partition cannot be made as indicated, and cannot be made with owelty, that they so report, that a sale be made under decree, etc. From which decree defendants George M. Rogers and W. W. Brannon appealed.

The claim of appellants, George Melvin Rogers and W. W. Brannon, is based upon the fact that at the time of the deed of August, 1881, by Conrad, the defendant George M. Rogers was a minor under the age of 21 years, and, the conveyance of the 72 acres in said deed being to said Mary Ann Rogers and her infant or minor children, he, being an infant at the time, insists that he was one of the grantees. This is technically true, but at the time he was quite a young man, and it was evidently intended, as appears from the face of the deed itself and the overwhelming preponderance of the oral testimony, that the purpose was to convey the 90 acres to George M. Rogers and his two brothers as and for their full portion of said 162 acres of land, and that the residue, 72 acres, was intended to be conveyed to Mary Ann Rogers, the mother, and the younger children. While George would hold an interest in the 72 acres under the deed but for the facts and circumstances of the case as they appear in the record, yet it is made clear from the testimony that the intention of the father in having the deed made as it was was to give to his three sons the 90 acres, and the mother and her younger children the residue. Immediately on the execution of the deed from Conrad the parents and the younger children left the 90 acres upon which they had been living and making their home, and took possession and made their home upon the 72 acres; the sons holding exclusive possession of the 90 acres, and their other and younger children that of the 72 acres. Elial G. Rogers, the father, testified that he purchased and paid for the whole tract, and had a contract in writing with Conrad for the same dated October 8, 1874; that he had searched for the same, and was unable to find it among his papers; that he asked Conrad to write the deed so as to convey to his three sons named the 90 acres, and to his wife, Mary Ann Rogers, and her other children the residue of the 162 acres after deducting the 90 acres, and that Conrad agreed to do so; that he had assigned said contract to his wife and children; that he went to Conrad, who was then clerk of the circuit court of Gilmer county, who told him he had written the deed as he had requested, and as he understood it, and thought

it would carry out witness' intentions; he acknowledged the deed, and witness had it recorded; that his son Francis Luther was 21 years of age on the 19th of February, 1882, and was dead when witness' deposition was taken; that the deed was acknowledged and recorded on the 15th day of March, 1882; that the three sons took possession of the 90 acres immediately after the deed was delivered, and they and those claiming under them had had possession of said 90 acres ever since; that "on behalf of Mary Ann Rogers, my wife, and our children other than John D. Estor Rogers, Francis Luther Rogers, and George Melvin Rogers, namely, Rebecca, who afterwards married James Moore, Elza A. Rogers (the plaintiff), Amelia B., who afterward married Miles Miller, Theodosia, who afterwards married Clarence Kidd, Josephine, who afterward married McClenen Henline, and is now deceased, Elizabeth, who afterward married Andrew Posey, Permetras N., I took possession of said residue, and my wife and myself and the said children and those claiming under them have had actual possession ever since"; that "it was held adversely, continuously, openly, and notoriously against Francis Luther Rogers, George M. Rogers, and all others—those of our children I have named as claiming it, and my wife, Mary Ann Rogers"; that he did not intend Conrad to convey any interest in the residue of the 162 acres after deducting the 90 acres to either of the three sons named, and never understood that the deed conveyed them any interest in said residue, but that his wife and the other children were to have the residue free from any claim of John D. Estor, Francis Luther, and George Melvin Rogers, and that he so understood the deed, and that it was so understood by all the children; that he never heard of George Melvin setting up any claim to it "until some time last winter or fall," and that Francis Luther and George Melvin knew from the first that witness' wife and his other children, who had possession of the residue, claimed the same as their own against the world; that witness was present when plaintiff Elza A. Rogers and George Melvin Rogers were in the house of the latter and talking to each other about the proposed purchase by the said Elza of the said residue from those witness had named as the claimants thereof under the possession he had spoken of, and George Melvin made no objection to Elza's proposed purchase, and made no claim to any interest in the residue; that "George Melvin Rogers told me he never would have claimed an interest in the residue if Elza had not made him mad."

Mary Ann Rogers testified that before her husband came back from Glenville and told her the deed was made they lived on the 90 acres, and right away after that they moved off the 90 acres and onto the residue of 72 acres, and continued in possession of it without any disturbance or any claim to it on the part of either of the three boys named until

her son Elza purchased the same, and that the three sons took possession of and held the 90 acres.

John D. Estor Rogers testified that when his father went to Glenville to get the deed from Conrad, on his return he told witness and his brothers George Melvin and Francis Luther that the deed had been made and put on record; that by it they three were to have the 90 acres, and that their mother and the other children were to have what was left of the 162 acres after taking out the 90 acres; that they took possession of the 90 acres immediately, and they and those claiming under them had been in possession thereof ever since, while, on the other hand, their father and mother, for their mother and the other children named in said deed, took possession of the said residue, claiming it and holding it as their own under said deed against all others, and held the same in open, notorious, and exclusive possession from that time on until his brother Elza purchased the same, and after that their father and mother continued in possession under Elza "until last spring"; that he never heard either George Melvin or Francis Luther make any claim to any part of said residue until after Elza had obtained deed therefor; that when his father returned from Glenville "he told me and my brother Francis Luther Rogers and George Melvin Rogers that the 90 acres was to be our full portion of the said 162 acres, and we all accepted it as such."

Mary A. Rogers, widow of Francis Luther Rogers, deceased, says her husband told her both before and after they were married that the parcel of 90 acres had been set apart for him and his brothers John D. and George Melvin as their portion of the 162 acres, and he never claimed, in any conversation when talking about the land, either before or after marriage, any interest in any part of the land except the 90 acres.

Rebecca Moore, daughter of Elial G. and Mary Ann Rogers, testified as follows: "I am thirty-seven years of age. I was present and remember the time when my father returned from Glenville and told my brothers John D. Rogers, George Melvin Rogers, and Francis Luther Rogers that he had had the 162 acres of land in this cause mentioned divided between the children and our mother; that he had given John D., Francis Luther, and George Melvin Rogers ninety acres, the portion of the 162 acres, and the residue he had given to my mother and the rest of us children as named in this cause. Immediately after he told us that, my three brothers John D., Francis Luther, and George Melvin took possession of the ninety acres, and my father and mother and the rest of us children moved upon and took possession of the remaining seventy-two acres. My father and mother lived and resided upon the seventy-two acres of land, claiming it for my mother and us children, until the same was purchased by my brother Elza, and in fact re-

sided there under Elza until last spring. My brothers John D., Francis Luther, and George Melvin, from the time they were informed by my father about the manner in which he had divided his land, were perfectly satisfied with their portion, and never made any claim of right to an interest in the seventy-two acres until after the same was purchased by my brother Elza, and during all that time they and each of them knew that the seventy-two acres was in the possession of and claimed by my mother and the rest of us children as above named by me; and in fact I never knew or heard of any of them making any claim to the same until last winter, when George Melvin made claim to an interest in the same."

Lillie I. Rogers, wife of plaintiff, testified that after her husband had obtained the deed from the other heirs for the 72 acres, George Melvin Rogers "was at our house on the 72 acres," and spoke about receiving a letter which she had written him for her husband, inclosing \$35, with the request that he pay it to Amelia Rogers when she would sign a writing which was sent with her letter, by which she would agree to sell her right, title, and interest; and when talking about the land he made no claim to any interest in the 72 acres; that the last time she heard him talk about the 72 acres was at her house on the land on the 23d of February, 1902, or on the first Sunday after the 16th of that month, and he did not then claim any interest in the land.

McClenen Henline testified that several years ago he was in the house of the late Francis Luther Rogers, who told him that his father had divided the home farm, and gave to him and his brothers John D. and George M. Rogers 90 acres as their portion of the land, and had given the residue of the land to his mother and other children named in this suit other than the first named three, George Melvin, John D., and himself.

P. N. Rogers, one of the defendants, testified that at one time he talked of buying the heirs' interest in the 72 acres, and George Melvin Rogers told him that if any of them would buy out the heirs except Francis Luther, John D., and himself, and go there and take care of the old people, they would get the 72 acres, and that George never claimed an interest in the 72 acres "until last winter" (deposition taken September 17, 1902); that it was always understood by all that John D., Francis Luther, and George Melvin had received their full portion of the 162 acres in the 90 acres which they took possession of immediately after the execution of the Conrad deed, and that his father and mother and brothers and sisters and those claiming under them, named in the Conrad deed, other than John D., Francis Luther, and George Melvin, had had quiet, peaceable, unbroken, and notorious possession of the 72 acres even since he could remember, and the 90 acres had been in like possession of the

said three brothers and those claiming under them, and he never knew John D. or Francis Luther to claim any right in the 72 acres, and never knew George Melvin to claim any such right until the recent development of oil in that particular neighborhood; and that "he told me he had tried to buy Elza out, and that Elza would not sell to him; and he further told me that he didn't like to stand by and see the oil flowing there in large quantities and him get none of it, and, if there had not been oil discovered there, he would never have made any claim to a right in the 72 acres."

George Rogers testifies to the three taking possession of the 90 acres, and the mother and her children occupying and holding as their own the 72 acres, which they held and claimed adversely to the said J. D. Rogers, Francis Luther Rogers, and George Melvin Rogers, with knowledge on the part of the latter three of such possession and claim; and that he was told by the said J. D., Francis Luther, and George Melvin, both before and after the Conrad deed, that the said 90 acres was to be their portion of the land, and that the residue was to be the portion of the others witness had designated. Other witnesses testified to like facts.

George Melvin claims in his testimony that he and John D. Estor and Francis Luther had paid for the land; that they paid all the purchase money but a little that had been paid before; and makes a lame attempt to bolster up a claim to an interest in the 72 acres; but he relies chiefly on the fact that he was not yet 21 years of age when the Conrad deed was made, and therefore takes under the deed as one of the minor children. He says he never made any claim of the interest before because he did not want to bother his parents while they were both living; and he speaks of other witnesses whom he had served with subpoenas, but were unable to attend the taking of the depositions because of bad weather, bad roads, and sickness. There is some little evidence tending to prove that George claimed an interest in the land at times before Elza purchased from the other heirs, but the overwhelming preponderance of testimony is that he claimed no interest in it, and, further, that he never had an interest in it, and that he always understood that he and his two brothers had the 90 acres for their share of the 162 acres, and had no claim whatever upon the 72 acres. And the possession adverse to George Melvin Rogers of the mother and the other minor children from 1882 to the date of the deed from the heirs to plaintiff, November 1, 1900, is well established.

This case is almost identical with the case of D. J. Cochran v. George B. Cochran (decided at the present term) 46 S. E. 925. That was a case in which the father died in 1865 seised of a tract of 215 acres, and the mother died in 1882 seised of a tract of 72 acres. The defendant, George B. Cochran, had lived

on the 72 acres with his mother and cared for her, and she had verbally given him the 72 acres. George had remained in possession of it, claiming it as his own, taking all the rents and profits, paying the taxes, keeping up the improvements, with knowledge to the other heirs that he was claiming it adversely. D. J. Cochran, his brother, brought suit for partition of the 215 acres among the heirs of his father and of the 72 acres among the heirs of his mother, all being the same parties. George filed his answer and cross-bill setting up his claim to the 72 acres, and proved his adverse possession. The circuit court decreed the partition of the 72 acres as well as the 215. George B. brought the cause here upon appeal, and the following is the syllabus in that case: "When one tenant in common occupies the common property openly, notoriously, and exclusively as the sole owner, keeping up the improvements, paying the taxes thereon, and receiving to himself the rents and profits, and exercising over the property such acts of ownership as evidence an intention to ignore the rights of his co-tenants, such acts amount to a disseisin, and his possession will be regarded as adverse to his co-tenants from the time they are shown to have knowledge of such acts and claims." The discussion of, and the authorities cited in, the said case of Cochran v. Cochran are equally applicable in the case at bar, and it is deemed unnecessary to do more here than to refer to that case as controlling this.

The decree of the circuit court must be affirmed.

BRANNON, J., absent.

(55 W. Va. 484)

MALSBY v. LANARK FUEL CO.

(Supreme Court of Appeals of West Virginia.
March 29, 1904.)

PLEADING—MISJOINDER OF COUNTS—DEMURRER.

1. A count upon an individual demand cannot be joined with a count upon a partnership demand in a declaration, neither partner being dead. It is a misjoinder of counts, and is fatal to the declaration on demurrer.

2. Misjoinder of counts in a declaration is fatal to the declaration upon demurrer.

Dent, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Raleigh County; J. M. Sanders, Judge.

Action by L. W. Malsby against the Lanark Fuel Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Hatcher and Laing & Fife, for plaintiff in error. H. A. Dunn and Farley & Honaker, for defendant in error.

BRANNON, J. This is an action of assumpsit in the circuit court of Raleigh county by L. W. Malsby against the Lanark Fuel Company, in which the plaintiff recov-

ered by verdict and judgment \$222.30, and the defendant brings the case to this court. The defendant demurred to the declaration and each count, but the demurrer was overruled. The first count is the common count in indebitatus assumpsit for goods sold, "for work furnished by the plaintiff for the defendant," for money laid out for defendant, and upon account stated. The second states a written contract between L. W. Malsby & Co., by which Malsby & Co. agreed to grade sidings, inclines, and pit for a drumhouse, and build a drumhouse, trestle, and chute, and some other work. It avers that L. W. Malsby & Co. was composed of L. W. Malsby and L. T. Marshal when the contract was made, but that before the work began Marshal withdrew from the firm, leaving L. W. Malsby as successor to L. W. Malsby & Co., and that all the work done was by L. W. Malsby as such successor. The third count avers an oral contract between Malsby and defendant for the doing of the work.

There is a misjoinder of counts. The first and third counts aver a contract by Malsby as an individual with the defendant, the second a contract between a firm and defendant. The contract, having been made by the firm, remained the contract of the firm after dissolution, because dissolution does not affect uncompleted contracts. The liability to do the work still rested on the firm, and when one partner did the work he did it for the firm in execution of a contract of the firm, and the legal right to pay for it vested in the firm. Right of action on it was vested in the firm as late partners. The cause of action accrued under a firm contract. The firm continued as to this contract. Bates on Partners, §§ 707, 711; 22 Am. & Eng. Ency. L. (2d Ed.) 217; Story on Partners, § 325; Houser v. Irvine (Pa.) 38 Am. Dec. 708. Both partners living, the right of action was joint in them. A partnership demand cannot be joined with an individual demand unless one partner is dead, leaving the demand to survive to him alone, as then he has the sole legal title. 15 Ency. Pl. & Pr. 914, 919. "The consequences of a misjoinder of counts or causes of action are more material than in a case of the single count being defective; for in the case of misjoinder, however perfect the counts may be in themselves, the declaration will be bad on general demurrer (1 Chit. Pl. [16th Am. Ed.] 228 et seq.) but not under our statute of Jeofails (V. C. 1878, c. 177, § 3; Id. c. 169, § 2) on motion in arrest of judgment, or on writ of error, unless a demurrer had been put in and overruled." 1 Minor, 448; 2 Tucker, 204. "When there is a misjoinder of counts, a demurrer for this cause will be a general demurrer to the whole declaration; not to a particular count, or a particular breach, or to any other part of a count. This principle is in no wise inconsistent with that which requires a demurrer to a particular count, or a particular part of a count,

in order to make available an objection applicable merely to a count or part of a count; for in the case of a misjoinder the objection is no more applicable to any one count or part of a count than to any other. The objection is that the plaintiff has joined causes of action which the law does not allow to be joined; and the objection, if sustained, necessarily shows that the whole declaration is bad." 1 Robinson's (Old) Prac. 284. See 4 Minor, 1161. "After demurrer for misjoinder the plaintiff cannot cure it by nolle prosequi." 2 Tidd's Prac. 735. The title—the legal title—to this demand being in the partners, both must join. How could a demand from the execution of a partnership contract be joined with an individual demand? It cannot be thought that, because the second count says that Marshal withdrew from the firm, "leaving said L. W. Malsby the successor to L. W. Malsby & Co.," and the work was done by the plaintiff as such successor, it is, in effect, an assignment. After dissolution there is no successor. It has no legal meaning here. One is no more successor than the other. And there is no allegation of a contract of assignment between the partners. The pleader only means that, by reason of the plaintiff doing the work, he, in law, was entitled to the demand, which is not the case, for it belonged to both, subject to settlement and firm debts. The law requires legal certainty in pleading, and the word used to aver withdrawal of one member and that the other was successor—the whole averment—is indefinite, uncertain, capable of other interpretation than that of assignment. No form can be found in common-law pleading averring assignment which would warrant this. *State v. Aler*, 39 W. Va. 549, 20 S. E. 585; *Hogg*, Plead. & Forms, 59.

We therefore reverse the judgment, set aside the verdict, and render judgment for the defendant on the demurrer to the declaration, because of misjoinder of counts. There being no declaration, it is improper to pass on other questions.

DENT, J. (dissenting). I cannot concur in the conclusion in this case, because it is unreasonable, and productive of gross injustice. The sole ground for dismissing the action is a misjoinder of causes of action in different counts. The second count is said to be a partnership demand, for which one partner cannot sue separately. If this were true, of course the misjoinder would be improper. The count, however, shows on its face that the plaintiff claims the whole beneficial interest in the demand sued upon, and when the writing is produced by order of the court it shows the plaintiff alone may sue upon it, as it is a contract in his own name. Hence the count, if badly defective, is amendable, and, if this action is dismissed, all the plaintiff can do is to bring another suit in his own name, in the same cause of

action, with proper allegations showing that he is the sole beneficiary thereof. To promote substantial justice the trial court may permit amendments at any time before final judgment. Section 8, c. 131, Code 1899. A defendant may not crave oyer to a writing not under seal, but he may have an order from the court permitting an inspection of the writing, which is equivalent to the same thing as oyer; and if, when the writing is produced, it shows that it has been misdescribed in the count, this should be accordingly amended. *Steph. Pleadings*, 160. When so amended, there is no misjoinder, for a partner has the right to sue for a partnership demand: First. When the beneficial interest is in him, and the other members of the firm are nominal, and this is a question of evidence. 1 Chitty, Plead. 11, 12. Second. Where the contract is made with him in his own name. *Dicey on Parties to Actions*, p. 174 (side page 153). In the present case both these principles are combined. The count shows the plaintiff claims, though it may be improperly, the whole beneficial interest, and the contract shows it was made in his own name for his own benefit. Hence the count, if bad, is amendable. Not to permit its amendment is gross injustice, and forces him to bring his suit over again without reason, not in the partnership names or in the names of the partners, but in his own name, for a claim in which he alone is interested. As shown by the allegations and contract, Marshal was a mere nominal partner, with no substantial interest in the partnership, and no legal interest in the claim in suit. *Dicey on Parties to Actions*, 172, 173. This has nothing to do with the merits of the case, but by the dismissal, instead of determining the case on the merits, the parties are simply sent back to begin over again. The decision therefore is unjust to both parties, when it might have ended the litigation.

(55 W. Va. 160)

HANNA et al. v. GOLFORD et al.

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

BILL BY EXECUTORS—REQUEST FOR INSTRUCTIONS.

1. The executors of the last will of G. filed their bill, alleging that their testator had bequeathed specific legacies to his wife and children, to be paid out of his personal property, and a residuary legacy to his granddaughter, to wit, the residue of his personal, and the whole of his real, estate; that testator, H., and others were the sureties of A. on his official bond as sheriff; that a judgment for a large sum of money was recovered against A. as principal, and H. and others as surviving obligors of themselves, and of G. and others, on said bond; that H. was compelled to pay said judgment; that H. claimed contribution from their testator's estate for one-half of the said judgment paid by him as aforesaid; that the legatees were clamoring for their legacies, and threatening plaintiffs with suits therefor; that testator's estate was not liable for any part of said claim of H.; that plaintiffs were in doubt as to their

duties in the premises; and praying that the validity or invalidity of said claim of H. be fixed and determined by the court, and that their executorial accounts be settled. *Held*, that the bill is insufficient to warrant the interposition of a court of equity.

2. The executor or administrator may apply, by a proper proceeding, to a court of equity for its aid and relief, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of the court. In such case it is competent for him to institute a suit against the creditors of the estate, generally, for the purpose of having all their claims adjusted, and a final decree settling the order and payment of the assets. The court will also lend its aid and relief, in a proper case, under such special circumstances as show that injustice will be done to the personal representative, or injury result to the estate, if such aid and relief be refused.

(Syllabus by the Court.)

Appeal from Circuit Court, Pocahontas County; J. M. McWhorter, Judge.

Bill by Samuel B. Hanna, executor, and others, against Nancy Galford and others. Judgment for plaintiffs, and defendants appeal. Reversed.

J. S. McWhorter, Andrew Price, and Molohan, McClintic & Mathews, for appellants. L. M. McClintic, for appellees.

MILLER, J. At the December rules, 1900, Samuel B. Hanna and O. A. Lightner, as executors of Allen Galford, deceased, filed their bill, in the circuit court of Pocahontas county, against Nancy Galford, Hannah McLaughlin, Alice McClure, Caroline Tacy, Brown N. Galford, James H. Galford, Bertie L. Galford, Sarah A. Galford, Nancy J. McLoud's administrator, Uriah Hevener, C. O. Burner, John Driscoll, W. H. Collins, J. C. Arbogast, late sheriff of Pocahontas county, and, as such, administrator of Samuel L. Gibson, J. C. Arbogast, and the West Virginia Spruce Lumber Company.

The bill alleges, in substance, that Allen Galford departed this life, testate, on the — day of —, 1898, and by his last will and testament named plaintiffs therein as his executors; that the will was probated, and that plaintiffs qualified as executors thereunder; that in and by his will the testator directed, first, that his funeral expenses and all of his just debts should be paid; and, next, made certain specific legacies to his widow, the defendant Nancy Galford, and other legacies to his children, Nancy J. McLoud (who died before the institution of the suit), Hannah McLaughlin, Caroline Tacy, Alice McClure, B. N. Galford, and James H. Galford; and a residuary legacy to his granddaughter, Bertie L. Galford, who, as it appears, is an infant; thus disposing of all of his personal estate. Plaintiffs say that under the provisions of the will they are directed to rent the land devised to said Bertie L. Galford, and to hold in trust all the estate devised and bequeathed to her, until she becomes 21 years of age, or until she marries; that said Allen Galford, Uriah Hevener, W.

H. Collins, S. L. Gibson, C. O. Burner, John Driscoll, and Thomas Galford became and were the sureties of J. C. Arbogast, as sheriff of Pocahontas county, on his official bond, in the penalty of \$30,000, bearing date on the 10th day of December, 1884; that the term of office for which bond was given as aforesaid commenced on the 1st day of January, 1895, and continued for four years next thereafter; that the state of West Virginia, at the relation, and for the benefit, of Amos Barlow, instituted its action at law in the circuit court of said county, on said bond, against said J. C. Arbogast, John Driscoll, W. H. Collins, C. O. Burner, and Uriah Hevener, who were the surviving obligors of themselves and of Thomas Galford, S. L. Gibson, and said Allen Galford; that in said action judgment was recovered by the plaintiffs on the 4th day of October, 1898, against said J. C. Arbogast, John Driscoll, W. H. Collins, C. O. Burner, and Uriah Hevener, for \$3,125.55, with interest thereon from that date until paid, and costs; that the said Uriah Hevener was compelled to pay, and did pay, said judgment in full, on the 28th day of August, 1899; that said Arbogast and the other sureties are insolvent; and that, if said Uriah Hevener be entitled to contribution from his co-sureties on said bond, such contribution will fall on their testator's estate, and will be a large debt against the same. Plaintiffs further allege that Uriah Hevener claims contribution from their testator's estate for one-half of the said judgment, with interest and costs paid by him as aforesaid; that the legatees under the will of Allen Galford are clamoring for their legacies, and threatening plaintiffs with suits for the same, and at the same time said legatees contend that the estate of their testator is not liable for any part of said judgment. Plaintiffs also say that they are advised, and therefore charge, that the estate of Allen Galford is not liable for any part of said judgment; that the said debt, and every part thereof, is barred by the statute of limitations as against their testator's estate; that they plead and rely upon the statute of limitations as a defense against said debt; and they further say that they are in doubt as to their duty, as executors of Allen Galford, in the premises, and are unwilling to further execute their trust without the aid and support of a court of equity to direct and ratify their proceedings; that said Allen Galford was, at the time of his death, seised and possessed of several tracts of land, deeds for which are filed; and that these lands, under the will, are held in trust for the defendant Bertie L. Galford. Plaintiffs then pray that their trust, as executors of Allen Galford, be executed under the direction of the court; that the validity or invalidity of the claim of Uriah Hevener, as one of the sureties of J. C. Arbogast, late sheriff of Pocahontas county, against their testator's estate, be fixed and determined; that their accounts as executors be settled;

and for general relief. N. C. McNiel was by the court appointed guardian ad litem for the infant defendant Bertie L. Galford, who, by her said guardian ad litem, filed her answer to the bill. Defendants Caroline Tacy and Alice McClure also filed their joint and several demurrer and answer to the bill, whereupon the cause was referred to a commissioner to ascertain and report, among other things, an account showing all the valid and subsisting debts, with their amounts and priorities thereto, against the estate of Allen Galford, deceased. Under this order of reference, the commissioner did not report the said claim of Uriah Hevener as a liability against the estate of said Galford, deceased, but referred the same, with certain observations thereon, to the court. Afterwards, defendant Uriah Hevener filed his answer to the bill, but did not demur thereto, in which answer he gives a history of the transactions leading up to and culminating in the said judgment against Arbogast, himself, and others, which he had been compelled to pay, and claiming, from the estate of Allen Galford, deceased, payment of one-half thereof. At the same term, defendants Bertie L. Galford, by N. C. McNiel, her guardian ad litem, Hannah McLaughlin, and Sarah A. Galford filed their joint and several demurrer and answer to plaintiffs' bill, which is also treated as an answer to the said answer of Uriah Hevener, which last-mentioned answer seems to have been treated in some respects as a cross-bill.

It appears from the report of the commissioner that said Uriah Hevener was indebted to the estate of Allen Galford on the 1st day of March, 1893, in the sum of \$1,782.95, being the amount due on the bond of Hevener to Galford for \$1,500, bearing date October 16, 1894, upon which certain credits are indorsed.

On the 21st day of June, 1902, the cause was heard upon the bill and exhibits, the said several answers and demurrers, which demurrers were then by the court overruled and disallowed; and, it then appearing to the court that Uriah Hevener was indebted to the estate of Allen Galford, on the bond mentioned in the commissioner's report, in the sum of \$1,718.40, as of that date, said Hevener having made certain payments thereon after the report of the commissioner and before the then hearing thereon, and the court being of opinion that Uriah Hevener was entitled to recover from the estate of Allen Galford contribution for one-half of the sum of \$2,869.37 paid by said Hevener on the said judgment against Arbogast, Hevener, and others, and also one-half of \$165 which said Hevener had paid on another judgment against said Arbogast and sureties, the court then ascertained and fixed the sum of \$1,772.24 as the amount then due from said estate to Hevener. And, proceeding to adjust all the matters in difference between said Hevener and the estate of Allen Galford, the

court found the sum of \$538.80 in favor of Hevener against the executors of Galford, and thereupon entered a decree against them in favor of Hevener accordingly. From this decree said Bertie L. Galford, by N. C. McNiel, her guardian ad litem, and Sarah A. Galford appeal, and, among other assignments of error, say that the circuit court erred in overruling their said demurrers to plaintiffs' bill.

It is suggested by counsel for appellee Uriah Hevener that appellants are not entitled to their appeal, because, as urged, the controversy is between said Hevener and the executors of the estate of Allen Galford. This position is untenable. The infant appellant is the residuary legatee of both the real and personal estate. The will, in part, says: "After paying all the expenses attending the execution of the provisions of this will, and the erection of a tombstone over my grave, and my wife's grave, I devise and bequeath all the remainder of my estate, both real and personal to my grand daughter, Bertie L. Galford." If the decree be erroneous and allowed to stand, it will deprive the estate of \$1,772.24, in which said Bertie L. Galford is directly interested. That she is interested, and prejudiced by the decree, if erroneous, is plainly apparent. Should the court have sustained her demurrer to the bill? The answer to this query depends upon the sufficiency of the allegations of the bill to bring the cause within some recognized equity principle which confers jurisdiction upon the courts. In 1 Story's Eq. Jur. § 544, it is said: "The application for aid and relief in the administration of estates is sometimes made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of a court of equity. In such a case it is competent for him to institute a suit against the creditors generally, for the purpose of having all their claims adjusted and a final decree settling the order and payment of the assets. These are sometimes called bills of conformity (probably because the executor or administrator in such case undertakes to conform to the decree, or the creditors are compelled by the decree to conform thereto), and they are not encouraged, because they have a tendency to take away the preference which one creditor may gain over another by his legal diligence. Besides, it has been said that these bills may be made use of by executors and administrators to keep creditors out of their money longer than they otherwise would be. However correct these reasons may be for a refusal to interfere in ordinary cases involving no difficulty, they are not sufficient to show that the court ought not to interfere in behalf of an executor or administrator under special circumstances, where injustice to himself or injury to the estate may otherwise arise."

Plaintiffs allege that Uriah Hevener claims contribution from their testator's estate for one-half of the said judgment, with interest and costs, paid by him as aforesaid. It nowhere appears that Hevener has instituted suit against the executors of the estate for the recovery of the claim, or that he intends to do so. It is the duty of persons who have claims or demands against an estate to establish the same in some appropriate legal manner. Until this be done, the personal representatives should not pay them. If action or suit be brought by the claimant, it is the legal duty of the personal representative to make proper defense thereto, under penalty of being charged with any loss occasioned by his negligence or failure to do so. It is not incumbent on the personal representatives to bring suit, and involve estates in litigation and costs, merely because some person claims something against the estate which they represent. If this practice were permitted, the courts would be filled with useless controversies, and estates wasted by unnecessary and unauthorized costs.

Plaintiffs pray that the validity or invalidity of the claim of Hevener be fixed and determined by the court. It will be proper for the court to adjudicate that matter when Hevener sees fit to bring it into court in some appropriate proceeding.

Plaintiffs further allege, by way of excuse for the institution of their suit, that the legatees under the will of Allen Galford are clamoring for their legacies, and are threatening plaintiffs with suits for the same, and at the same time said legatees contend that the estate of their testator is not liable for any part of said judgment; and plaintiffs also say that they are advised, and therefore charge, that the estate of Allen Galford is not liable for any part of said judgment, because said debt and every part thereof was and is barred by the statute of limitations. This allegation is wholly insufficient to sustain the bill. If the executors had really desired to pay the legacies to the legatees, they could have taken proper and sufficient refunding bonds for their indemnity. Moreover, there is no apparent reason why the executors could not have maintained an action at law against Hevener for the recovery of the amount due from him on his said \$1,500 bond given to Allen Galford. There is not shown any such complication of accounts between Hevener and the Galford estate as authorizes the interposition of a court of equity.

Plaintiffs state, as a further reason for their suit, that they are in doubt as to their duty as executors of Allen Galford in the premises, and are unwilling to further execute their trusts without the aid and support of a court of equity to direct and ratify their proceedings. They do not ask for a construction of the will, or of any of the provisions thereof. Neither do they pray the authority of the court for the investment or disposition

of any funds belonging to the infant defendant arising from the estate under the will. The suit was not necessary for the settlement of the executorial accounts of the plaintiffs. Such settlement could have been made by a commissioner of accounts. There are no facts averred from which it can be determined that the executors found the affairs of their testator so much involved that they could not safely administer the estate except under the direction of a court of equity, and no special circumstances are shown why injustice to themselves, or injury to the estate, would be suffered unless the interference and aid of the court should be allowed in their behalf. In no view, nor for any purpose stated therein, can the bill be sustained. It was therefore error to overrule appellants' demurrer thereto.

For the reasons stated, the decree of the circuit court complained of is reversed and held for naught, appellants' demurrer to the bill sustained, and said bill dismissed for want of equity jurisdiction.

(54 W. Va. 441)

HOLT v. KING et al.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

TAX SALE—ASSIGNMENT OF CERTIFICATE—REDEMPTION—FRAUD.

1. A person holding a vendor's lien on a certain tract of land, which has been sold for the nonpayment of the taxes, proposes to the purchaser, within the year of redemption, to redeem the same; and such purchaser informs him that a subsequent lienor has demanded the right to and is going to redeem, and he afterwards informs the subsequent lienor that the prior lienor wanted to redeem, but that he preferred to allow him to make the redemption. He is then induced by such subsequent lienor, who was fully aware that the prior lienor expected him to make the redemption, to execute an assignment to him of the sheriff's certificate on payment of the redemption money, which assignment is kept secret, and no notice thereof, either by the purchaser or the subsequent lienor, is given to the prior lienor until the redemption period has elapsed—a court of equity, on application of the prior lienor, will hold such assignment to be a mere redemption of the property, and will enjoin the subsequent lienor from obtaining a deed therefor from the clerk of the county court.

2. If a purchaser of delinquent lands represents to a prior lienor, desiring to redeem the same, that a subsequent lienor demands the right to and is going to make such redemption, and afterwards such purchaser secretly assigns the sheriff's receipt to such subsequent lienor, and fails to advise the prior lienor of such assignment until too late for him to make redemption, such conduct on the part of the purchaser is fraudulent; and, if the subsequent lienor knowingly accepts and retains the benefits of such fraud, he will be held equally guilty with the purchaser, especially if he is the moving cause of such purchaser's conduct, though he may be entirely free from intentional wrong or mala fides.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County;
W. G. Byrne, Judge.

Bill by M. S. Holt, against John King and

others. Decree for defendants, and plaintiff appeals. Reversed.

Linn, Byrne & Cato, for appellant. W. W. Brannon, for appellee.

DENT, J. M. S. Holt filed his bill in the circuit court of Lewis county against John King, W. W. Brannon, and E. A. Bennett, clerk of the county court of Lewis county, for the purpose of setting aside a tax sale of 100 acres of land to said King, and the assignment thereof made by him to said Brannon, and to prevent the clerk of the county court from making a deed therefor. Plaintiff bases his right to maintain this suit on the fact that he has a purchase-money lien against the land, and therefore had the right to redeem the same, but he does not seek to enforce such purchase-money lien. It appears, however, that there are suits pending already in which this may be done. The prayer of the bill is that plaintiff "may be awarded an injunction against the said E. A. Bennett, clerk of the county court of Lewis county, restraining him from making such deed to said W. W. Brannon, and that said W. W. Brannon may be enjoined and restrained from taking such deed or further proceeding to obtain the same, and that he may have a decree declaring the said land redeemed, and the said assignment canceled and annulled, and that he have his costs, and such other, further, and general relief as the court may see fit to grant." Defendant Brannon appeared, entered a demurrer, and filed an answer to the bill, claiming that he purchased the land, and did not redeem it, and denying the right of plaintiff to the relief prayed. Depositions were taken by both parties, and on a final hearing the court dismissed the bill.

Plaintiff admits, in his bill that he knew of the delinquency and sale of the land, and that he intended redemption of the same, but, being informed that the defendant Brannon intended to redeem, he acquiesced therein. He then alleges various irregularities in the delinquency and sale of the land, sufficient to vitiate the same. As to these he should not be heard to speak, as he was in no wise misled by them, and had ample opportunity to redeem notwithstanding such irregularities. He knew the land had been returned delinquent, that the taxes were unpaid, that it was sold, and who the purchaser thereof was, in time to have asserted his rights. Against his own neglect a court of equity will afford him no relief.

The controversy therefore narrows itself down as to whether defendant Brannon redeemed or purchased the land, and, if the former, whether plaintiff has the right to maintain this suit to have such redemption declared, or to be permitted to redeem such land. A lien creditor, under section 15, c. 31, Code 1899, has the privilege of redemption; but he is under no obligation to do so,

and may waive such privilege and become a purchaser. But he cannot do both at the same time. That is, he cannot take advantage of the right to redeem in so far as the purchaser at the delinquent sale is concerned, and yet claim to be a purchaser in so far as the landowner or other lienors are concerned. A redemption, by whoever made, inures to the benefit of the landowner, and hence to all lien creditors, as it relieves the land from tax delinquency, as though it had never occurred. While a purchase deprives the landowner and all other lienholders of all claim or title to the land, unless redeemed within the limit fixed by law. It would therefore be unjust to allow a lienholder, or even one claiming to be a lienholder, to compel the tax purchaser, by virtue of the statutory privilege, to submit to a redemption of the land, and yet convert it into a purchase, as to the owner and other lienors, by taking a secret assignment of the tax purchaser's rights. An open assignment is proper to secure to the lienor the right to hold the amount of taxes as a lien upon the land, or even to take the title in trust for this purpose, but not to give the lienor taking advantage of his statutory privilege of redemption the right to hold absolute title to the property. The defendant Brannon, in his evidence, states the manner in which he obtained from the tax purchaser an assignment of his rights as follows, to wit: "I talked with Mr. King about redeeming of him, and he was inclined to refuse the offer, and I said, 'Now, Mr. King, I have concluded to redeem the tract,' or words to that effect, and 'I will make you a tender of the amount of money necessary if you require it, or will give you my check,' or words to that effect; and he said my check was all right, and he would make no question about that, but that he would refuse the offer. I then told him that his refusal was all right, and I had no complaint to make against him, and that I would simply go to Mr. E. A. Bennett, clerk, and pay the necessary amount, and thereby effect the redemption. He left me, and after some time returned and said that he had seen Mr. Bennett, the clerk, who had informed him that I could redeem in the manner just indicated, and he had suggested to Mr. King that he would as well allow me to redeem, and Mr. King said, 'I am willing to let you redeem it.' I then said to Mr. King, in the presence of Mr. R. L. Zinn, who was performing some clerical work for me along about that time, that I would prefer that he would assign his purchase to me, so that, if anybody wanted to redeem it, they would have to pay me the money, with interest, or I would hold the land. I told him that I had already borne considerable burdens to relieve the Butcher lands from forfeiture, and that all creditors had been chiefly benefited thereby, and I did not like to increase the amount of expenditure, and layout of the money; and he said, in the presence of Mr. Zinn, that he

would just as leave assign the claim to me as not, remarking that I was offering to make him whole." This plainly shows that defendant Brannon was not making a bona fide purchase of the tax purchaser, but forcing him to permit a redemption of the property, and, after convincing the tax purchaser of his legal right to make a redemption, persuaded him to make an assignment of his rights simply because he was being made whole, and could not avoid the alleged rights of defendant to redeem. Hence it should be treated as a mere statutory redemption, and not a purchase. Defendant Brannon, having paid the money necessary to redeem, might take the title in his own name to secure repayment thereof, but he should hold as trustee for the benefit of the landowner and other lienors who might otherwise be defrauded of their rights, and he obtain, by reason of his statutory privilege of redemption, an unconscionable advantage over them. Nor does it make any difference whether defendant Brannon had the right to redeem or not. If he did not have the right, he would be guilty of fraud in representing that he had, and thus securing a redemption under a false pretense. In either event he should hold as trustee for the benefit of those interested. In taking advantage of the statutory privilege to redeem, he puts himself in the same position as a person whose duty it is to redeem, and the attempt to convert a redemption by either into an absolute purchase is inequitable, and will be avoided at the instance and for the benefit of an interested party who has been prevented from making such redemption. *State v. Eddy*, 41 W. Va. 95, 23 S. E. 529. When the statute conferred upon a lienor the right to redeem, it imposed upon him the duty not to assert such right in such manner as to mislead and injure co-redemptioners. *Black on Tax Titles*, § 280; *Fair v. Brown*, 40 Iowa, 209.

It is insisted, however, that Brannon owed no duty to Holt in connection with the matter, and that he had the right to redeem or buy without consulting Holt. This is undoubtedly true, if the transaction was open and free from any charge of fraudulent concealment or deception to deprive Holt of his right of redemption. The indisputable facts in the case are as follows: Holt held a lien on the land in controversy for \$1,700—far more than its value. Brannon held an individual lien subsequent to Holt's, and which could not be reached if Holt's lien remained. King purchased the land at tax sale. Brannon insisted he had the right to, and would, redeem the land either from King or Holt. Holt informed King he wanted to purchase from him if it would be legal, and, if not, he wanted to redeem the land. King informed Holt that Brannon was going to redeem the land. On the same day King went to Brannon to let him redeem the land, when Brannon persuaded King, in the presence of Zinn, his clerk and typewriter, to make him

an assignment of his purchase for the amount necessary to redeem the land—in the assignment recited "for valuable consideration." Zinn, Brannon's clerk, under Brannon's direction, prepared the assignment, and, being a notary public, took the acknowledgment of King and his wife thereto. This all occurred on the 26th of December, 1901, and the time for redemption expired on the 1st day of January, 1902. No one knew of this assignment but the parties thereto and Zinn, Brannon's clerk. It was not put on record. Whether there was any agreement to secrecy or not does not appear, but it does appear that the matter was kept secret from Holt by all those who were present at the making of the assignment, and it was not known to him until some time afterwards, on inquiry of the clerk. It further appears that it was to Brannon's interest to have it kept secret. His clerk testifies that Mr. Brannon said at the time of the assignment, and as inducement thereto, "that he had held up these people quite awhile, and it had been quite a burden to him, and, if they redeemed the land that they were talking about, he would be out all his money, but that, if he purchased it, they would either have to pay him back the money, or he would hold the land." This shows it was Brannon's intention to prevent a redemption of the land, if possible. The parties so understood, and knew it was necessary, to accomplish this purpose, that the assignment should be kept a matter of secrecy from Holt until the expiration of the time of redemption. It was so kept secret. The effect of all this was that Holt was deprived of his lien. King got nothing that he would not otherwise have gotten, and Brannon got all that Holt lost. Brannon tries to justify himself in his answer by claiming that Holt was trying to do the same thing. Holt stood on a different ground, as Brannon himself admits when he says that Holt's lien was more than the value of the property. This being true, Holt's purchase thereof, either openly or secretly, would have injured no one, while Brannon's redemption of the land would inure to the benefit of no one but Holt—the very person whom he shows by his answer and deposition he did not want to benefit. Hence there can be no other conclusion than that it was the intention of Brannon to purchase this land and defeat Holt's lien thereon. He may have intended to do so legally, but in doing so he had no right to take advantage of any false position in which Holt had been placed by his words or conduct, whether knowingly or willfully done or not. After Brannon found out by this suit that his language and conduct communicated to Holt by King had misled Holt and prevented him from redeeming the land, instead of obeying the Golden Rule, which, according to Jewish interpretation, "That which is hateful unto thyself do thou not to another," is the delight of equity, he retains Holt's property,

and claims himself innocent of wrong. Equity looks at the results of conduct, and not to protestations of honest purpose. If the rule were otherwise, no fraudulent conveyance would ever be interfered with, for all men who engage in unjustly depriving their neighbors of their property first convince themselves of the legality of their conduct and the purity of their motives. This is why our books are so full of cases convicting persons of fraud, against their most solemn protestations to the contrary. *Frazier v. Brewer*, 52 W. Va. 306, 43 S. E. 110; *Moore v. Mustoe*, 47 W. Va. 549, 35 S. E. 871, 81 Am. St. Rep. 812; *Atkinson v. Plumb*, 45 W. Va. 626, 32 S. E. 229; *Bank v. Atkinson*, 32 W. Va. 208, 9 S. E. 175. The number of such cases is beyond computation. It has been said that language was invented to conceal motives and intentions, and, while this cannot be accepted as stating an axiom, yet it may be admitted that language has proven an ever-ready help in time of trouble. The law never accepts language as proof against contradicting facts and circumstances, and, when these lead to a certain conclusion, no words, however sincere, can overthrow it.

The undisputed facts in this case show that Holt has been deprived of his property by the concealment of the truth from him after he had been misled by the conduct and representations of those who have deprived him of the same, and one of whom enjoys the full benefit of his loss, and retains the same after full knowledge of the wrong suffered. "Fraud has been defined to be any kind of an artifice by which another is deceived." *Pothier*, cited 1 *Mad.* 205. All surprise, trick, cunning, dissembling, and other unfair way by which another is cheated is fraud. Collusion, in a court of equity, is fraud. 3 *Atk.* 757. In short, "fraud is infinite." 2 *Tuck. Com.* 411. The suppression of the truth is equivalent to the utterance of a falsehood, and both are frauds. 2 *Tuck. Com.* 415. There is no question but that King is guilty of fraud, in a legal sense, by concealing from Holt the assignment made by him to Brannon. If a person make a representation that is true, and afterwards he renders such representation false by his own act, and another is about to be deceived thereby to his injury, he is guilty of fraud, unless he corrects the delusion produced by his former representation. 14 *Am. & Eng. En. Law* (2d Ed.) 74. In *Dickinson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618, Mr. Justice Swayne says: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

King is guilty of legal fraud, yet he de-

rives no benefit therefrom. Why he concealed from Holt the fact of the assignment is a matter of legal inference from the effect thereof, as there is no positive testimony showing the reason therefor. If Holt had been given the opportunity, which was denied him, of cross-examining Brannon's witnesses, this matter might have been made plain. Brannon claims to be wholly innocent, yet he receives, and after full knowledge retains, the benefit of King's fraud. In section 211, *Ferry on Trusts*, it is written: "So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured, or, as Lord Chief Justice Wilmut said, 'Let the hand receiving the gift be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it.'" *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. When Brannon found out the manner in which Holt had been deceived, if he wished to relieve himself from the many imputations of collusion apparently justified by the facts and circumstances of this case, and place his conduct above suspicion, he should have promptly afforded the opportunity to Holt to have redeemed the land, and not have waited for the interference of a court of equity. Whether he loved his enemy or not, he should have meted out to him even-handed justice. It was the duty of King to have relieved Holt from the delusion under which he was laboring by reason of the former's representations, and it was the duty of Brannon, who profited by such delusion, when he became cognizant of the manner in which Holt had been deceived, to offer him proper restitution. Holt having in this manner been deprived of his right of redemption, equity will hold that the assignment was nothing more than a redemption, and will enjoin the clerk from making a deed to the purchaser's assignee. Nor will it be necessary for the plaintiff to make a tender and keep it good, for he was prevented from so doing during the redemption period by the conduct of the purchaser and his assignee. This is not such a proceeding under the statute to set aside for irregularities or other causes a deed obtained by a bona fide purchaser, wherein a tender is required. *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509. It is a suit instituted to estop a redemptioner from converting a redemption into a purchase in deprivation of the plaintiff's rights, and from obtaining a deed for the property which would forever conclude plaintiff as to his vendor's lien.

While the allegations of the bill are not as specific as they might be, yet they are sufficient to justify the relief sought. They set out sufficient facts to show the fraudu-

lent conduct of King, inuring to Brannon's benefit, and that Brannon intended to retain the same to the injury of the plaintiff.

Nor has plaintiff been guilty of such laches as would bar his equity. The evidence shows that Brannon only redeemed the land, and that he induced the purchaser to make an assignment, which, if enforced, operated to deprive plaintiff of his vendor's lien, which was kept concealed from Holt until the time of redemption had passed.

In some states notice is required in all cases before a redemption can be precluded. Black on Tax Titles, § 329. Equity requires notice where the proposed redemptioner is about to be misled to his injury by the representations of the purchaser in collusion with other redemptioners. If Brannon had notified Holt, or directed King to have notified him, in time for redemption, he would have received his outlay back, with interest, or, if he had offered to have permitted Holt to redeem, even after this suit was brought, he would have been entitled to be remunerated for his outlay; but, as he stands on his legal rights, he is entitled to no more.

On the solicitation of Mr. Brannon, through his counsel, this opinion has been revised the third time. He disclaims all disposition to wrongfully deprive Mr. Holt of his property, and that if he has been guilty of any wrong in the matter, which he in no wise admits, it is a mistake as to his legal rights. He is entitled to the full benefit of such disclaimer.

The decree is reversed, the assignment held a redemption of the land, and the injunction perpetuated.

BRANNON, J., absent.

(119 Ga. 833)

WRIGHTSVILLE & T. R. CO. v. KELLEY.

(Supreme Court of Georgia. March 30, 1904.)

VENUE—EVIDENCE—INSTRUCTIONS.

1. On the trial of an action for damages alleged to have been sustained in Wrightsville, Johnson county, evidence of a witness to the effect that he remembered an occurrence when a man claimed to have been injured at Dublin, in Laurens county, but that he did not know who the man was, and could not say that it was the plaintiff, furnished no basis for a charge submitting to the jury the question whether the plaintiff's injuries were sustained in the county in which the suit was brought, or in Laurens county. Especially is this true when the plea filed by the defendant set up no such contention.

2. Where the court correctly submitted to the jury a contention of counsel, it is not error, in the absence of a written request for such an instruction, to fail to charge "the effect of said contention if found by the jury to be true from the evidence."

3. Where the judge, at the conclusion of his charge, gave, by request of counsel, additional instructions as to a contention which had not been previously specifically dealt with, it was not error for him to preface such instructions with the remark, "I did not cover that, gentlemen, in so many words;" nor can it be said that the tendency of the remark was to lead the jury to believe that the judge considered this contention of no importance.

4. Whatever inaccuracies there may have been in the charge as to the amount, the plaintiff would be entitled to recover in the event the defendant was found liable, it is evident, from the amount of the verdict, that no harm was thereby done the defendant. The charge, as a whole, fully and fairly covered all the points at issue, and was not open to any of the objections made to it in the motion for a new trial. While the evidence was conflicting, that for the plaintiff was sufficient to authorize the verdict returned in his favor, and the judgment overruling the motion is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; H. G. Lewis, Judge.

Action by J. W. Kelley against the Wrightsville & Tennille Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Daley & Bussey, for plaintiff in error. Faircloth & Blount and James K. Hines, for defendant in error.

CANDLER, J. Affirmed. All the Justices concur.

(119 Ga. 781)

ATLANTA, K. & N. RY. CO. v. WILSON.

(Supreme Court of Georgia. March 29, 1904.)

LIMITATIONS—RENEWAL SUIT—ACTION—DISMISSAL—JURISDICTION—REVERSAL—REMITTITUR.

1. If the point be raised by special demurrer, the plaintiff, who relies on the privilege of renewal under Civ. Code 1895, § 3783, to escape the bar of the statute, may be required to attach a copy of the petition in the first suit, so that the court may determine, as matter of law, whether it was for the same cause of action as the second, between the same parties, brought before the original bar had attached, and in a court having jurisdiction of the subject-matter.

2. Civ. Code 1895, § 3783, is remedial, and to be liberally construed, so as to preserve the right to renew the cause of action set out in a previous suit wherever the same has been disposed of on any ground other than one affecting the merits.

3. A suit brought in a court having jurisdiction of the subject-matter is not void, and when the petition therein is seasonably served operates to toll the statute.

4. A suit in such a court is notice of the plaintiff's intent to enforce by judicial proceedings the cause of action therein indicated, and is effective to warn the defendant to preserve its evidence for use therein or in a renewal suit.

5. Where the plaintiff begins an action in a court of this state having jurisdiction of the subject-matter, and, after the bar of the statute has attached, the same is dismissed because of a ruling indicating that the court has no jurisdiction of the person, such action may be renewed within six months in another court of this state having jurisdiction of the person and the subject-matter.

6. Where there is a plea to the jurisdiction, which is overruled, and a verdict for the plaintiff, which is reversed by the Supreme Court on the ground of error in reference to the question of jurisdiction, the receipt of the remittitur by the clerk of the lower court after its adjournment or during recess vacates the verdict and judgment in favor of the plaintiff and re-establishes the control of the trial court over the case.

7. Thereafter, and before the remittitur is entered on the minutes, the plaintiff, in term time or vacation, may dismiss the suit.

8. The petition set out a cause of action in the administratrix under the Tennessee statute, but the children were improperly named as beneficiaries, and direction is given that their names be stricken as such.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by L. M. Wilson, administratrix, against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See 41 S. E. 699; 42 S. E. 356.

Mrs. Wilson, as administratrix, brought suit under the Tennessee statute for the homicide of her husband, which she alleged occurred on December 21, 1898. Suit was filed in Cobb superior court September 28, 1899, the petition averring that the company's principal office was there located. The railway company filed a plea to the jurisdiction, alleging that by charter its residence was in Fulton county, and that the courts of Cobb county had no jurisdiction, the homicide not having occurred there, but in Tennessee. Thereupon the administratrix immediately instituted another suit for the same cause of action in the city court of Atlanta on December 17, 1899. To this suit the railway company pleaded in abatement the suit pending in Cobb county. This plea was sustained on June 21, 1901. The judgment was affirmed by the Supreme Court April 3, 1902, 41 S. E. 699. It does not appear when the remittitur was filed in the city court of Atlanta, but the judgment of the Supreme Court was made the judgment of the lower court on May 7, 1902. In the meantime the plea to the jurisdiction of Cobb superior court had been overruled, the case there tried on its merits, resulting in a verdict for the plaintiff, and a motion for a new trial made, which, on August 8, 1902, was granted by the Supreme Court (116 Ga. 189, 42 S. E. 356) on the ground that the lower court had committed error in holding, under the evidence offered, that the superior court of Cobb county had jurisdiction to try the case. When the remittitur granting the new trial in Cobb county was received does not appear, but it was there received during the recess of the court; and after it was there filed, but before it was made the judgment of the court, the plaintiff, on September 3, 1902, dismissed the suit in Cobb, and bought the present action in the city court of Atlanta on November 5, 1902. The defendant demurred to the petition on the grounds (1) that the cause of action was barred by the statute of limitations; (2) because there is no law for pleading two former suits which have been nonsuited, dismissed, or discontinued, as the basis of a renewal suit; (3) because the former suit in the city court of Atlanta was not nonsuited, dismissed, or discontinued within the meaning of the statute, but was finally adjudicated on a plea constituting a good defense thereto; (4) because

this suit was disposed of more than six months prior to the filing of the present suit; (5) that, it having been adjudicated that the superior court of Cobb county was without jurisdiction, the suit there filed was not such a former suit as would prevent the statute from running. There were also special demurrers because the heirs at law of the plaintiff were set out, and because no cause of action was set out in the plaintiff as administratrix, such right having been alone in the widow. The court overruled the demurrer, and the plaintiff excepted.

Cited for plaintiff in error: *Williamson v. Wardlaw*, 46 Ga. 126; *Kimbro & Morgan v. Virginia & T. Air-Line Ry. Co.*, 56 Ga. 185; *Gray v. Hodge*, 50 Ga. 262; *Moss v. Keesler*, 60 Ga. 44; *Rountree v. Key*, 71 Ga. 214; *Cox v. R. R.*, 68 Ga. 448; *McIver v. R. Co.*, 110 Ga. 223, 36 S. E. 775; *Phipps v. Alford*, 95 Ga. 215, 22 S. E. 152; *Hamilton v. Phenix Ins. Co.*, 111 Ga. 875, 36 S. E. 960; *Carpenter v. Ry. Co.*, 112 Ga. 152, 37 S. E. 186; *Southern Ry. Co. v. Goodrum*, 115 Ga. 689, 42 S. E. 49; *Hill v. State*, 115 Ga. 833, 42 S. E. 286; *McClendon v. Hernando Co.*, 100 Ga. 219, 28 S. E. 152; *White v. Moss*, 92 Ga. 244, 18 S. E. 18; *Colley v. Gate City Coffin Co.*, 92 Ga. 669, 18 S. E. 817; *Rumph v. Truelove*, 60 Ga. 482; *Gilmore v. Georgia R. & Banking Co.*, 93 Ga. 483, 21 S. E. 50; *Knox v. State*, 113 Ga. 930, 39 S. E. 330; *Brunswick Grocery Co. v. Brunswick & W. R. Co.*, 106 Ga. 270, 32 S. E. 92, 71 Am. St. Rep. 249; *Meador v. Dollar Sav. Bank*, 56 Ga. 605; 3 Coke, 275; *Richards v. Maryland Ins. Co.*, 8 Cranch, 84, 3 L. Ed. 496; 1 Lord Raymond, 482; *Bagley v. Stephens*, 80 Ga. 736, 6 S. E. 695; *Harrison v. Walker*, 1 Ga. 32; *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Webb v. Ry. Co.*, 88 Tenn. 128, 12 S. W. 428; *Loague v. R. R.*, 91 Tenn. 458, 19 S. W. 430; *Railroad v. Bean*, 94 Tenn. 388, 29 S. W. 370; *Adams v. Holden* (Iowa) 82 N. W. 468; *Foote v. Pfeiffer*, 70 Mich. 581, 38 N. W. 586; *Humphrey v. Carpenter*, 39 Minn. 115, 39 N. W. 67.

Cited by defendant in error: *Wilson v. Atlanta, K. & N. Ry. Co.*, 115 Ga. 171, 41 S. E. 699; *Atlanta, K. & N. Ry. Co. v. Wilson*, 116 Ga. 189, 42 S. E. 356; *Civ. Code* 1895, § 8786; *Rountree v. Key*, 71 Ga. 214; *Cox v. Berry*, 13 Ga. 806; *Jordan v. Faircloth*, 27 Ga. 372; *Hendrix v. Kellogg*, 32 Ga. 435; *Smith v. Bryan*, 60 Ga. 628-631; *Grimes v. Jones*, 48 Ga. 362; *Mercer & Co. v. Davidson*, 80 Ga. 495, 6 S. E. 175; *Cohen v. Southern Exp. Co.*, 53 Ga. 128; *Knox v. State*, 113 Ga. 929, 39 S. E. 330, 9 Lea, 841; *Webb v. East Tennessee, V. & G. R. Co.* (Tenn.) 12 S. W. 428.

Smith, Hammond & Smith, for plaintiff in error. *Hoke Smith*, *H. C. Peeples*, and *Clay & Blair*, for defendant in error.

LAMAR, J. (after stating the foregoing facts). Where, to prevent the bar of the statute of limitations, the plaintiff relies on

the privilege of renewal within six months, conferred by Civ. Code 1895, § 3786, a copy of the record in the first suit should be attached, so that the court may determine as a matter of law whether the two suits were for the same cause of action and between the same parties. The court should have before it the petition, rather than the conclusions of the pleader thereon, for the further reason that it should be in position to determine whether the first suit was itself brought within the statute, and in a court having jurisdiction of the subject-matter. But here there was no special demurrer for failure to attach such exhibit. Enough appears to permit the determination of the question as to whether the present suit was saved by the renewal statute. Compare *Gibbs v. Crane*, 180 Ill. 191, 54 N. E. 200. The plaintiff, being in doubt as to which court had jurisdiction, instituted separate suits for the same cause of action in Cobb and Fulton counties. If either or both were effective to prevent the running of the statute and to permit the renewal under Civ. Code 1895, § 3786, there is nothing in our law calling upon her to elect on which she would rely as the foundation for the right. The railroad company insists that it was ruled in *Atlanta, K. & N. R. Co. v. Wilson*, 116 Ga. 189, 42 S. E. 356, that the superior court of Cobb county had no jurisdiction. It contends, therefore, that the suit was void, did not arrest the running of the statute of limitations, and cannot be used as a basis for a renewal within six months under Civ. Code 1895, § 3786. It relies upon *Williamson v. Wardlaw*, 46 Ga. 126, *Ferguson v. New M. Co.*, 51 Ga. 609, and *McClendon v. Hernando Co.*, 100 Ga. 219, 28 S. E. 152, that suits void for want of service; *Hamilton v. Phenix Co.*, 111 Ga. 875, 36 S. E. 960, *Hill v. State*, 115 Ga. 833, 42 S. E. 286, that a void application for a certiorari; *Edwards v. Ross*, 58 Ga. 149, that a void attachment; *Moss v. Keesler*, 60 Ga. 44, that a suit in another state or in the United States court—cannot be relied on to prevent the running of the statute, nor to preserve the privilege of renewal. It relies particularly upon *Gray v. Hodge*, 50 Ga. 262, and *Moss v. Keesler*, 60 Ga. 44, where it was held that “a suit in a court having no jurisdiction is no suit at all, but a mere nullity,” and cannot be the foundation for the right of renewal. On the other hand, the defendant in error seeks to differentiate these cases, drawing the distinction between “void” and “voidable” suits; insisting that what was said in *Moss v. Keesler* as to jurisdiction was obiter, and that the case was rightly decided on the ground that a suit brought in the United States court is not within the provisions of Civ. Code 1895, § 3786. She also insists that *Gray v. Hodge* was rightly decided on grounds other than that relating to jurisdiction, as the renewal statute could not be used to save a case barred by the limitations act of 1869; that the court had no jurisdiction of the subject-mat-

ter under the Constitution of 1868, the consideration of the debt being a slave; that the judgment of dismissal of the first suit on the ground that the court had no jurisdiction was conclusive that the same court, for the same debt, had no jurisdiction in the second, and that what was written as to a void suit was obiter. She also relies on *Rountree v. Key*, 71 Ga. 214, where the petition alleged that the courts of Telfair county had jurisdiction, and the defendant filed a plea that he resided in Macon county. Acquiescing in the correctness of this plea, the plaintiff failed to prosecute his action, and the suit was dismissed after the bar had attached; but within six months it was renewed in Macon county, where the defendant then resided, and this court held that, though the dismissal had not been by the plaintiff, it might be renewed in Macon county, saying “that this court has gone to great lengths in permitting the renewal of suits within six months, so as not to be barred, if the original suit was not barred, so as to extend the provisions to almost any case where the suit was dismissed not on its merits.” It is not necessary to re-examine these cases, nor to determine whether there is any real conflict, and, if so, which line of authorities is to be followed; for here it is evident that the suit in Cobb county cannot be treated as void. It was sufficiently valid to be used as a means of abating the later suit brought in the city court of Atlanta. And if enough of a former suit to sustain a plea in abatement, it was enough of a suit to prevent the running of the statute, and to form a stock upon which the renewal suit might be grafted. When this court decided that the plea in abatement, because of the pendency of the former suit in Cobb county, was well founded in point of law and fact, it was necessarily adjudicated, in view of Civ. Code 1895, § 5094, that “the first action was not so defective that a recovery thereunder could not possibly be had.” It was not absolutely void; the court had jurisdiction of the subject-matter. In fact, in passing on the plea in abatement, it was distinctly recognized that the suit in Cobb county was far from being a nullity; for it was expressly said that “the defendant has surely been called upon to do something in the way of defending against the original action. If it had ignored that action, it would not, after a judgment therein, have been heard to say that the same was ‘ineffectual.’” *Wilson v. Atlanta, K. & N. Ry. Co.*, 115 Ga. 183, 41 S. E. 705. In selecting Cobb county as the venue in which her action was to be tried the plaintiff made a mistake, but was not guilty of such laches as to warrant the defendant in insisting that nothing had been done to interrupt the running of the statute. Section 3786 of the Civil Code of 1895 was intended to afford relief from such mistakes, accidents, and errors. If the plaintiff had brought her suit properly, there would have been no occasion to discontinue. When the

reason for discontinuance appeared, or was determined by the court, the statute allows a renewal for the very purpose of avoiding the result of the error. The mistake cannot, then, be relied on to prevent the right to renew. Unless the case is an absolute nullity, the defective or improper suit may be used to nurse the cause of action into full life in the proper form and forum. The acts of 1847 and 1856 (Civ. Code, § 3786) are remedial. The decisions of this court to that effect in *Gordon v. McCauley*, 73 Ga. 669, *Cox v. Berry*, 13 Ga. 306, and *Rountree v. Key*, 71 Ga. 214, are in accord with the decisions of courts in other states under similar statutes. In *Coffin v. Cottle*, 16 Pick. 385, Chief Justice Shaw said: "This is a remedial statute, * * * and should have such construction as will best carry into effect the intent of the Legislature. This statute is founded on the presumption that, if a creditor had permitted his debt to remain a certain length of time without any attempt to enforce it, or to revive and perpetuate the evidence of it, it is paid or otherwise discharged. * * * But this presumption does not arise if the creditor resorts to legal diligence to recover his debt within the time limited; and the proviso follows this obvious consideration, and declares that, where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality which he can remedy or avoid by new process, the statute shall not prevent him from doing so, provided he follows it promptly, by a suit within a year." In *Smith v. McNeal*, 109 U. S. 430, 3 Sup. Ct. 321, 27 L. Ed. 986, in discussing what would be such laches, the court said: "Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute; as, if an action in ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace." In *Little Rock v. Manees*, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45, it appeared that a suit was brought in a justice's court for injury to personal property, the damages being laid at \$125. On appeal the judgment was reversed on the ground that in that particular class of cases a justice's court had no jurisdiction where the amount in controversy was more than \$100, but the court said that the renewal act "was intended to secure that class of suitors from loss, who, from causes incident to the administration of the law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action yet undetermined by giving them a reasonable time within which to renew. * * * The remedy was evidently intended to be coextensive with the evil." The plaintiff was therefore allowed to maintain its renewed suit. In *Weatherly v. Weatherly*, 81 Miss. 662, a

judgment was reversed in the Supreme Court for want of jurisdiction in the trial court, but the plaintiff was allowed to maintain the renewed suit. To the same effect is *Woods v. Houghton*, 1 Gray, 580. In *Cox v. E. T., V. & G. R. Co.*, 68 Ga. 446, and *Constitution Pub. Co. v. De Laughter*, 95 Ga. 18, 21 S. E. 1000, it was held that a suit begun in the United States court in Georgia could not be used as a basis of a renewal in a state court. In other jurisdictions, on cogent reasoning, the opposite view is taken. Yet their rulings are of value in so far as they discuss the effect of a want of jurisdiction in the United States court, when the suit therein is relied on to support the new action. In *Pittsburgh R. Co. v. Bemis*, 64 Ohio St. 26, 59 N. E. 745, it appeared that Bemis brought suit against the Pittsburgh Railroad Company and the Wagner Palace Car Company, in the United States Circuit Court, for false imprisonment. The Wagner Company demurred, and was dismissed. Later, and after the bar, the plaintiff's case against the remaining defendant was dismissed for want of jurisdiction. He renewed in the superior court of Cincinnati, and the court held that the first proceeding was the commencement of an action; that he failed otherwise than upon the merits, and was entitled to commence a new action within one year, saying that "in no text-book and in no reported case cited save *Sweet v. Electric Light Co.*, 97 Tenn. 252, 30 S. W. 1090, is there any statement or intimation that the question of the jurisdiction of the court has any potency whatever in determining what is and what is not an action. * * * It must be conceded that the weight of authority supports the proposition, as a general rule, that a dismissal of a former suit for want of jurisdiction in the court in which it was brought is such a failure as will not constitute a bar to another action. * * * Questions of jurisdiction are often of the very nicest which lawyers have to determine for their clients and courts to decide for litigants. * * * It is clearly unreasonable to compare the mistake in the present case as akin to the bringing of such a case before a justice of the peace or a mayor. It is quite apparent that the intention was to secure that class of suitors from loss who, without laches or fault, but from causes incident to the administration of the law, are compelled to abandon a present action without a determination of its merits, and give to such without distinction an opportunity in reasonable time within the statute to renew such action." Justice Gray, in *McCormick v. Elliot* (C. C.) 43 Fed. 472, said that "a plaintiff may bring a new action * * * even if the first action is dismissed for want of jurisdiction of the court in which it was brought. And it has been so held by Mr. Justice Clifford and Judge Lowell in *Caldwell v. Harding*, 1 Lowell, 326 [Fed. Cas. No. 2,302]." He therefore ruled that, where a suit was brought in the superior court of

Massachusetts, and, after the bar of the statute, was reversed, it might be renewed in the United States Circuit Court within a year. The decision in *Atlanta, K. & N. Ry. Co. v. Wilson*, 116 Ga. 189, 42 S. E. 356, set aside the verdict because of the erroneous charge of the court on the subject of the legal residence of the company. As the question of jurisdiction depended upon questions of fact, the effect of the ruling was not to dismiss the case, but to leave it still pending in Cobb county. But upon the return of the mandate the verdict and judgment in favor of the plaintiff ceased to be longer of force. Good practice requires that the remittitur should be entered upon the minutes of the trial court, but such entry is not necessary to restore its jurisdiction and control over the case. As soon as the remittitur is received by the clerk, the case should again be docketed. The reversal vacates the judgment below, and after the remittitur has been so received the plaintiff in term time or vacation may dismiss her suit. Compare *Knox v. State*, 113 Ga. 929, 39 S. E. 330; *Wiggins v. Tyson*, 112 Ga. 745, 38 S. E. 86; *Lyon v. Lyon*, 103 Ga. 747, 30 S. E. 575; *Folmar v. Folmar*, 71 Ala. 136 (2); *Dryden v. Wyllis*, 53 Iowa, 391, 5 N. W. 518; *Cox v. Pruitt*, 25 Ind. 90. The petition set out a cause of action. The suit under the Tennessee statute was maintainable by the administratrix, and the general demurrer was properly overruled. In *Atlanta, K. & N. Ry. Co. v. Smith*, 119 Ga. 607, 46 S. E. 553, it was held that, there being a widow, it was improper to set out the names of the children as beneficiaries, and direction is given that this ground of the special demurrer be sustained, and that the names of the children be stricken as beneficiaries.

Judgment affirmed, with direction. All the Justices concurring.

(119 Ga. 746)

BLACK v. STATE.

(Supreme Court of Georgia. March 29, 1904.)

RAPE—IMPEACHMENT OF WITNESS—LEWDNESS—INSTRUCTIONS—EVIDENCE.

1. A woman sworn as a witness to prove a rape alleged to have been committed upon her may be impeached by proof of bad repute as to lewdness, but not by evidence of specific acts of unchastity.

2. Nor was the withdrawal by the court of the woman's denials of specific acts of lewdness hurtful to the plaintiff in error.

3. While the oft-repeated observation of Lord Hale as to rape cases is entirely proper by way of argument to the jury, it is not a fitting charge by the court.

4. While the court erred in charging as an abstract proposition: "If, however, a female yields because she is forced by fear of death or by duress, the intercourse, under such circumstances, would be against her will, and the offense would be rape"—there being no evidence to justify such charge—the case was sufficiently made out by evidence of actual force, and this

error was not repeated in subsequent charges as to the use of force.

5. The court correctly charged the jury as to the effect which evidence of lewdness on the part of the woman might have, both as to her credibility and as to the probability of her yielding.

6. The court committed no harmful error in charging or in refusing to charge, and the jury having found the defendant guilty, upon sufficient evidence, and the trial judge having approved their finding, this court will not interfere.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Newman Black was convicted of crime, and brings error. Affirmed.

A. L. Franklin, Austin Branch, and Geo. T. Jackson, for plaintiff in error. J. S. Reynolds, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

TURNER, J. The plaintiff in error was tried in the superior court of Richmond county upon an indictment charging him with the crime of rape. The jury found him guilty, with a recommendation of mercy, and he was by the trial judge sentenced to imprisonment in the penitentiary for a term of three years. He made a motion for a new trial on various grounds, which being overruled, he sued out a bill of exceptions to this court.

The offense was alleged to have been committed upon one Lucy Wood. According to her story, she was a country girl, about 18 years old, and went to the city of Augusta in search of employment at the factories. On the night of the 3d of August, 1903, she went, accompanied by the woman with whom she boarded, to a ball which was had at a place in that city called the "Platz," and there got acquainted with the prisoner. At a late hour of the night, her female friend having left her at that place, she accepted the company of the prisoner, who undertook to guide her to the house at which she stayed. They started off in a direction different from that from which she had come to the ball, but the prisoner assured her that he knew a nearer route. He took her along a path which led to a lonely place, beyond police protection, where there was a street railroad track, and there made to her improper proposals. She repelled his overtures, but he pulled her down in spite of all the resistance she could make. She made outcry, and a colored man approached and made known his presence, but was warned by the prisoner to leave, which he did. The prisoner then took her a short distance further, when he renewed his effort to have intercourse with her, dragging her down the side of the railroad into a ditch, despite her protests and resistance. She called for help, and attracted the attention of three colored persons who lived in the vicinity, and also of Stephen McCoy, a white man, and Sol Jones, a colored man, who were watching a cornfield some

¶ 1. See *Rape*, vol. 42, Cent. Dig. §§ 55, 56.

four or five hundred yards away. In response to her cries, they came near to the place where the assault upon her was made; but, before they could interfere, the prisoner had accomplished his purpose, notwithstanding she continued to resist him as best she could. Under the protection of McCoy and Jones, to whom she related what had occurred, she returned to the city, and repeated to a policeman her account of the crime, and caused the prisoner to be arrested. Both McCoy and Jones, who were called as witnesses in behalf of the state, confirmed the testimony of Lucy Wood as to what took place after they appeared on the scene, and as to the subsequent arrest of the prisoner; and they testified with some detail as to the woman's pleadings and outcries while the prisoner was violating her person; that her clothes seemed to be torn, and that she was apparently offering all the resistance she could.

1. On the trial the defendant offered J. T. Amerson as a witness to prove that he had had connection with this young woman on a certain occasion. The court excluded this evidence, holding that her lewdness could be shown only by proof of general bad character, and not by specific acts. The court did not err in this ruling. In the case of *Camp v. State*, 3 Ga. 417, which was a case of assault with intent to rape, this court held that "evidence that the person charged to have been injured is in fact a common prostitute, or evidence of reputation that she is a woman of ill fame, may be submitted to the jury to impeach her credibility and disprove her statement that the attempt was forcible and against her consent." But the court added (page 422): "It seems that testimony of specific acts of lewdness is not admissible"—citing *Rex v. Clarke*, 2 Stark. N. P. 334; *Rex v. Barker*, 3 Car. & P. 467; *Rex v. Hodgson*, Russ. & R. C. C. 211; *People v. Abbot*, 19 Wend. 192; 6 Car. & P. 562; *Com. v. Murphy*, 14 Mass. 387; *contra*, *Com. v. Moore*, 3 Pick. 194. There are many other American and English cases which seem to hold the same view, though there are some very respectable courts which have held the other way. See 23 Am. & Eng. Enc. L. (2d Ed.) 871, and authorities cited in notes 3 and 4; also *Hughes*, Cr. L. & Proced. § 337, and cases cited. We adopt the view indicated in the Georgia case above referred to, because it seems to be supported by the great weight of authority, and appears to be founded on good reason. If proof of specific acts of lewdness were admitted, it would "not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice." *Shirley's Leading Cr. Cas.* *57, citing *Reg. v. Riley*, 18 Q. B. Div. 481. Many of the text-books on criminal law are to the same effect. These authorities relate to acts of lewdness committed with persons other than the prisoner.

There are many cases holding that the injured woman may be examined as to previous acts of this character with the defendant, on the hypothesis that acts of lewdness committed with him prior to the alleged assault tend strongly to show that she was not in fact forcibly violated on the particular occasion under investigation. The rule relating to the admission of evidence of this nature is thus stated in 3 Gr. Ev. (16th Ed.) § 214: "The character of the prosecutrix for chastity may also be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible."

2. When, in the present case, the woman alleged to have been wronged was upon the stand, she was interrogated as to specific acts of lewdness committed with Amerson and other men, but denied that she had ever had criminal intercourse with any of them. Counsel for the defendant insisted that the proffered testimony of Amerson was admissible for the purpose of discrediting or impeaching her as a witness, if not admissible for any other purpose. Thereupon the court withdrew from the jury her testimony as to this matter, stating that he would exclude from the consideration of the jury all testimony relative to specific acts of lewdness. This action on the part of the court is assigned as error in one of the grounds of the motion for a new trial. We do not think a witness can be impeached by proof of inadmissible matters, merely because the witness has denied these matters; and we accordingly hold that the withdrawal of the testimony of Lucy Wood, in which she denied having had improper relations with other men than the prisoner, was not error as to the prisoner, and that the trial judge rightly excluded the testimony offered of specific acts of lewdness.

3. The defendant also, by his counsel, asked the court to charge the well-known saying of Lord Hale that the crime of rape is one which is "easily charged, hard to prove, and harder still to be defended by the accused, be he ever so innocent." And to this saying the defendant added some words, equally strong and potent, to a similar effect. This admonition is proper for the court below always to bear in mind on the trial of a rape case, and also for this court to consider, and it was a proper matter of argument before the jury, but it should not have been given in charge by the court. In the case of *Crump v. Com.*, in the Supreme Court of Appeals of Virginia, 23 S. E. 700, that court held that such an instruction to a jury in a rape case was irrelevant and without application, saying, in this connection: "The oft-repeated observation of Lord Hale, which

It was here attempted to put in the form of an instruction, was entirely proper by way of argument to the jury, but not as an independent instruction." We concur in this view, and hold that the refusal to charge as requested in the present case was not ground for a new trial.

4. In the motion for a new trial the plaintiff in error complained that the court erred in charging as follows: "If, however, a female yields because she is forced by fear of death or by duress, the intercourse under such circumstances would be against her will, and the offense would be rape." The assignment of error made upon this charge is (1) that it does not state a correct principle of law, and (2) that there was no evidence before the court upon which to base such a charge. An examination of the brief of evidence in this case convinces us that this charge should not have been given, there being no testimony to the effect that she yielded on account of any fear of death. But we have concluded that, as the crime was sufficiently shown to have been committed by force, this erroneous charge does not require the granting of a new trial. See *McGruder v. State*, 83 Ga. 616, 10 S. E. 281 (7). It is also to be observed that in a subsequent paragraph of the charge the court instructed the jury as follows: "If you believe, beyond a reasonable doubt, that that intercourse was had against her will, and that it was accomplished by force, you would be authorized to find the defendant guilty of rape." This latter charge did not contain the erroneous matter. The court further instructed the jury: "It must appear that the carnal knowledge was had against the will of the woman, and was accomplished by force. It must appear that the female offered resistance to the sexual act. The defendant must do more than simply importune; he must exercise sufficient force to overcome the will of the female." This charge also omitted the objectionable matter.

5. Another complaint made in the motion for a new trial is that the court committed error in charging the jury as follows: "It is no excuse that the woman be lewd or unchaste. The crime of rape may be committed on the most abandoned and depraved strumpet. Yet, in determining whether or not the intercourse was by consent or against the will of the female, the jury should take into consideration all evidence relating to the character of the female for chastity or want of chastity." The complaint is that this charge restricted the jury as to the purposes for which they could consider the evidence tending to show that the woman alleged to have been raped was lewd, and that the judge should have instructed the jury that such evidence could be considered as affecting her general credibility as a witness. It is to be noted that the foregoing charge is not assailed for what it says, but for what it does not say. It is a sufficient reply to this com-

plaint to observe that the court elsewhere in its charge, while instructing the jury as to the law on the subject of impeachment of witnesses, expressly informed them that one "mode of impeachment is by proof of general bad character, or by proof of lewdness"; and also, in another paragraph of the charge, instructed the jury that, among other pertinent matters to be determined by them, was the question "whether or not the female was a woman of good character as to chastity."

6. In the motion for a new trial there is also a general assignment that the verdict is contrary to the evidence and without evidence to support it. In considering this ground of the motion, it is to be stated that there was evidence in the case tending to show that the woman alleged to have been injured was of doubtful purity. While this element of the case was calculated to greatly weaken her testimony, the jury had a right to give to it whatever weight they saw fit, just as they had the right to attach whatever credit they saw fit to the statement of the defendant in denial of the charge brought against him. Moreover, it is to be borne in mind that the testimony of this woman was not unsupported. She was strongly corroborated by the witnesses Stephen McCoy and Sol. Jones, who had been attracted by her cries, while they were at a cornfield a considerable distance from the scene of the crime, and arrived there before the prisoner had made his departure, though too late to render her assistance in repelling his assault upon her. Even where, in cases of this character, the evidence has not been altogether satisfactory to this court, it has upheld convictions. In the case of *Paschal v. State*, 89 Ga. 303, 15 S. E. 322, wherein the accused was indicted for an assault with intent to rape, this court held: "The evidence, though not altogether satisfactory, warranted the verdict; and, as the presiding judge approved the finding by denying the motion for a new trial, the judgment is affirmed." In *Jackson v. State*, 91 Ga. 323, 18 S. E. 132 (4), 44 Am. St. Rep. 25, which was also a case of assault with intent to rape, this court said: "The evidence was barely sufficient to uphold the verdict. It made a case on which the jury might well have doubted whether the accused intended to ravish, but the verdict negatives the existence of any reasonable doubt, and the trial judge was satisfied with the finding." And in the case of *Tolbert v. State*, 93 Ga. 153, 20 S. E. 40, this court declined to set aside a conviction of the accused for the offense of assault with intent to rape, saying: "In view of the evidence, there is ground for grave apprehension that the little girl who was assaulted may have been mistaken in identifying the accused as the guilty person; but this was a question for the jury, and, the trial judge having approved the finding, this court is constrained by law to recognize the doubt as having been rightly solved against the prisoner." We also

recognize the decisive authority of the jury in this case, and that of the trial judge, who was primarily invested with the power to review the finding of the jury.

We find no harmful error in the refusals of the court to charge as requested, nor in any of the charges complained of, or omissions to charge. The general charge given by the court sufficiently covered the issues in the case.

Judgment affirmed. All the Justices concurring.

(68 S. C. 332)

NICHOLS et al. v. MONTGOMERY et al.
(Supreme Court of South Carolina. March 29, 1901.)

PLEADING—COMPLAINT.

1. In determining whether a complaint states a cause of action, the exhibits cannot be considered.

Appeal from Common Pleas Circuit Court of Marion County; Townsend, Judge.

Action by Nichols & McGhee against W. J. Montgomery, W. H. Cross, and E. C. Edmunds, trading under name of E. C. Edmunds. From order overruling demurrers, defendants appeal. Affirmed.

Jos. W. Johnson and Walter F. Stackhouse, for appellants. J. M. Johnson and Junius H. Evans, for respondents.

GARY, A. J. This is an appeal from an order overruling demurrers to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In order to understand clearly the questions presented by the exceptions, it will be necessary to set forth a copy of the complaint and of Exhibit A, which are as follows:

Complaint: "(1) That at the times hereinafter mentioned the plaintiffs, A. B. Nichols and W. H. McGhee, were co-partners in trade, conducting a tobacco warehouse at Nichols, S. C., under the firm name of Nichols & McGhee. (2) That the plaintiffs are informed and believe that at the time hereinafter mentioned, to wit, during the tobacco season of the year A. D. 1899, the defendants, W. J. Montgomery, W. H. Cross, and E. C. Edmunds, were copartners in the purchase and sale of tobacco, under the name and style of E. C. Edmunds, as will appear by reference to the contract, a copy of which is hereto annexed, marked 'Exhibit A.' (3) That from July 27 to October 30, A. D. 1899, to wit, during the tobacco season of that year, the plaintiffs above named sold and delivered to the defendants, to wit, to the defendant E. C. Edmunds, for the use and benefit of himself and his codefendants, W. J. Montgomery and W. H. Cross, under the terms of their said contract, the following described goods and chattels, and paid the exchange, and rendered the services, and furnished the items of cash at the time and for the prices hereinafter specified—that is to

say, as are stated, specified, and itemized in the account thereof hereto annexed and marked 'Exhibit B,' as a part of this complaint, to which all necessary reference is craved, on which account all proper credits are also stated, specified, and itemized; that the total debts on said account amount to \$10,908.44, and the total credits thereon amount to \$10,132.93, leaving a balance unpaid, past due and owing to the plaintiffs thereon, of the sum of \$775.51 by the defendants. (4) That the plaintiffs, before the commencement of this action, made frequent demands upon the defendants for the payment of said balance of \$775.51, and the same was refused." Exhibit A: "The State of South Carolina, Marion County. An agreement entered into this 1st day of October, 1899, between E. C. Edmunds, as the party of the first part, and W. H. Cross and W. J. Montgomery, as parties of the second part, witnesseth: Whereas, said party of the first part is engaged in the business of buying tobacco in orders on the Marion, Nichols and Lumberton markets, and the money to purchase same is being furnished by the Merchants' and Farmers' Bank of Marion, S. C.: Now, in consideration that said parties of the second part shall hold harmless said bank from any loss by reason of said purchases by said party of the first part, he agrees that they shall receive one-fourth of the profits arising from said business, expenses of conducting said business, including interest charges, to be deducted before there is any division of profits. The business is to be conducted and the account kept in the name of said party of the first part, a balance sheet to be rendered monthly. This agreement is to cover the business of the present season and continue of force until dissolved by the mutual consent of the parties hereto. In witness whereof, the parties hereto have affixed their seals the day and year above written. [Signed] E. C. Edmunds. [Seal.] [Signed] W. H. Cross. [Seal.] [Signed] W. J. Montgomery. [Seal.] Witness: [Signed] W. F. Stackhouse."

It will not be necessary to set out a copy of the other exhibit, as it simply contains a statement of account. W. J. Montgomery and W. H. Cross demurred jointly and E. C. Edmunds demurred separately, but their grounds are the same, and are as follows: "(1) Because it appears upon the face of the complaint that defendants were not partners, and therefore could not be sued as such. (2) Because it appears from the exhibit, which forms a part of the complaint, that, if a partnership did exist, all of the partnership debts have been paid, and therefore the action will not lie. (3) It appears upon the face of the complaint that there is a misjoinder of parties defendant."

If the complaint is alone considered in determining whether the circuit court erred in overruling the demurrers, it is apparent that there was no error. The appellants, how-

ever, have not based their grounds of demurrer upon the complaint alone, but also upon the exhibit attached to it. The case of *Cave v. Gill*, 59 S. C. 258, 87 S. E. 817, decides that the exhibits cannot be considered in determining whether the complaint states facts sufficient to constitute a cause of action.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

(68 S. C. 284)

BOND v. CORBIN et al.

(Supreme Court of South Carolina. March 24, 1904.)

DISMISSAL OF ACTION—FAILURE TO PROSECUTE—NOTICE—REVIEW.

1. Where the first case on the trial docket is set on the first day of jury cases, and, when it is called, plaintiff is absent, and in the afternoon is also absent, and again when called the next morning, a dismissal for failure to prosecute is proper.

2. Motion to dismiss for want of prosecution is properly granted, though no notice thereof was given.

3. The Supreme Court will not review the facts stated in affidavits filed on a motion to rescind an order dismissing a case for want of prosecution.

Appeal from Common Pleas Circuit Court of Oconee County; Watts, Judge.

Action by J. A. Bond against W. B. F. Corbin and J. T. McKinney. From an order dismissing case for failure of plaintiff to attend and prosecute, plaintiff appeals. Affirmed.

J. R. Earle and Stribling & Herndon, for appellant. Jaynes & Shelor, for respondents.

POPE, C. J. This action in the court of common pleas for Oconee county, in this state, was begun May 14, 1900. A trial was had at the May, 1902, term of court, and resulted in a mistrial. Again the cause was called for trial at the November term, 1902, when the following circumstances were brought to the attention of his honor Richard C. Watts, as presiding judge: That this cause was at the head of the docket, being cause No. 1 on docket No. 1. That, by agreement of counsel on both sides, it was fixed for trial on Thursday morning. At the hour of trial, that plaintiff failed to appear. That Mr. J. R. Earle had written plaintiff, his client, when the cause would be called for trial, and that no answer had been received, although the plaintiff lived at Pelzer, in Anderson county, which is an adjoining county to Oconee county. The presiding judge postponed the cause until 3 o'clock on Thursday afternoon. Again the plaintiff failed to be in attendance upon the court. That the defendants, with their witnesses, were present in court, and demanded a trial. The presiding judge again continued the further

hearing until Friday morning; stating that, if the plaintiff failed to appear, he would dismiss the cause for want of prosecution if the defendants still demanded a trial. That on Friday morning, when the court assembled, the plaintiff still failed to appear, but had sent this telegram to his attorney: "To J. R. Earle, Walhalla, S. C.: Will come tomorrow. Will try to be there by noon. J. A. Bond." The defendants demanded their right of trial. That thereupon the presiding judge granted the following order: "Upon the call of the above-named action for trial, and the defendants announcing themselves ready for trial, and the plaintiff not being present, now, on motion of Jaynes & Shelor, defendants' attorneys, it is ordered that plaintiff be, and is hereby, nonsuited." In the afternoon of that day (the 7th day of November, 1902) the plaintiff appeared in person, and thereafter during the term of court a motion was made to vacate the foregoing order, and affidavits pro and con were filed. The circuit judge refused the motion. An appeal was then taken from the order of nonsuit, as well as from the order refusing to vacate the same, on these grounds: "(1) For it was error on the part of the presiding judge to order complaint dismissed and a nonsuit entered before the end of the term, and before jurors were dismissed, but his honor should have ordered that the case be passed over, and that it lose its place on the docket, but the case remain on the docket at least until the jurors were dismissed; there being no motion to continue the case beyond the term. (2) For that it was error on the part of the presiding judge to dismiss the complaint and order a nonsuit for want of prosecution, no notice of such motion having been given to plaintiff. (3) For that it was error on the part of the presiding judge to hold that the affidavits furnished do not present such a showing as would entitle plaintiff to have the order rescinded, and to order and adjudge that the motion to rescind be refused, but his honor should have held that, under the affidavits furnished, and the facts stated therein, the order dismissing the complaint and ordering a nonsuit should be rescinded."

In passing upon these grounds of appeal, we feel that it is our duty to emphasize what the court said in the case of *State v. Box*, 68 S. C., at page 404, 44 S. E. 970: "One of the strongest criticisms of the administration of the law relates to the many delays of the trial of the cases. Parties in the criminal and the civil courts should be ready to try their cases promptly." Every man is held to know the law. This November term of court was a regular term. The position of this case was the first on the docket. Counsel on both sides had fixed Thursday morning as the time for the trial of this cause. Yet, when the case was called, the plaintiff is not there. Delay is had till the afternoon session of the court. Still he is absent. On

¶ 2. See *Dismissal and Nonsuit*, vol. 17, Cent. Dig. § 164.

Friday morning it is called for trial, and still the plaintiff is absent. The circuit judge grants a nonsuit, refusing to continue any longer. Was this error? From the earliest adjudications to the present time, this matter is wisely left to the discretion of the circuit judge. *Hort v. Jones*, 2 Bay, 440; *Sheppard v. Lark*, 2 Bailey, 576; *Hunter v. Glenn*, 1 Bailey, 544; *Cook v. Cottrell*, 4 Strob. 62; *Chalk v. McAlilly*, 11 Rich. Law, 153; *State v. Atkinson*, 33 S. C. 106, 11 S. E. 693; and many other cases, concluding with *Heyward v. Middleton*, 65 S. C. 496, 43 S. E. 956. We can see nothing in the conduct of the circuit judge in this matter which was erroneous. The first exception is overruled.

As to the second exception, we will state that there was no necessity for giving a notice for the motion to dismiss the case for want of prosecution. The case was regularly reached on the docket. The plaintiff was not ready to go on. Therefore he ought to have been dismissed. This exception is overruled.

Lastly as to the third exception: We cannot pass upon the sufficiency of the facts developed by the affidavits. This is a law case. This court cannot, under the law, canvass the facts. They were for the circuit court. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 335)

WADDELL v. WADDELL et al.

(Supreme Court of South Carolina. March 29, 1904.)

WILLS—CONSTRUCTION—LEGACIES—CHARGE ON LAND.

1. Testator's will, after devising certain lands, provided that it shall be "distinctly understood that I will to each of my grandchildren twenty dollars to be paid to them by their parents when they become old enough to know the worth of money. This is a matter of trust and love for my grandchildren of course the money to come out of my landed estate." Held to carry a legacy to each grandchild living at testator's death, and to be a charge on the land devised to each parent, but not to restrict the power of sale conferred, subject only to restraint in equity in the event of an attempted breach of trust.

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Action by David Hoke Waddell against Randell T. Waddell and others. From the decree, defendant James G. McCarter appeals. Affirmed.

Cothran, Dean & Cothran, for appellant. Haynsworth, Parker & Patterson, for respondent.

JONES, J. This action was instituted to compel James G. McCarter to comply with his agreement to purchase a certain tract of land, and involves a construction of the will of T. E. Waddell. The said testator, after

devising a life estate in 65 acres of land, devised the remainder to his children, David Hoke, Randell, and Mattie. The plaintiff, David Hoke Waddell, has acquired all the interests of the other devisees, and contracted to sell the land to the defendant James G. McCarter; but he, being advised that there was some doubt about the title, declined to comply, and as a result this friendly suit was brought in order to have construed the following provision in said will: "I wish it to be distinctly understood that I will to each of my grandchildren twenty dollars to be paid to them by their parents when they become old enough to know the worth of money. This is a matter of trust and love for my grandchildren of course the money to come out of my landed estate. Hoke Randell and Mattie care for their own children. Right here I wish to be distinctly understood that each of my grandchildren to have twenty dollars."

The cause came on to be heard before Judge R. O. Purdy, who rendered the following decree: "The question presented in this case is whether, under the will of T. E. Waddell, his children, David Hoke Waddell, Randell T. Waddell, and Mattie T. Cook, have the power to dispose of the real estate given to them by the testator's will. These devisees were directed by the will to pay to each of their respective children \$20. This was declared to be a matter of trust and love, the money to come out of his landed estate. It appears that the devisees fully intend to carry out the directions of the will, and they admit that they became bound by the terms of this direction. But the question presented to me is whether a sale made by them of the lands given them will be valid. Some question might be raised as to whether the lands were charged with the payment of this money to the grandchildren. But even if this constitutes a charge, my opinion is that the devisees have the power of sale, and that such sale will release the land from the charge. There is no ground for suspecting that the devisees intend any breach of trust, but, on the contrary, they declare their purpose to carry out the directions of the testator, and he, on his part, declared that this was a matter of trust and confidence. My opinion, therefore, is, and it is so adjudged, that a sale made by David Hoke Waddell of the land described in the complaint will carry a good fee-simple title, free from all charges imposed by the will. It is therefore ordered that Jas. G. McCarter do comply with his contract as set forth in the complaint."

The appellant, McCarter, alleges error in holding that a sale made by David Hoke Waddell will carry a good fee-simple title free from all charges imposed by the will, and in ordering specific performance, because (a) the legacies of \$20 to each of the grandchildren are made by the will charges upon the testator's land; (b) that grandchild

dren born after the death of the testator will be entitled to said legacy of \$20 each.

We think that only those grandchildren who were in esse at the death of the testator are entitled to claim the legacy "when they become old enough to know the worth of money." The language of the will indicates this. The testator, as a matter of trust and love for his grandchildren, was anxious that each of them should receive \$20; showing that he had in mind grandchildren who had inspired his trust and love. Furthermore, the period of payment is indefinite. The general rule upon this subject is, where there is a fixed period when the distribution is to take place, as when the legatees shall arrive at the age of 21, then all the children born before that time will come in, and such as are subsequently born will be excluded; but, where there is an indefinite period for distribution, the legacy vests at the death of the testator, and none can take except those in esse at that time. *Myers v. Myers*, 2 McCord, Eq. 256, 16 Am. Dec. 648. This rule might be different if, as matter of fact, there were no grandchildren in esse when the will speaks, but the admitted facts in this case show that a number of grandchildren were living at the death of the testator. It is alleged in the complaint and admitted that all the grandchildren of the said testator who were in existence at the time of his death have been joined as parties defendants to this action. We think, further, that the testator meant to charge the land devised to each parent named with the payment of the legacy of \$20 to each of the children of such devisee. The legacy was made payable by the parents, and each parent devisee was in this matter to take care of his or her own children. But an absolute estate had been devised to each devisee, and the gift to the grandchildren in no wise affected the absolute power of the sale which each devisee had. Indeed, the gift being of money, and the land being referred to only as a source of payment, it is perfectly consistent with the trust imposed upon the devisees to pay these legacies that they have unrestricted power of sale, subject only to restraint by a court of equity in event of an attempted or proposed breach of trust, all of which features are eliminated from the case by the unassailed conclusions of the circuit court. We agree, therefore, with the circuit court, that plaintiff can convey a good fee-simple title, free from all charges imposed by the will, and that defendant McCarter should specifically comply with his contract of purchase.

The judgment of the circuit court is affirmed.

WOODS, J. (concurring). I concur in the view that the legacies were limited to grandchildren in esse at the death of the testator. On the authority of *Bank v. Gregg*, 46 S. C. 169, 24 S. E. 64, I think the legacies were

charges on the land, and that the devisees could not make a title free from this charge. The grandchildren, however, were parties to the cause, and, not having appealed, are bound by the circuit decree. For this reason, I concur in the result.

(68 S. C. 269)

KETCHIN v. RION et al.

(Supreme Court of South Carolina. March 24, 1904.)

POWERS—EXECUTION—VALIDITY—WILLS.

1. An execution of a power under a will, which is contrary to the limitation contained therein, is void.

2. Where a power of distribution created by will is void because executed contrary to the limitation contained in the will creating it, the property passes under the first will.

Appeal from Common Pleas Circuit Court of Fairfield County; Klugh, Judge.

Action by Thomas H. Ketchin, as executor of the will of Mary C. Rion, against Preston Rion and others. From decree Margaret H. Rion, Floride C. Barron, Holbrook Rion, Lucy Rion-Boozar, Hannah Rion-Williams, Willie C. Rion, Margaret H. Rion, Jr., Lucile Rion, Charles H. Barron, Floride C. Barron, Jr., Jacob T. Barron, Jr., Elizabeth K. Barron, and Jane Fisher Barron appeal. Modified.

Buchanan & Hannahan, for certain appellants. A. S. Douglass, for appellant Mrs. Barron and children.

POPE, O. J. Col. James H. Rion, of Fairfield county, in this state, departed this life on the 12th day of December, 1886. He left a last will and testament, dated the 1st day of April, 1882. In this last will and testament he had provided for his daughter Mrs. Kitty Rion-McMaster. By a codicil to his will, dated 24th October, 1883, she having died during his lifetime, he declared that all provisions in his will for said daughter are revoked. The testator nominated his wife, Mrs. Mary C. Rion, as the sole executrix of his will and codicil, who after his death procured said will and codicil to be admitted to probate, and qualified as executrix. Before Mrs. Rion, as executrix, had settled the estate of her deceased husband, she died, leaving her last will and testament, in which she appointed the plaintiff the executor of the said will. She attempted in her will to execute the power she had under her husband's will. Thus matters were in confusion, as will be made to appear by reference to the will and codicil of Col. Rion as well as the will of Mrs. Rion. We have thought it best to reproduce those three papers herein, by copies thereof, as follows:

"In the name of God. Amen. The following is my last will and testament:

"Item 1. I give and devise unto Sally, the wife of Preston Rion, and her children all my Ford place. Also all my personal prop-

erty upon my said Ford place and Preston 'Ford' place. Also all the bonds, mortgages and debts owing me at the time of my death by my son, Preston.

"All the foregoing for her children during her life without power of sale or of encumbering the same by mortgage or other lien, and after her death to her children, who may survive her, or if she die without surviving children, then all the aforesaid property is to be disposed of as my son Preston may appoint by a written declaration of trust. All the foregoing devise and bequest I value at five thousand dollars.

"Item 2. I devise and bequeath to my son Holbrook all my Peay places, being all my Rochelle Hill place, all my Dutchman Creek place, and all my Belton place, in all about eighteen hundred and twenty-three acres and one thousand dollars. All of the above I value at five thousand dollars.

"Item 3. I devise to Floride Barron and her children during her life, with power of sale by her but not of encumbering by mortgage or other lien, my Arthur lot in Columbia and improvements thereon, and after her death the same to belong to her surviving issue or failing issue to her husband, Jacob T. Barron, as he may appoint by declaration of trust in writing. In case of sale, the proceeds must be invested in real estate subject to the foregoing restrictions and limitations. This property I value at three thousand five hundred dollars.

"Item 4. I devise to Maggie Rion my law office in Columbia and my large diamond shirt button. The foregoing land and stud I value at fifteen hundred dollars.

"Item 5. I give to Kitty Rion McMaster my smaller diamond shirt button valued at three hundred dollars.

"Item 6. I value my law library and office fixtures at five thousand dollars.

"Item 7. I devise and bequeath to my wife Mary C. Rion all the real and personal estate and choses-in-action not hereinbefore disposed of which may belong to me at my death for and during her natural life with power to sell any part or give off to our children whenever she may choose, or she may dispose of the same by will, but in giving off or disposing by will she must not, with what I have herein given, give any daughter less than five thousand dollars nor any son over five thousand dollars in value, unless when each shall have received five thousand dollars there be a balance in which case she may equalize or dispose of such balance as she chooses.

"Item 8. My tombstone must be a single upright slab of marble not costing over fifty dollars.

"Item 9. In all contingencies arising under Item 7 (seven) Sally and her children are to stand in lieu of Preston with remainders and limitations as provided in Item 1 (one), and whatever Floride receives is to be subject to

the remainders and limitations provided in Item 3 (three).

"Item 10. I give to my grand-son, James H. Rion, Jr., all my jewelry (except my diamond snuff box) not hereinbefore disposed of, my sword and military trappings, my South Carolina College book, my presentation copy of Calhoun's works, my Calhoun's Memorial book, Mr. Calhoun's watch seal and portfolio, Dr. Leibert's inkstand and five hundred dollars.

"Item 11. At the death of my wife in case she make no will my children are to be equalized. Item 9 (nine) also applying in such case.

"Item 12. I constitute my wife the executrix hereof. Executed as my last will and testament this the first day of April, 1882.

"James H. Rion."

"Codicil.—State of South Carolina, County of Fairfield.

"In the name of God. Amen.

"My daughter Kitty Rion McMaster having died, the following is a codicil to my last will and testament, executed on 1st April, 1882:

"1. All provisions made in my will for my daughter Kitty are hereby revoked.

"2. I give to my daughter Hanna my smaller diamond shirt button valued three hundred dollars.

"3. I desire my wife (or executor) to make a provision for my grand-son Kitt Rion McMaster equal to one-half of what she would have made for my daughter Kitty had she lived. She is to use for his benefit the income of his share if she deem expedient until he arrives at the age of twenty-one years and should he attain that age, then turn over to him his share. Should he die before attaining maturity then the provision for him is to return to my estate and be distributed under the provisions of my will.

"Executed this the twenty-fourth day of October, 1883.

"James H. Rion."

Will of Mary C. Rion.

"State of South Carolina, County of Fairfield.

"In the name of God. Amen.

"I, Mary C. Rion, do hereby declare this to be my last will and testament and all others null and void and do hereby revoke any heretofore made by me.

"Item 1. The estate of my husband, James H. Rion, deceased, is in debt to me as executrix for the maintenance and administration of the same. I desire my executor to collect as soon as possible this money and first pay any personal debts I may owe, the remainder of said money being my own personal property I bequeath and give for love and affection to my three daughters, viz.: Margaret H., Lucy Rion and Hannah Rion, in equal division share and share alike.

"Item 2. It is my desire to execute the

wishes of my deceased husband, James H. Rion. To this end I dispose of the property therein devised and bequeathed by his will to me as follows:

"To my daughter Margaret H. Rion I give and bequeath thirty-five hundred dollars.

"Item 3. Floride Calhoun Barron having received the value of thirty-five hundred dollars in a house and lot during her father's life, which she has now occupied near twenty years and has held possession of, I consider that with the interest accruing the investment, she, Floride, has hereby gotten more from her father's estate than any of the other sisters will get at my death—it would be unjust to make her a legatee under my will. Therefore I declare that said Floride, her husband nor any of her children have any part or parcel in any real estate, monies, bonds or chattels I may leave or anything accurate to the estate in the future.

"Item 4. My husband making no provision in his will for our son Willie Calhoun Rion but 'leaving him to me on his death-bed to do what I could for him,' I give and bequeath twenty-five hundred dollars to his son Willie and his daughter Margaret, share and share alike, and hereby appoint and constitute my daughter Margaret their trustee.

"Item 5. I give and bequeath to my daughter, Lucy Rion Edwards, five thousand dollars and my silver, pictures, clothes and household linen.

"Item 6. I give and bequeath to my daughter, Hannah Rion Williams, four thousand dollars, also my rosewood bedroom set. And to her daughter Theresa any script belonging to me personally.

"Item 7. I give and bequeath to Kitt Rion McMaster twenty-five hundred dollars.

"Item 8. I have desired to execute my husband's will as far as possible. The estate after paying all legitimate debts had no available funds, and therefore I offered at different times some valuable real estate for sale, but my son, Preston Rion, by circulating erroneous and damaging reports of my ability to give clear titles to any property I sold, made sales impossible and prevented me settling Item 10 of my husband's will. Therefore I consider it due to the heirs at law to exonerate my executor from paying same after my death. No date for payment of Item 10 was fixed and therefore no interest could be claimed if I had been able to settle it and it could not have been paid until all other debts had been paid.

"Item 9. The sideboard claimed and held by Preston's wife Sally was never given to her by me and belongs to my dining room set and shall be claimed and restored as my property at my death.

"Item 10. I desire a careful appraisement shall be made by disinterested parties as J. E. McDonald and T. K. Elliott of my real estate, stocks and household effects of which the estate may be possessed at my death and at its appraised value any piece of property

may be taken by agreement of any daughter as a part of her legacy without the necessity of a public sale.

"Item 11. To Helen Rion, Jr., I give and bequeath my piano music, music stool and music rack and tuning keys.

"Item 12. If, after a careful appraisement of real estate, bonds and script, the amount shall aggregate less than the amount to be divided under my will in proportion to the amount bequeathed to each one, I direct and leave the aggregate remainder to be prorated among Margaret H., Lucy, Hannah, Kitt McMaster and Willie's two children.

"Item 13. I nominate and appoint and constitute Thomas H. Ketchin as the executor of this will and hereby give unto him full power and authority to sell and convey any real estate and other properties. And also desire him to make as speedy settlement as possible with the heirs. I desire that my executor be not required to give bond for the faithful execution of this trust and in witness thereof I hereby subscribe my name this 26th day of February, A. D. 1900.

"Mary C. Rion."

This action was brought by the executor of Mrs. Mary C. Rion's will, to which the children of Col. Rion and certain of his grandchildren who are affected by the terms thereof are parties defendant. All parties defendant duly answered. A reference was made to J. J. Nell of all the issues of law and fact. His report was made and came on to be heard by Judge Klugh, who pronounced the following decree:

"Col. James H. Rion died on December 12, 1886, leaving his widow and seven children, to wit, Preston, Margaret H., Floride C., Willie C., Holbrook, Lucy, and Hannah. He left a will, of which his widow, Mrs. Mary C. Rion, was appointed executrix. In his will he gave to the wife and children of his son Preston property which he valued at \$5,000; to his daughter Margaret property which he valued at \$1,500; to his daughter Floride C. Barron and her children property which he valued at \$3,500; to his son Holbrook property which he valued at \$5,000; and to his daughter Hannah (in a codicil to his will) property which he valued at \$300. It will be observed that he made no specified provision for his son Willie C., nor his daughter Lucy. The seventh paragraph of his will is as follows: '7. I devise and bequeath to my wife, Mary C. Rion, all the real and personal estate and choses in action not hereinbefore disposed of which may belong to me at my death for and during her natural life, with power to sell any part or give off to our children whenever she may choose, or she may dispose of the same by will, but in giving off or disposing by will, she must not, with what I have herein given, give any daughter less than five thousand dollars, nor any son over five thousand dollars in value—unless when each shall have received five thousand

dollars, there be a balance, in which case she may equalize or dispose of such balance as she chooses.' In the tenth paragraph of his will he gives to his grandson James H. Rion certain articles of personal property and five hundred dollars. In the codicil to his will he directs his wife to make provision for his grandson Kitt Rion-McMaster, son of his predeceased daughter, equal to one-half of what she would have made for his daughter Kitty had she lived.

"Mrs. Mary C. Rion qualified as executrix and took possession of her husband's estate and entered upon the enjoyment of the same as life tenant. In her returns as executrix she charged the estate with many items for taxes, repairs, insurance, and other expenses with which she as life tenant is chargeable, and her return also shows various payments to her children on account of their interest in the estate. It also appears that in the year 1896 she conveyed to Holbrook Rion a tract of 118 acres of land for the expressed consideration of \$32.50 and one bale of cotton of five hundred pounds per year during her life. No mention of this transaction is made in her returns. It appears that Col. Rion paid \$380 for the same land in 1883. These matters will be adverted to hereafter. Mrs. Rion died in 1901, leaving a will of which the plaintiff herein is the executor. She attempts in her will to execute the power conferred upon her by the seventh clause of her husband's will by disposing of his estate to certain ones of their children. She gives to her daughter Margaret H. Rion \$3,500; declares that Floride C. Barron, having received \$3,500 in her father's lifetime, is entitled to nothing further from the estate; gives to the two children of Willie C. Rion, who died after his father, \$2,500, to be divided equally between them; gives to her daughter Lucy \$5,000; to her daughter Hannah \$4,000; to her grandson Kitt Rion-McMaster \$2,500; and declares her inability to pay a legacy of \$500 bequeathed by her husband to his grandson James H. Rion, on the ground that she has been unable to do so, and exonerates her executor from doing so; and confers upon her executor 'full powers and authority to sell and convey any real estate or other properties.' It will be observed the whole scheme of Mrs. Rion's will proceeds upon the conversion of the property of Col. Rion into money, although she made no sale thereof herself, and the disposal of the money to certain of her children whom she seems to prefer over the others.

"The obvious conflict of the provisions of her will with those of her husband's was well calculated to create doubts in the mind of her executor as to his powers and duties. He therefore brings this action against the heirs at law and the devisees and legatees under the wills of Col. Rion and Mrs. Rion for the purpose of having said wills construed by the court, his own duties defined, and

the rights of the several parties under said wills ascertained and adjudicated. The defendants all answer, setting up their respective contentions. The cause was referred to J. J. Neil, Esq., as referee, and he has taken testimony, stated the account of Mrs. Rion as executrix, and also made a statement showing the amounts advanced by her as executrix to the several defendants, and has filed his report. The cause comes before me upon said report without formal exceptions.

"The main question in the case is the proper construction of the seventh clause of Col. Rion's will, and whether Mrs. Rion has executed the powers therein conferred upon her. In this clause the testator, after giving to his wife a life estate in all the residue of his estate left after certain devises and bequests therein specified, confers upon her power to do three things: (1) To sell any part of the estate; (2) to 'give off to our children whenever she may choose'; (3) to dispose of the estate by will. Upon the exercise of the second and third of these powers the testator placed this restriction: that 'in giving off or disposing by will she must not, with what I have herein given, give any daughter less than five thousand dollars, nor any son more than five thousand dollars in value.' If there should be a balance after each one has received five thousand dollars, as to such balance the restriction is removed, and 'she may equalize or dispose of such balance as she chooses.' The executrix failed to execute the power to sell and also the power to give off, except a very limited extent under each, which will be hereafter noticed. So the question is narrowed to this: Has Mrs. Rion executed the power to dispose of the estate of her husband by will? This power is subject to the above restriction. In exercising it, she must give to each daughter that which, added to what she has already received, will amount to full five thousand dollars in value; and that before she gives to any son any part of the estate. In her attempt to exercise this power, Mrs. Rion proceeds upon the assumption that the whole estate is converted into money, which, as we have seen, she in the last clause of her will authorized her executor to do. To her daughter Margaret, who had received \$1,500 worth of property under her father's will, she gives \$3,500, making the full amount \$5,000 for her; to her daughter Lucy, who had received nothing under her father's will, she gives \$5,000, besides certain of her own personal effects; to her daughter Hannah, who had received under her father's will property valued at \$800 and also certain advances from her mother, she gives \$4,000, making more than the full amount of \$5,000 for her; to her daughter Floride, who had received under her father's will property valued at \$3,500, she gives nothing, declaring that said Floride and her husband and children shall have no part in the estate, nor anything accruing thereto in the future.

to the children of her son Willie she gives \$2,500; and to Kitt Rion-McMaster, son of her predeceased daughter, Kitty, she gives, in accordance with the express desire of her husband, \$2,500. It is manifest that Mrs. Rion in the above disposition transgressed the power conferred by her husband in at least two particulars: First, in excluding Mrs. Barron from any further participation in the estate; and, secondly, in appointing a portion to the children of her deceased son, William, before making Mrs. Barron's share, with what her father had given her, the full amount of \$5,000. Without entering upon a discussion of the authorities, my opinion is that Mrs. Rion's execution of the power, being contrary to the limitations contained in it, is void. *Fronty v. Fronty*, Bail. Eq. 529, 530; *Alexander v. Alexander*, 2 Ves. 640; 2 Min. Inst. (2d Ed.) 748; 22 Encyc. (2d Ed.) 1148-1151; 2 Sug. Pow. *219. The residuary estate of Col. Rion passes, therefore, to his heirs at law, subject to the provisions of the eleventh clause of his will, which is as follows: '(11) At the death of my wife, in case she makes no will, my children are to be equalized. Item 9 (nine) also applying in such case.'

"It becomes necessary to ascertain what portions of the estate have been received by the several heirs either under the will or from the executrix. The heirs are the seven children above named, the wife and children of Preston being substituted for him by the testator, and the wife and children of William, who has died since his father, representing him, and Kitt Rion-McMaster, the son of a predeceased daughter of the testator. The portions given to certain of the children by the testator in his will have already been stated. It appears that Margaret H. Rion has received from the executrix \$20.05; Lucy Rion (Edwards) Boozer, \$159.57; and Hannah Rion-Williams, \$1,074. I do not think the expenses of her education can be charged against Hannah (*Cooner v. May*, 3 Strob. Eq. 185), and it is clear that the four shares of bank stock for the proceeds of which she recelpted to her mother as her guardian were purchased with her interest in certain life insurance money, which, so far as appears, was no part of the estate of her father. These payments to these three daughters was the extent to which Mrs. Rion appears to have exercised the power to 'give off to our children.' The conveyance to Holbrook Rion of a certain tract of land of her testator, as above set forth, was a legitimate exercise of the power to sell a part of the estate which the will conferred upon Mrs. Rion, and the consideration, while it may or may not have been adequate, was more than nominal, and sufficient to support the transaction. The evidence does not warrant the conclusion that there was bad faith in the conveyance. The deed must stand.

"The legacy to James H. Rion, Jr., must be paid, with interest from the 1st day of Janu-

ary, 1888. 18 Ency. (2d Ed.) 793; *Barksdale v. Hall*, 13 Rich. Eq. 180. This is a charge upon the estate, which must be satisfied before any distribution. It is subject to a credit of \$54.23 for payments made on account of it by the executrix. The executor of Mrs. Rion has no authority to sell any part of the estate of Col. Rion; nor, indeed, under the statute, to take any other step in the administration of said estate. Code 1902, § 2502. It is his duty to preserve said estate so far as it has come into his hands, and to deliver it to such person or persons as may show proper authority to demand and receive it from him. The referee finds that the estate of Mrs. Mary C. Rion is indebted to that of James H. Rion in the sum of \$2,263.42, which finding and all his other findings, except as herein modified, are hereby confirmed.

"It will be necessary to have an administrator cum testamento annexo of the estate of Col. Rion before the court before any final order for the winding up of the estate can be made. It is impracticable, upon the record as it is now presented to the court, even to make an order for the sale of the property belonging to his estate, which it seems will be necessary before a distribution of the same in accordance with the terms of his will can be effected. It is ordered, adjudged and decreed:

"1. That the plaintiff, Thomas H. Ketchin, as executor of the will of Mary C. Rion, deceased, do collect and preserve the assets of the estate of James H. Rion, deceased, so far as they have come or may hereafter come into his hands, until the further order of the court, or until some party duly authorized to receive the same shall demand them of him; that the plaintiff, as executor as aforesaid, pay to the estate of James H. Rion, deceased, out of any assets in his hands, or to come into his hands, of the estate of Mary C. Rion, deceased, the sum of \$2,263.42, with interest from July 1, 1902, or so much thereof as such assets will pay.

"(2) That James H. Rion do recover from the estate of James H. Rion, deceased, the legacy bequeathed to him in the will of said deceased, to wit, the sum of \$500, with interest thereon from January 1, 1888, less a credit of \$54.23, and also the specific articles bequeathed to him by the testator in said will, and that he may have leave to proceed as he may be advised to enforce payment of said amount, and also the delivery of said specific personal property.

"(3) That the will of Mrs. Mary C. Rion, in so far as it purports to dispose of the residuary estate of James H. Rion, deceased, is null and void, and that said residuary estate be distributed, after payment of any indebtedness that remains unpaid against such estate, including any unpaid taxes now due or hereafter to become due, and the aforesaid legacy of James H. Rion, Jr., amongst the heirs at law of the said James H. Rion, deceased, in the following proportions, to wit: To the

wife and children of Preston Rion, by substitution for the said Preston Rion, one-eighth part; to Margaret Rion, one-eighth part; to Floride C. Barron, one-eighth part; to Holbrook Rion, one-eighth part; to Lucy Edwards Boozer, one-eighth part; to Hannah Rion-Williams, one-eighth part; to Kitt Rion-McMaster, one-eighth part; to Lucile A. Rion, Willie C. Rion, and Margaret H. Rion, Jr., each one twenty-fourth part. That the share going to the wife and children of Preston Rion is subject to all restrictions, limitations, and remainders set forth and prescribed in item 1 of the will of James H. Rion, deceased, and the share going to Floride C. Barron is subject to the remainder and limitations provided in item 3 of said will. That the following parties, before taking any share of said estate, shall account for the amounts already received by them, respectively, from the estate of the said James H. Rion, deceased, as follows: The wife and children of Preston Rion, \$5,000; Margaret H. Rion, \$1,520.05; Floride C. Barron, \$3,500; Holbrook Rion, \$5,000; Lucy Edwards Boozer, \$159.57; Hannah Rion-Williams, \$1,374. And that the shares of the parties be equalized as provided in the eleventh clause of the will of James H. Rion, deceased.

"(4) That any of the parties to this action have leave to apply at the foot of this decree or in the further progress of the cause for any order or orders that may be necessary to carry out the views herein expressed, or to effect and expedite the settlement and distribution of the estate of the said James H. Rion, deceased.

"(5) That the plaintiff, as executor of the will of Mary C. Rion, deceased, out of the assets of her estate pay the costs of this action."

The parties plaintiff and defendants acquiesced in all of the findings of law and fact by the circuit judge except on two points, which are set out in the two exceptions as follows:

"(1) Because his honor, after holding 'that Mrs. Rion's execution of the power, being contrary to the limitations contained in it, is void,' erred in finding and holding 'that the residuary estate of Col. Rion passed, therefore, to his heirs at law, subject to the provisions of the eleventh clause of his will'; whereas he ought to have held and found that the said residuary estate, after the expiration of the life estate of Mrs. Mary C. Rion, passed under the will of James H. Rion, deceased, and the codicil thereto, to the children of the testator living at the time of his death in equal shares, and to Kitt Rion-McMaster, the son of a predeceased daughter, in the proportion of one-half of a child's share, subject to the provisions of the eleventh clause of the said will, and also of the ninth clause thereof, under which latter clause Sallie and her children are to stand in lieu of Preston, with remainders and limitations as provided in item 1, and whatever

Floride receives is to be subjected to the remainders and limitations provided in item 3.

"(2) Because his honor erred in ordering and adjudging that the residuary estate of James H. Rion, deceased, be distributed, after the payment of any indebtedness that may remain against such estate, and any taxes due or hereafter to become due, and the legacy of James H. Rion, Jr., among the heirs at law of James H. Rion, deceased, in the proportion of one-eighth part to the defendant Floride C. Barron, and one-eighth part to each of his other children living at the time of the testator's death, or their representatives, and also one-eighth part to the defendant Kitt Rion-McMaster; whereas his honor ought to have adjudged that the said estate be divided among the children living at testator's death, or their representatives, and the said Kitt Rion-McMaster, under and according to the provisions of the testator's will and codicil thereto, in the proportion of two-fifteenths part thereof to each of the defendants Floride C. Barron, Margaret H. Rion, Lucy Rion-Boozer, Hannah Rion-Williams, and Holbrook Rion, and two-fifteenths thereof among them to the representatives of Willie C. Rion, deceased, who was living at the time of testator's death, and one-fifteenth thereof to the said Kitt Rion-McMaster, and two-fifteenths thereof to Sallie H. Rion and her children, subject to accounting for amounts already received by the parties, respectively, as stated in the decree."

We will now pass upon these two exceptions.

1. We find no great difficulty in reaching a conclusion on the first exception in favor of the appellants. The circuit judge, having found that the attempted exercise of the power carved out of Col. Rion's will by Mrs. Rion was null and void, felt that it was necessary for the fee in the property of Col. Rion to be vested somewhere, and placed it in his heirs at law, thus admitting the grandson Kitt Rion-McMaster, as the representative of his deceased mother, among the heirs at law. As well remarked in *Mr. Hannah's* argument from *Welborn v. Townsend*, 31 S. C. 408, 10 S. E. 96, "Where there is a will, the policy of the law is not in favor of declaring a partial intestacy unless the reasons for such result are clear and indisputable." It is patent from an inspection of the will and codicil that Col. Rion did not intend any intestacy. He so arranged the provisions of the will and codicil that there could be no intestacy of his estate. We think that a careful study of Col. Rion's will will show that he intended his wife to receive a life estate, but that the residuary estate vested at his death in his seven children, one share to each, and one-half of one share in his grandson Kitt Rion-McMaster. This half share of his grandson Kitt is devised under the codicil. In *Williams v. Holmes*, 4 Rich. Eq. 475, the court holds that: "Where an estate is devised to one for life, with remain-

der to such persons as the tenant for life or any other appointor shall direct and appoint, and, in default of such appointment, to a person or class of persons in esse, the remainder is vested notwithstanding the interposition of the power. The estate is vested in the remaindermen, subject to be divested by the execution of the power." These views are sustained by the cases of *Bilderback v. Boyce*, 14 S. C. 528; *Atkinson v. Dowling*, 33 S. C. 424, 12 S. E. 93; *Bently v. Long*, 1 Strob. Eq. 43, 47 Am. Dec. 523. As we have just held that there was no intestacy as to any property left by Col. Rion at his death, and thus the statute of distributions plays no part in the distribution of his estate, it follows of necessity that the provisions of the will itself must regulate the settlement of the shares therein. Each child must receive a full share and the grandson can only take one-half of one share. Of course, we mean when we say each child must receive a full share that such share of each child must be under the limitations and restrictions of the will. Thus Preston's share goes to his wife and children, and that of Mrs. Barron under the restrictions and limitations of the will, and Kitt Rion-McMaster must have one-half of one full share. The decree is erroneous when it orders a full share paid to the grandson Kitt Rion-McMaster, and must be corrected as herein provided.

It is the judgment of this court that the decree of the circuit court herein shall be modified as herein required, and after it shall have been so modified that it stand affirmed.

(68 S. C. 297)

LENHARDT et al. v. FRENCH.

(Supreme Court of South Carolina. March 24, 1904.)

PLEADINGS—ANSWER—MOTION TO STRIKE.

1. Cir. Ct. Rule 20, which provides that a motion to strike out of any pleading matter alleged to be irrelevant, and a motion to correct pleadings as indefinite, must be noticed before demurring to or answering the pleadings, and within 20 days from service thereof, has no application to an answer; and a motion to strike out part of an answer is not too late, when made after six terms and two mistrials, on submitting an argument on a similar motion to a judge, who did not formally pass thereon, but refused to permit defendant to offer any testimony on the second defense in the answer, which second defense was thereafter, on motion, stricken from the answer.

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Action by Richard Lenhardt and W. B. Perry against Jesse L. French. Judgment for plaintiffs, and defendant appeals. Affirmed.

The following are the exceptions:

"The circuit judge erred in striking out the second paragraph of defendant's second defense to plaintiffs' alleged cause of action, for the following reasons:

"(1) The motion to strike out being made upon the ground that the allegations in said

paragraph were irrelevant, the said motion should have been made within twenty days after the service of the said answer, under rule 20 of the circuit court.

"(2) His honor erred in holding that 'I do not construe the rule of court as requiring a motion of this kind to be made within twenty days after the service of the answer. Such requirement applies to demurring to or answering a complaint.' It being respectfully submitted that, under said rule 20 of the circuit court, motions to strike out of any pleading matter alleged to be irrelevant must be noticed within twenty days from the service thereof.

"(3) Because his honor erred in not holding that plaintiffs, by failing to give notice of the motion to strike out within twenty days from the service of the answer, had waived the right to make such motion.

"(4) Because his honor should have held that the motion having been made at a previous trial of the cause before Judge Watts, and he having heard the motion and allowed the case to go to trial without any formal order in the matter, such action amounted to a refusal of the motion, and was binding upon all succeeding circuit judges.

"(5) Because, the case having been upon the docket for six terms prior to this term, and having been tried three times before the notice of motion was given, the circuit judge should have held that the plaintiffs had waived their right to make such motion at such stage of the proceedings, and that the court had no power, under rule 20 of the circuit court, to grant the motion.

"(6) The circuit judge erred in holding that, 'inasmuch as there have been several mistrials, the result of the same has been just as though there had been no trial,' whereas he should have held that, several trials of the case having been had, the motion to strike out came too late, and that plaintiffs had waived their right to strike out any part of the said answer after having thrice gone to trial under its allegations.

"(7) Because, even if the circuit judge was correct in holding that the matters stated in said paragraph were irrelevant, yet, as plaintiffs had failed to move to strike out said paragraph at the proper time and in the proper way, defendant had the right to introduce testimony responsive to its allegations. The circuit judge erred, therefore, in striking out said paragraph, and refusing to allow defendant to introduce testimony responsive to the allegations of said paragraph."

Blythe & Blythe and B. M. Shuman, for appellant. Jos. A. McCullough, for respondents.

POPE, C. J. On the 20th day of February, 1890, the defendant Jesse L. French made his promissory note, whereby he promised, on the 1st day of October thereafter, to pay to A. J.

French the sum of \$600, for value received, with interest at 8 per cent. On this note was endorsed on the back the payment of \$100 on the 19th November, 1895. The complaint set up these facts, and demanded judgment for \$600, less \$100 paid on the 19th November, 1895, and interest at 8 per cent. per annum, and costs. The answer admitted the death of Mrs. A. J. French, that plaintiffs were legally appointed the administrators of her estate, and that he made the note as described in the complaint. However, he denied the payment of \$100 on 19th November, 1895, or that he ever at any time made a payment of any sum whatsoever. As a second defense, he pleaded the statute of limitations, and in the second paragraph of said second defense he set out: "(2) That this defendant pleaded the statute of limitations all the more willingly because [Mrs. A. J. French] plaintiff's intestate had received from the estate of her husband, Jesse French, Senior, the grandfather of this defendant, at his death, which occurred in July, 1878, the sum of about \$1,800, which had been bequeathed to this defendant by the said grandfather, and left with her to be turned over to the defendant at his majority (he being then a minor), and which she failed and refused to do, and that, in a former action on the note which is the subject of this action, the said sum of \$1,800 was set up as a counterclaim by this defendant, and these plaintiffs pleaded the bar of the statute of limitations thereto, which said plea was sustained by the court, and said counterclaim disallowed and dismissed." This answer is dated 8th day of March, 1901. The case was placed on the docket at the March term, 1901, of the court, and continued on defendant's motion. At the July term, 1901, a trial was had, and, the jury failing to agree, a mistrial was ordered. At the November term, 1901, and the March term, 1902, the case was continued. At the July term, 1902, a mistrial was ordered, but at this trial, which was before Judge Watts, the plaintiffs made a motion to strike from the answer of the defendant subdivision 2 of the second defense. While Judge Watts did not formally pass upon this motion, he refused to permit the defendant to offer any testimony on this second subdivision of the second defense. The plaintiffs gave notice of a motion to strike from the answer this second subdivision of a second defense, which was heard by Judge Purdy, who granted the motion in an order reduced to writing, and the trial again was had, when the jury rendered a verdict for the plaintiffs. The defendant made a motion before Judge Purdy for a new trial on the ground that the circuit judge erred in striking from the answer the second subdivision of the defense, for the reason that, the motion not having been made for a long time after the service of the answer, and after several trials had been had, the plaintiffs had waived their right to make the motion, and that the circuit judge had no power

to grant the motion, under rule 20 of the circuit court. This motion was refused by Judge Purdy. After entry of judgment on the verdict, an appeal was taken on the ground of error in striking out the second paragraph of the second defense set out in defendant's answer. The plaintiffs gave notice that, if this court should find itself unable to sustain the rulings of Judge Purdy, Judge Purdy's ruling can be sustained, because rule 21 of the circuit court and the provisions of the Code as to redundant and irrelevant matter in the pleadings refer only to redundant and irrelevant facts; that inasmuch as the matter stricken out by Judge Purdy did not contain a statement of fact, but purports to give a reason of the defendant's pleading the statute of limitations, said rule of court had no application thereto; that, in that event, the court was right in excluding testimony offered in support thereof, and the error, if any, was harmless. We will now pass upon the questions raised by the appellant.

Rule 20 of the circuit court does not, as it strikes us, govern in this matter. The language of that rule is as follows: "Motions to strike out of any pleadings matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being 'so indefinite or uncertain that the precise nature of the charge or defense is not apparent,' must be noticed before demurring or answering the pleadings and within twenty days from the service thereof." Here this language shows that the object of the rule is to require any objection to the pleadings to be made before the pleading in reply to the same, so that the subsequent pleading may conform to the true condition of the pleading before answering or demurring—just as was held by this court in the case of *Whaley v. Lawton*, 53 S. C. 582, 31 S. E. 660. In the case just cited, an answer was delayed by agreement, but the notice was not given in the 20 days following the service of the complaint. In our judgment, the two cases of *Cohrs v. Fraser*, 5 S. C. 351, and *Nichols v. Briggs*, 18 S. C. 479, control this case, for in the case just cited (*Cohrs v. Fraser*, supra) the motion was not made for about seven months after the pleading against which the motion to strike out was made. Indeed, the court in that case held that this rule of court did not apply. So, also, in the second case (*Nichols v. Briggs*, supra) this court held that the motion could be made at the trial. Although several attempts at a trial were had, resulting in mistrials in the case at bar, what in law was the trial of the cause was that at which a verdict was rendered, and here the motion to strike out the irrelevant matter from the answer was made upon motion before the trial was begun. An inspection of alleged irrelevant matter set out in the second subdivision of the second defense of the answer was only an excuse or an apology for this matter in the answer. It could

not affect the merits of the plea of the statute of limitations, which, upon the pleadings, depended upon the payment of \$100 alleged to have been made in November, 1895.

We agree with the circuit judge when he passed his order striking out of the answer this subdivision 2 of the second defense, and also in refusing to grant a new trial on that account. This is the only ground of objection. No request for a continuance on the ground of surprise was made by the defendant in the court below.

The seven reasons of the appellant why the circuit judge was in error will appear in the report of the case, but, in the abundance of caution, we will examine each one:

(1) We have just held that rule 20 did not govern this case. So the reason fails.

(2) We have already held that the circuit judge committed no error in holding that rule 20 did not govern this appeal.

(3) So, also, if rule 20 did not govern this motion, the 20 days in such rule prescribed could not obtain.

(4) We do not construe Judge Watts' action on this motion, when submitted to him at a previous term of court, as a refusal of this motion. Neither side of the controversy called his attention to the fact that he had not ruled on the motion. But it is a very significant fact that Judge Watts refused to allow any testimony to be offered as to second subdivision of the second defense. This fact is admitted in the record.

(5) The fact of the action being kept on the docket of the circuit court for six terms, while this motion was not made, shows culpable delay on the part of the plaintiffs as to the notice of their motion, but did not destroy their right to make this motion before actual trial.

(6) We have just held that the circuit judge was not in error in holding that the right to this motion was not waived in not having presented it earlier.

(7) We do not conceive that the defendant appellant had any right to introduce testimony in support of this irrelevant matter which had been stricken from the answer.

Lastly, holding as we do, there is no necessity for us to resort to any other matters to support the judgment.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(68 S. C. 304)

STATE v. McDANIEL.

(Supreme Court of South Carolina. March 25, 1904.)

HOMICIDE—EVIDENCE—IMPEACHMENT—RES GESTÆ—INSTRUCTIONS.

1. Where, on trial for murder, the defense is accidental killing, the reputation of deceased when drinking is incompetent on issue of his violence when drunk.

2. On trial for the murder of a town marshal, it is competent to show, on cross-examination,

differences between the town council and defendant about electing a marshal, in order to show the relation existing between the parties.

3. After evidence of contradictory statements by a witness, by way of impeachment, it is incompetent to show that he had made statements in accordance with his testimony at the trial.

4. Where, on trial for murder, there was evidence that deceased had hold of the pistol when he was shot, evidence in return that there were no powder burns on his hands is admissible.

5. The court will not reverse a ruling of the trial judge in excluding evidence of statements of accused made two or three minutes after the homicide and a short distance from the place of the crime, as not a part of the res gestæ.

6. On a trial for murder, an instruction that "if defendant intentionally, wrongfully, killed the deceased, without any justification or without excuse, then he killed him with malice, and that would constitute murder," is not a charge on the facts.

7. An instruction that if defendant wrongfully killed deceased, without justification, then it would constitute murder, properly defined the crime.

8. Where, on a trial for murder, defendant pleads accidental killing, the state must overcome such plea beyond all reasonable doubt.

Appeal from General Sessions Circuit Court of Lexington County; Klugh, Judge.

R. W. McDaniel was convicted of murder, and appeals. Reversed.

Efird & Dreher, G. T. Graham, and Leroy F. Youmans, for appellant. J. Wm. Thurmond and W. H. Sharpe, for the State.

JONES, J. This case was first heard at the April term, 1903, of this court, but, an order for rehearing having been made, it was heard again at the present term. The defendant was tried at Lexington, February term, 1903, under an indictment for the murder of John L. Neece at Swansea, Lexington county, on the 24th day of December, 1902. The jury rendered a verdict of guilty, with recommendation to mercy, and sentence of life imprisonment was imposed, from which he now appeals upon exceptions to the court's rulings as to the admissibility of testimony and charge to the jury.

The first exception alleges error in not allowing the witness Hildebrand to testify as to the reputation of deceased for drinking, in that one issue raised by the defendant was that deceased was a violent and treacherous man when drinking, and that he was intoxicated at the time of the difficulty. The court did not restrict defendant in showing the reputation of the deceased for violence when drinking, and that deceased was drinking at the time of the difficulty. The reputation of the deceased for drunkenness was not relevant. In a prosecution for murder, evidence of the general bad character of the deceased is irrelevant, but evidence of his character or reputation for violence, treachery, etc., is admissible under a plea of self-defense. State v. Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706. There was no plea of self-defense in this case. On the contrary, counsel for defendant expressly declared on trial that defendant did not plead self-defense, but pleaded homicide by accident.

A second exception assigns error in not allowing defendant to testify that he had received a message from the deceased concerning the discharge of blank cartridges within the corporate limits of the town on the day of the difficulty. The deceased was marshal of the town of Swansea, and it seems there was an ordinance of the town against the firing of guns within the corporate limits. The defendant kept a store in Swansea, and was celebrating Christmas Eve by firing several blank cartridges from a shotgun while standing in his store door. The homicide, whether intentional, as contended by the prosecution, or accidental, as contended by the defense, was the result of a struggle between the defendant and the deceased, growing out of the deceased's attempt to arrest defendant for the alleged unlawful shooting of the gun. The court ruled that defendant could not testify as to any message delivered by a third person, as coming from the deceased marshal, about shooting blank cartridges; but later, all objection being withdrawn, the defendant was permitted to testify fully as to the said message as received by him; and the bearer of the message, Joe Adams, testified as to the same, which was to the effect that the marshal permitted or did not object to the shooting of blank cartridges. The exception is therefore without foundation.

The third exception complains that there was error in allowing and compelling defendant to testify as to his action and that of the town council of Swansea in the election of a town marshal, in that said testimony showed a difference between the defendant and the town council—an entirely collateral issue, not competent in this case and prejudicial to the defendant. The solicitor, as it appears, was endeavoring, on the cross-examination of the defendant, to show that defendant had some ill will or unfriendliness to the deceased, by bringing out that defendant had tried to secure the election of another marshal at the time deceased was elected. The question propounded and admitted over defendant's objection was, "You tried to get in another marshal, did you?" The question was competent for the purpose of showing whether the relations of defendant and deceased were friendly.

The fourth exception charges error in refusing to allow defendant's witness Redmond to be asked on redirect examination whether his testimony at the coroner's inquest was to the same state of facts as his testimony on the trial. The solicitor had cross-examined the witness as to his statements in an affidavit used in an application for bail, with a view to show contradictory statements, and appellant contends that the testimony proposed was competent on redirect examination. It would doubtless be competent, after a witness has been cross-examined respecting a former statement made by him, for the party who called him to re-examine him as to the same statement, as in *State v. Tur-*

ner, 36 S. C. 538, 15 E. E. 602; but, where evidence of contradictory statements by a witness is offered by way of impeaching the witness, it is not competent in reply to offer evidence that the witness has on other occasions made statements similar to what he has testified in the cause. 1 *Greenleaf*, Ev. § 469; 10 *Ency. Pl. & Pr.* 330; *Davis v. Kirksey*, 2 *Rich. Law*, 176; *State v. Thomas*, 3 *Strob.* 269. There is an exception to this general rule, making such testimony competent when it is charged that there is a design to misrepresent in consequence of the relation of the witness to the party or to the cause, by showing similar statements made before the relation existed. 10 *Ency. Pl. & Pr.* 330; *State v. Thomas*, 3 *Strob.* 269. This exception to the general rule is illustrated in *Lyles v. Lyles*, 1 *Hill, Eq.* 76, for in that case it was charged that the witness alleged to have made contradictory statements had been induced to testify as he did on the trial by hope or promise of money, and so it was competent to show in reply that the witness had been heard to make statements similar to his testimony at a time previous to the alleged improper relation to the cause. It does not appear that the present instance falls within the exception. There is no ground for a distinction in questions of this kind between testimony on re-examination after cross-examination of same witness and independent testimony. In the case of *State v. Gilliam* (S. C.) 45 S. E. 6, it was held it was not competent to corroborate the testimony of defendant's witness at the trial by showing that the witness made similar statements at the coroner's inquest.

The fifth exception imputes error in allowing W. R. Barra to testify that there were no powder burns on deceased's hands, because not in reply to any testimony offered by defendant. The defendant and one of his witnesses (Joe Adams) had testified that, when the pistol fired, both defendant and deceased had hold of it—the defendant by the stock, and the deceased by the barrel. The testimony that there were no powder burns on deceased's hands had some tendency to show that deceased did not have hold of the barrel of the pistol at the time it was fired, and thus was in reply to defendant's testimony.

The sixth exception alleges error in not allowing the witness Hildebrand to testify to the declaration of the defendant immediately after the shooting, and in holding that the same was not part of the *res gestæ*. The case shows the following in reference to this matter: "Q. Did he say anything about shooting being accidental? A. On the way to his house he did. Q. The Solicitor: Only just what occurred then? A. He asked me to go home. I said for him to go home, as I thought there would be some of Neece's friends— Q. Mr. Efrid: How far were you from the store when he told you this? A. We had just stepped out. Q. How long was

it after shooting before you and he stepped out—how long between the shooting and the time you went out? A. It was not two minutes, I hardly think. He said: 'I will take your advice if you go with me. I will go if you go with me to my house.' And this was before we got to the house. Q. How far from the store to McDaniel's house is it? A. About one square—two or three hundred feet. The Court: I don't think that is part of the *res gestæ*." Hildebrand had previously testified that after the shooting he advised defendant that he had better go away to avoid further trouble—to go and tell his wife. The witness Johnson had testified that after the shooting he told defendant he had killed Neece, and that he had got his foot in it, and that defendant said, "No man put your hands on me;" that defendant inquired of Johnson and Hildebrand for the gun; and that Adams got the gun and gave it to defendant, who then went to his house. As stated in the case of *State v. Belcher*, 13 S. C. 468: "When the inquiry is as to a certain transaction, not only what was done but what was said by those present during the transaction is admissible for the purpose of explaining its character. * * * To make declarations a part of the *res gestæ*, they must be contemporaneous with the main fact—not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then regarded as contemporaneous." If the declarations are a mere narration of a past occurrence, they are not admissible as *res gestæ*. *State v. Taylor*, 56 S. C. 369, 34 S. E. 939. When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge, in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instructive, spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. Accordingly, in *State v. Arnold*, 47 S. C. 13, 24 S. E. 928, 58 Am. St. Rep. 867, the court held admissible as *res gestæ* a statement, "Charlie shot me to death," made by a man shot in a doorway of a house from which he staggered some 30 yards and fell; the utterances being made a few minutes after the shooting, to the first persons who reached him in response to his cry for help. The declarations here in question were made probably within two or three minutes after

the shooting, and within two or three hundred feet of the place of the shooting. These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestæ*, but they are factors, with other circumstances, in determining whether the declarations were the spontaneous utterances of the mind under the immediate influence of the transaction. It is to be remembered that it was in testimony that defendant did not declare that the shooting was accidental, when he saw that Neece had been shot and when Johnson told him that he had killed Neece, and that, on the contrary, the testimony tended to show that he forbade any one to put hands on him; that he had a conversation with Hildebrand as to the advisability of going home to avoid further trouble, and inquired and secured possession of his gun before leaving the store where the shooting took place. No doubt, the circuit court considered that these circumstances tended to indicate a mind which was not then being actively influenced by the transaction to make explanation thereof, but rather a mind adverting to means of future safety. Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be. Moreover, no harm arose to the defendant from the ruling, for the testimony quoted above shows that the witness was allowed to state that defendant, on the way to his house, did say something about the shooting being accidental.

The remaining exceptions relate to the charge, the seventh exception being as follows: "(7) His honor erred in charging the jury: 'In this case, if defendant intentionally, wrongfully, killed the deceased, without any justification or excuse, then he killed him with malice, and that would constitute murder.' Whereas (1) the killing of one person by another may have been intentional and wrongful, and yet the circumstances show that the killing was not more than manslaughter; (2) this was charging on the facts." It is very clear that this charge was not in respect to matters of fact, in violation of the Constitution, as it is based upon a hypothetical statement of facts. There is no significance in the use of the words "in this case," which was commented upon in argument. Every charge necessarily relates to the case in hand, whether the court uses such words or not. The first specification of this exception is based upon the view that the court, in the charge quoted, should have used words excluding the circumstances which extenuate an intentional homicide to manslaughter; that is, the charge should have been thus: "If the defendant intentionally, wrongfully, killed the deceased,

without any justification or excuse or extenuation (as sudden heat and passion upon sufficient legal provocation), then he killed him with malice, and that would constitute murder." It must be noted here that the court was not attempting, in this part of the charge, to cover the law as to an intentional homicide upon sudden heat and passion, upon sufficient legal provocation. In another portion of the charge the law as to voluntary manslaughter was fully and correctly stated to the jury, and no exception has been taken thereto. The court here was instructing the jury with reference to murder, and malice as an essential ingredient. In the sentence just preceding the one excepted to, the court said: "In its general signification, 'malice' means the doing of a wrongful act intentionally, without justification or excuse." This is substantially the famous definition of "malice" by Bayley, J., in *Bromage v. Proser*, 10 E. C. L. 321: "'Malice', in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." In *State v. Doig*, 2 Rich. Law, 182, our court said: "In law, 'malice' is a term of art, importing wickedness, and excluding a just cause or excuse." There can be no doubt, under the decisions in this state, that malice is presumed from an intentional killing, in the absence of facts and circumstances in evidence tending to show want of malice. *State v. Hopkins*, 15 S. C. 153; *State v. Ariel*, 38 S. C. 221, 16 S. E. 779; *State v. Jones*, 29 S. C. 201, 7 S. E. 296; *State v. Alexander*, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879. But the court in this case left it to the jury to decide whether the killing was intentional, and whether malice was any justification or excuse, and in that event malice existed, and the killing would be murder. An intentional homicide, without any excuse, is certainly murder. The language "without any justification or excuse" not only excludes justifiable and excusable homicide, but homicide extenuated to manslaughter because done in sudden heat and passion upon sufficient legal provocation. It must not be supposed that the word "excuse" is only applicable to excusable homicide, as homicide in self-defense. In the early stages of the common law there was ground for distinction between justifiable and excusable homicide, when the accused was not entitled to an acquittal in case of excusable homicide, but upon special verdict was entitled to pardon; but now the distinction is of no practical importance, as in both cases the accused is entitled to an acquittal, and there is no penalty whatever attaching. It would therefore be wrong to hold that the word "excuse" was intended by the court or understood by the jury to be used in the absence of something which renders one wholly excusable or justifiable, but, on the contrary, it should be held to include also any legal

extenuation of the offense charged. The dictionaries give as one definition of "excuse" "a plea offered in extenuation of a fault or neglect." *Bouvier's Law Dictionary* says: "This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that, though guilty, he is less so than he appears to be." In the case of *State v. Mason*, 54 S. C. 240, 32 S. E. 357, the court sustained a charge to the effect that malice is implicated from an intentional killing, without justification or excuse.

The eighth exception complains of error in charging the jury in these words: "So, if you could suppose a case where it was evident that one person had intentionally killed another, and any other fact about it was evident or known, the law would imply malice from the intentional killing"—because no such presumption of malice arises where all the facts are brought out. In the opinion upon the former hearing of this case, we assumed from the context that the word "any," in the charge as above quoted in the exception, was a misprint for "no," and held, in accordance with *State v. Jones*, 29 S. C. 235, 7 S. E. 296, that, while the law presumes malice from the mere fact of an intentional killing, yet, when the facts attending the homicide are brought out, there is no room for the presumption, and the state must prove the malice from the facts and circumstances, without aid from the artificial presumption. In the application for rehearing, it was urged that the charge was printed in accordance with the "case" as agreed upon, and with the copy of the stenographic notes as furnished appellant. This court was so impressed with the impropriety of assuming of its own motion to correct the "case" as agreed upon, and the danger of injustice to litigants by establishing such a precedent, that it was induced by this circumstance, along with other circumstances, to grant a rehearing. By subsequent proceedings allowed at the instance of the solicitor, the "case" has been corrected by order of Judge Klugh, and it now appears regularly that the circuit judge used the word "no," instead of the word "any," in the charge to which exception was taken. So corrected, the charge is free from error, under the cases cited above on this subject.

The ninth exception is as follows: "(9) His honor erred in charging the jury: 'Now, in this case, if the facts and circumstances surrounding the homicide have been brought out before you, then you look to the facts and circumstances, and say whether they establish beyond a reasonable doubt the fact of malice on the part of the defendant in taking the life of the deceased; and, if so, then your verdict will be guilty of murder.' The error consists (1) in his honor assuming and in pressing on the minds of the jury that defendant had actually killed deceased, when,

under the facts in the case, defendant contended that he had not fired the pistol which killed the deceased; (2) this was charging upon the facts." It is too clear for argument that this was not a charge upon the facts, and the following extract from the charge preceding the portion complained of shows that the exception, in its first specification, is also without foundation: "Now, in order for the state to convict a person of murder, where the plea is not guilty, as it is in this case, in the first instance, it is necessary for the state to prove beyond a reasonable doubt the material facts of the indictment. The state must therefore prove, first of all, that John Lee Neece is dead, that he came to his death at the hands of some person other than himself, and then must prove that this defendant killed him, and must prove that the killing was done with malice aforethought, whether the malice be express or implied malice. It is a matter for you to determine from the evidence in the case whether these facts are established beyond a reasonable doubt or not. If the state has proved the killing of the deceased by the defendant, then it becomes necessary for you to determine whether the killing was a malicious killing or not. Of course, if the state has not established the fact of the killing of the deceased by the defendant, the case falls to the ground there, and must result in a verdict of not guilty; but, if you are satisfied beyond a reasonable doubt that the defendant killed the deceased, then the next inquiry is, was it done with malice aforethought?"

We next notice the eleventh exception, which assigns error "in refusing to charge defendant's second request, in that one issue raised by defendant, and which there was testimony tending to support, was that deceased attempted unlawfully to arrest defendant, and it was error not to instruct the jury as to full rights of defendant in resisting an illegal arrest." This exception fails to specify wherein the court failed to charge the law as to arrests. The jury were instructed at length on that subject, and no exception is taken to what the court said. The court refused to charge the defendant's second request on the ground that it was incoherent, in the form in which it was presented. The charge to the jury fully covered the right of the defendant to resist an illegal arrest, and we see no reversible error in refusing the request in the particular form presented.

The question which is deemed most serious is presented in the tenth exception, which imputes error in charging the jury that the plea of homicide by accident is an affirmative defense, which defendant must prove by the preponderance of the evidence. In this connection the court charged: "The defendant, in addition to the plea of not guilty, sets up the plea of accidental killing. Now, where a person comes into court, whether in a civil or criminal case, and sets up an affirmative

defense—where he comes in and says that the charge against him would be true, but for certain facts which he relies upon—he must establish those facts by the preponderance of the evidence. The rule is the same in a criminal case as in a civil case, and, so far as a defendant is concerned, in a criminal case, the state must prove beyond a reasonable doubt its side of the case. The defendant is only required to prove by the preponderance of the evidence—which means the greater weight of evidence—the facts that he relies upon by way of excuse or justification. In this case, therefore, the defendant must establish the facts upon which the plea of accidental killing rests by the preponderance of the evidence, and, if he has established his plea of accidental killing to that extent, then he is entitled to a verdict of not guilty.

* * * He further charged: "So, if he has established his plea of accidental killing by the preponderance of the evidence, you must find a verdict of not guilty. If you have a reasonable doubt whether he has established the plea by the preponderance of the evidence, you must give him the benefit of the doubt, and find he has established it, and still find a verdict of not guilty. If he has failed to establish the plea of accidental homicide, then you disregard that plea, and determine, from his other plea of not guilty to the indictment, whether the state has established its case beyond a reasonable doubt or not; and, if it has not, you must give him the benefit of the reasonable doubt, and find a verdict of not guilty." Then finally the court charged: "So if you should conclude, in this case, that the defendant was resisting an unlawful arrest, or if you should conclude he was defending himself against unnecessary violence, and thus engaged in a lawful act, and that while so engaged he unintentionally, accidentally, took the life of the deceased, that would be an accidental homicide, or a homicide by misfortune, which the law will excuse. But if the defendant has failed to show that to your satisfaction by the preponderance of the evidence, then you, as a matter of course, will disregard that plea of accidental killing, and determine whether he is guilty of murder, manslaughter, or not guilty, upon the indictment and upon the plea of not guilty. Give the defendant the benefit of every reasonable doubt." We have been particular to reproduce all that the circuit court charged in this connection. This charge was given by the court upon being advised by defendant's counsel that defendant pleaded homicide by misadventure or accident. We are not content with the conclusion which we reached in this opinion on the first hearing of this case, in overruling this exception. The rule has been established in this state that, where self-defense is pleaded to an indictment, the defendant must establish it by the preponderance of the evidence, but at the same time the guilt of the accused must be made to appear beyond a rea-

sonable doubt. *State v. Welsh*, 29 S. C. 4, 6 S. E. 894; *State v. Bodie*, 83 S. C. 132, 11 S. E. 624. Whether such a rule, as applied to self-defense, is sound or practically useful, we need not now inquire. If there is no distinction between self-defense and homicide by accident, when set up by plea and evidence, then, unquestionably, the circuit court charged the jury correctly, as he charged in accordance with the law as laid down in repeated decisions concerning self-defense as an affirmative defense. But we do not think that a defense that the homicide was accidental is in any sense an affirmative defense. It is distinguishable from self-defense as a plea, which admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional. In *Commonwealth v. McKie*, 1 Gray, 61, 61 Am. Dec. 410, the logical rule is thus stated: "Where the defendant sets up no separate independent fact in answer to a criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains on the government to satisfy the jury that the act was unjustifiable and unlawful." In the case of *State v. Cross* (W. Va.) 24 S. E. 906, the court held that the defense of accidental killing is a denial of the criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony. It was error, therefore, to instruct the jury to disregard the plea of accidental homicide if the defendant failed to establish it by the preponderance of the evidence. It is true, the charge did finally impose upon the state the duty of establishing the charge beyond a reasonable doubt, but it will be observed that this last instruction was conditioned on defendant's failure to establish an accidental killing by the preponderance of the evidence. The error consisted in charging that the burden of proof had shifted to the defendant at all on the question whether the killing was accidental. For this material error, in an otherwise exceedingly clear and able charge, the judgment must be reversed.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(68 S. C. 276)

STATE v. LINDSEY et al.

(supreme Court of South Carolina. March 24, 1904.)

CRIMINAL. LAW — EVIDENCE—ADMISSIONS—INSTRUCTIONS.

1. Where declarations are not precisely concurrent with a transaction, their admissibility is in the sound discretion of the trial court.

2. On trial for assault and battery, where the charge assumes that the defendants were claiming to act in self-defense, or under the apprehension that they were acting in self-defense, whereas defendants were contending in evidence that they did not strike any blow at all, the instruction was erroneous, as on the weight of evidence.

Appeal from General Sessions Circuit Court of Spartanburg County; Aldrich, Judge.

Thomas Lindsey and Asberry Lindsey were convicted of assault and battery, and appeal. Reversed.

Mr. McCravy and Hunt Bros., for appellants. T. S. Sease, for the State.

JONES, J. The defendants were tried before Judge Aldrich and a jury at January, 1903, court of general sessions for Spartanburg county, on the charge of assault and battery, with intent to kill, upon W. D. Howard, and were convicted of assault and battery of a high and aggravated nature, and sentenced. They appeal upon exceptions to the rulings of the court as to admissibility of testimony and to the instructions to the jury.

The first, second, and third exceptions raise the question whether the excluded testimony came within the *res gestæ*. The witness C. B. Amans was asked by the defendants' counsel whether he heard Mrs. Howard say anything when they started to carry W. D. Howard into the house. It appears that W. D. Howard was unconscious, having been stricken on the head by a rock alleged to have been thrown by one of the defendants, and was being carried into the house, near by, a short time after the injury. The solicitor objected to the testimony on the ground that no foundation had been laid by asking Mrs. Howard, when on the stand, whether she had said so and so, and the objection was sustained. It was not suggested to the court by any one that the testimony was admissible as part of the *res gestæ*. If the purpose of the testimony was to contradict Mrs. Howard, the ruling was certainly correct. But it is now contended that the evidence was admissible as *res gestæ*. If we must assume that the circuit court considered this question, then there is nothing in the "case" to show any abuse of discretion. In ruling upon the question whether any particular testimony is admissible as *res gestæ*, the circuit court must necessarily view all the circumstances, and decide in the first instance whether the circumstances were such as to bring the testimony within the rule. This subject has been very recently considered in the case of *State v. McDaniel*, 47 S. E. 884, where the court said: "Where the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard and fast rule as to the precise time,

near an occurrence, within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declaration must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations." The court further said that "questions of this kind must be largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not review his ruling unless it clearly appears from the undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be." For the reasons stated above, we must overrule these exceptions.

The fourth, fifth, and sixth exceptions complain of the charge to the jury, but the points made are fully presented in the sixth exception, which is as follows: "(6) Because his honor erred in charging the jury as follows: 'If the state has failed to prove either of these charges against the defendants, and they acting in self-defense, if it is proven that they acted in self-defense, then your verdict will be not guilty,' in that this part of the charge, in connection with the following: 'The defendants here have pleaded "Not guilty." Now as to self-defense. Self-defense comes to a man or men when they are, at the time of the encounter or difficulty, without fault in bringing about the trouble, and they are assaulted, or there is danger to their lives or persons, which is then and there pending. Then, if the defendant or defendants, being impressed with this apprehension of danger to their lives or persons, honestly believing it was necessary, in order to protect their lives or persons, to resort to force to repel the attack, and, so believing, do inflict punishment or injury upon the party assaulting them, that would be the first element of self-defense. The second is believing that a man of ordinary sense, discretion, would, under the circumstances shown by the testimony in this case, feel justifiable or excusable in forming the opinion which the testimony shows the defendants formed, or the understanding on which they acted, and acting as they did in self-defense. If so, then if an ordinary man would have done as these defendants did under the apprehensions that they were acting in self-defense, then they have made out their case. If the average man would not have believed it was necessary for him to resort to force, then they have failed to make out a plea of self-defense'—was charged on the facts, and, by so doing, directed the jury that, unless the defendants made out their plea of self-defense, they would have to find them guilty, when, as a matter of fact, their only plea was

an alibi." In addition to their plea of not guilty, defendants set up an alibi, and there was some testimony tending to show that they, while near, did not strike the blow. The defendants offered no testimony whatever tending to show self-defense, but there were some circumstances which came out in the testimony for the state (that W. D. Howard and Thomas Lindsey had quarreled a short while before, and that, at the time of receiving the blow on the head by a rock, Howard was advancing towards Thomas Lindsey with a knife in his hand) which made it not improper for the court to instruct the jury as to the law of self-defense. But in charging the language quoted, we think he charged in respect to the facts. The charge assumes that the defendants were claiming to act in self-defense, and did something under the apprehension that they were acting in self-defense, whereas defendants were contending in evidence that they did not strike any blow at all; that they were standing some distance away, talking to Mrs. Smith, when Howard was struck by some one else. Of course, the evidence for the state combated this view, but the jury were the sole judges of the force of the testimony.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(63 S. C. 279)

KINARD v. PROCTOR et al.

(Supreme Court of South Carolina. March 24, 1904.)

INFANTS—SALE OF PROPERTY BY MOTHER—RATIFICATION—EXCEPTIONS.

1. Where a mother executes for a minor a deed, several months before his majority, to lands which she had conveyed to him and in which she has a life interest, and he receives the purchase money as her agent, and she gives him a part, which he retains, in an action brought 14 years after obtaining his majority he will be held to have ratified the action of his mother.

2. An exception alleging errors in overruling findings and conclusion of master is too general to be considered.

Appeal from Common Pleas Circuit Court of Greenwood County; Dantzler, Judge.

Action by Julia V. Kinard against Susan Proctor and J. A. Proctor. Judgment for plaintiff, and defendants appeal. Affirmed.

E. S. F. Giles, for appellants. Sheppards & Grier, for respondent.

POPE, O. J. This action was commenced on the 4th day of August, 1902, for the purpose of restraining and enjoining the defendant J. A. Proctor from cutting down and destroying the growing wood and timber and committing waste on a tract of land containing 135 acres, being situate in the now county of Greenwood (in the year 1889 being in Edgefield county), in the state aforesaid. In the complaint the plaintiff asserts that the defendant Susan Proctor owned in fee all of

said land, but that in October, 1889, the said Susan Proctor, of her own motion, divided out amongst her children said lands, giving to each one of said children her deed of conveyance to said lands, but in each deed reserved to herself a life estate in all of said lands. That the plaintiff has purchased all of said lands (135 acres), but subject to the life estate of the said Susan Proctor. That upon the death of the said Susan Proctor the plaintiff will be entitled to the possession of said lands. That the defendant J. A. Proctor, claiming to act under the authority of the said life tenant (Susan Proctor) is now engaged in cutting down and destroying the growing timber on said lands, for the purpose of marketing the same for his own pecuniary advantage, to the great damage of said lands and of this plaintiff. That he has already cut down a considerable quantity of the growing timber, and is threatening to remove and sell the same for his own use, and threatens to continue to do so. That the defendants are entirely unable to respond to a judgment for damages if recovered against them, and could not be made to account for the damage done and threatened, and, unless the court restrains and enjoins them in the acts herein complained of, plaintiff will suffer great and irreparable injury. That plaintiff has requested said defendants to discontinue the cutting down of said timber, but they refused to do so, and she has forbidden the removal of the timber cut down, but they threaten to disregard her in the premises, etc. The defendants, by their joint answer, deny some of the allegations of the complaint, and in a general defense they admit that Susan Proctor, on the 8th of October, 1889, did divide the 135 acres among her eight children, giving a deed to the portion assigned to each child, reserving a life estate in the whole tract of 135 acres, and they admit that the plaintiff has received deeds for all the parcels of land allotted, except the defendants, J. A. Proctor and G. E. Proctor, and some others. In articles 5 and 6 of the answer it is stated as follows:

"(5) That some time thereafter the husband of the plaintiff, C. L. Kinard, now deceased, applied to the defendant Susan Proctor to buy for his wife, the plaintiff herein, the tract of land owned by the said G. E. Proctor, and was told by the defendant Susan Proctor that the same was owned by the said G. E. Proctor, and that he was under age; that the said C. L. Kinard insisted on taking a conveyance from the said Susan Proctor, and told her that it would be all right for her to convey the same to him, provided she surrendered the deed already executed to the said G. E. Proctor, which had not been recorded, and she consented to do so, and did execute to the wife of the said C. L. Kinard a deed prepared by him, or some one for him, purporting to convey a fee-simple title to the plaintiff herein, reserving to herself a life estate in said land,

which she had already conveyed to her said son, G. E. Proctor.

"(6) That the said conveyance by the defendant Susan Proctor to the plaintiff was null and void, and conveyed to her no interest in the said tract of land."

It was also claimed in said answer that the timber cut by the defendant J. A. Proctor was cut from the tract of 20 or 24 acres which Mrs. Susan Proctor had conveyed to her son, G. E. Proctor, on 8th October, 1889, by the consent of said G. E. Proctor. His honor Judge Watts granted an order restraining the defendant J. A. Proctor from cutting down and selling timber until the further order of court. By consent of all parties, all the issues of law and fact were referred to W. J. Moore, Esq., as master for Greenwood county. He took all the testimony and made his report to the court, having decided all the issues of law and fact in favor of the defendants. Exceptions were duly presented to said report, and the exceptions came on to be heard before his honor C. G. Dantzler, together with the pleadings and the testimony. After a full argument, he reversed the report of the master in the following decree:

"This is an action instituted by the plaintiff against the defendants above named, to enjoin the said defendants from committing waste on the lands described in the complaint. It appears that Mrs. Susan Proctor, one of the defendants, received, as her distributive share in the estate of her husband, a certain tract of land containing one hundred and thirty-five (135) acres, more or less, situate in what is now Greenwood county, then the county of Edgefield, in the state of South Carolina. That Mrs. Proctor, who was the mother of several children, divided this tract of land between her said children, and gave to each a deed to the portion of the lands which she had set apart to each in fee, reserving for herself, in each instance, a life estate. It appears further that, after this, the children executed deeds conveying their interest in fee in remainder to the plaintiff, Mrs. Julia V. Kinard, full consideration being paid. J. A. Proctor, one of the defendants, it seems, was in possession of the lands under the authority of the life tenant, Susan Proctor. It is alleged in the complaint, and the testimony shows, that J. A. Proctor has been engaged in cutting down growing timber on the lands, for the purpose of selling the same and for his own pecuniary advantage, to the great damage of the lands; that he has cut down already the greater portion of the timber, and has removed a considerable part of it, and sold some of it, and claims the right to cut timber from any portion of the lands. It appears that he has built a house for himself on a tract of land which he owns, and which joins the lands in question, largely from the timber cut from the lands described in the complaint, of which the plaintiff is the owner in

fee, subject to the life estate of Mrs. Susan Proctor. It further appears that the principal value of the lands is the timber thereon, and the cutting down of the same greatly depreciates the value and the interest of plaintiff therein. It also appears that the defendant J. A. Proctor threatens to continue his conduct in the particulars herein stated, and refuses to stop, although requested by Mrs. Kinard on several occasions before suit was instituted to desist. The matter came on to be heard before me in open court at Greenwood, S. C., on the 14th day of August, 1903, on the report of the master, the testimony taken, and the pleadings and the exceptions to the master's report on behalf of the plaintiff. No exceptions on behalf of defendants.

"The question was fully argued by counsel representing both plaintiff and defendants. The contention of the defendants, as I gather from the answer filed, and from the argument of counsel representing defendants, is that G. E. Proctor, also called Eli Proctor, was under age at the date he received the deed from his mother to his portion of the lands, the date of which deed is October 8, 1889, and conveyed to him a tract of land of about 20 acres, reserving a life estate in Mrs. Susan Proctor; and it is contended in argument, and alleged in the answer, that all of the wood and timber cut by the said J. A. Proctor was from his 20-acre tract, known as the G. E. Proctor or Eli Proctor tract, and that no timber or wood has been cut from any other portion of those lands by either of the defendants; that Mrs. Kinard, the plaintiff, is not the owner of this particular 20-acre tract; and it is alleged in paragraph 5 of the answer that the husband of the plaintiff, now dead, applied to Susan Proctor to buy for his wife, the plaintiff, this tract of land, and was told by the said Susan Proctor that the land was owned by her son, G. E. Proctor, who was under age; that thereupon Kinard insisted in taking a conveyance from Mrs. Proctor, and told her that it would be all right for her to convey the land to him, provided she surrendered the deed which she had already executed to her son, G. E. Proctor, which was not recorded, and that she consented to do so, and did execute such deed to Mrs. Kinard, reserving to herself a life estate; and in paragraph 6 of said answer it is alleged that this deed was null and void, and conveyed no interest in the said tract of land.

"In this connection it is sufficient to say here that there is no testimony to support the allegations of paragraph 5 of the said answer. G. E. Proctor himself, in his testimony, gives quite a different version of this transaction. The testimony of Mr. B. B. Kinard, which comes up without exception on part of defendants, shows that plaintiff's husband, some 14 years ago, during his lifetime, bought this identical tract of land from Eli Proctor, and says he saw him pay Eli

Proctor, also called G. E. Proctor, the purchase money for this 20-acre tract, but don't remember the exact amount, and says that before this transaction his brother had previously bought the land from Eli's mother; that his mother said that Eli had to have some money to go on, and the only way to get it was from this land; and that Eli was present when this conversation took place. The plaintiff, Mrs. Kinard, says, without objection, that she is the owner of this land, and that she has a plat to it, and a deed executed by G. E. Proctor, which was executed a few years before her husband's death, which deed she says she could not find after search for it, and that the purchase price was paid to G. E. Proctor. These seem to be reputable witnesses of character and standing in their community. In this connection, Mr. G. E. Proctor says that he never made a deed to the 20-acre tract of land to Mrs. Kinard, and that he gave his brother permission some two years ago to cut timber on this tract of land. He admits signing the receipt introduced in evidence, which he signed 'G. E. Proctor, agent for Susan Proctor,' and which recites that \$125 has been paid in full for the purchase price of this 20 acres of land. On his cross-examination, Mr. Proctor says that this money was paid for the 20-acre tract; that it was paid to him for his mother, and that he doesn't know whether his mother was present or not when he received the money from Mrs. Kinard; and that his mother at that time made Mrs. Kinard a deed to the 20 acres of land, and that he knew at that time what the money was being paid for.

"Take the view of the case as presented by the testimony of G. E. Proctor, and it seems to me, upon that alone, without reference to the other testimony in the case, that defendants' contention must fall. At the date of this transaction G. E. Proctor was almost 21 years old. He knew that his mother was conveying his interest in the land to Mrs. Kinard; he knew that Mrs. Kinard believed that she was buying his interest in this land, and that she was paying for this interest the sum of \$125. It was for his benefit that the sale was being made; this he does not deny. He admits that he knew he had an interest in the land in fee, and admits that he knew that this was the interest which his mother by her deed undertook to convey to Mrs. Kinard. His mother was not present when the money was paid, but Mr. Proctor receives this money in his own hands, and himself signs a receipt therefor, styling himself 'Agent' for his mother in this receipt. He further says that he gave the money voluntarily to his mother, and received a part of it—how much does not appear—for himself. He has never returned or offered to return any part of this money. It does not appear what disposition was made of it—whether he invested it in other property or what. Very soon after this he reaches his majority, and

for almost 14 years he has never made any complaint or brought into question in any way the transaction. It is only after suit is brought that he, for the first time in all these years, brings the matter into question. If these facts be true—and Mr. Proctor himself says that this is the case—it seems clear that he should not now be heard to complain. If G. E. Proctor did not mean, in accepting a part of the purchase money of this tract of land from his mother, and at the hands of Mrs. Kinard, to confirm the acts of his mother, he intended and meant to commit a fraud on Mrs. Kinard, which this court will not sanction or permit. Mr. Proctor, by his acquiescence in this transaction for nearly 14 years after coming of age, and his accepting a part of the purchase money and retaining the same, ratifies and confirms the sale. G. E. Proctor, on reaching his majority, had the right to avoid this transaction. It was not void, but only voidable. In the very nature of things, an act which is only voidable, strictly speaking, needs no confirmation, but it stands good until it is avoided, and, where there is an effort made to avoid an act, it is important to see whether there has been confirmation. If there had been confirmation, then the matter has passed beyond the power of the party to avoid it. *Ihley v. Padgett*, 27 S. C. 302, 3 S. E. 468.

"In the case of *Norris v. Vance*, 3 Rich. Law, 164, cited with approval in the case of *Ihley v. Padgett*, supra, it is held that there may be confirmation of an infant's act in either of three ways: 'There must be, after he has attained his majority, with full knowledge of his rights, (1) acquiescence from which assent may be fairly inferred, (2) an adequate benefit enjoyed, which has grown directly or indirectly out of the contract, or (3) some direct or expressed assent.' The case at bar falls under the first two classifications. There has been an adequate benefit enjoyed, growing directly out of the contract of sale, and, in addition thereto, acquiescence for nearly 14 years. In the case of *Belton v. Briggs*, 4 Desaus. 471, the court held that Briggs, although a minor, was bound by a sale made of his interest in a tract of land by his mother and two brothers, which was made with his knowledge and approbation. In the case at bar, if we take the testimony of G. E. Proctor only, it appears that he also knew what was being done, and, like Briggs, it was done with his approbation and approval. Here, if his testimony only is taken, his mother undertook to act for him, and, as did the mother of Briggs, he received a part of the purchase money from his mother, and all of it at the hand of Mrs. Kinard, his mother not being present. With full knowledge of the whole transaction, he remains silent thereafter, and after his majority for 14 years, when he undertakes for the first time in this suit to question the transaction. To permit him to do so would be unconscionable, and assist him in perpetrating a fraud on the plaintiff.

While infants should be protected from the consequences of their inexperience and immaturity of judgment, a court should not forget that their protection does not require the overriding of the legal rights of persons who have dealt with them in good faith. If, on reaching his majority, G. E. Proctor had refused to be bound by this transaction, had shown a disposition to avoid the same on account of his alleged minority, a different question would have been presented. This was his right, and, with full knowledge of his rights, he chose to affirm and certify what was done. It is therefore as binding on him after ratification and confirmation as on any one else, and, by reason of his so ratifying and confirming what was done, it is now beyond his power, and at this late date, to bring it into question.

"I hold that Mrs. Kinard, from all the testimony submitted, is the owner of this 20-acre tract in fee, subject to the life estate of Mrs. Proctor.

"I further hold that the testimony shows clearly that J. A. Proctor has been cutting wood and timber promiscuously from all parts of the land described in the complaint, asserting a right to do so, and threatening to continue. Mrs. Kinard, as the owner in fee in remainder, is entitled to the protection of the court to prevent the denuding this land of the growing timber.

"It is therefore the judgment of the court that the exceptions to the report of the master be, and are hereby, sustained, and the master's report reversed, overruled, and set aside.

"It is further ordered and adjudged that plaintiff is entitled to the relief set out in her prayer herein, and that the said defendants, and each of them, be, and hereby are, perpetually enjoined and restrained from committing any acts of waste on the premises described in the said complaint, and from cutting down and removing the timber from said premises."

Thereupon, the defendant appealed from said decree upon the following exceptions: "(1) It was error in the circuit judge to overrule the findings of fact of the master, and to find independently as to fact, viz.: 'It is alleged in the complaint, and the testimony shows, that J. A. Proctor had been engaged in cutting down growing timber on the lands, for the purpose of selling the same, and for his own pecuniary advantage, to the great damage of the lands; that he has cut down already the greater portion of the timber, and has removed a considerable portion of it, and sold some of it, and claims the right to cut timber from any portion of the lands.' (2) It was error to find as an independent fact, overruling the master: 'It further appears that the principal value of the land is the timber thereon, and the cutting down of the same greatly depreciates the value and interest of the plaintiff therein.'

It is respectfully submitted that the evidence shows that there was very little timber on the land, and that the land was worth more cleared than with the timber on it. (3) It was error to hold as a fact that G. E. Proctor, or Eli Proctor, acquiesced and consented to the conveyance by his mother to Mrs. Kinard on the 31st of October, 1889, and received a part of the consideration, when on the 8th day of November, 1889, he receipted for the purchase money paid to his mother, through him as her agent; and it was error to hold that 'very soon after this he reached his majority, and for almost fourteen years he has never made any complaint or brought into question in any way the transaction. It is only after suit is brought that he, for the first time in all these years, brings the matter into question.' It is respectfully submitted that G. E. Proctor, or Eli Proctor, has not now brought the matter into question; he is not a party to this suit, and the question of title only arises collaterally, the defendant, J. A. Proctor, claiming to act under the authority of G. E. or Eli Proctor in cutting wood on the land. (4) It was error to hold that G. E. or Eli Proctor made a complete ratification and confirmation of the deed of Susan Proctor, his mother, to Mrs. Kinard, by receiving from Mrs. Kinard the purchase money, \$125, for his mother, as her agent, and receipting for the same by himself as agent for his mother, and then receiving a part of the money as a gift from his mother. (5) It was error to hold that G. E. or Eli Proctor acquiesced for 14 years in this transaction, when the record shows that Mrs. Proctor, the life tenant, has always been in possession of the said tract of land, and that Mrs. Kinard is not now in possession, has never been in possession, and has never set up any claim to this land until this suit was brought. (6) It was error to hold that there was no testimony to support the allegations of paragraph 5 of the answer, thereby overruling the findings of fact of the master. (7) It was error to hold that Mrs. Kinard is the owner of the 20-acre tract of land in fee, subject to the life estate of Mrs. Proctor, but he should have sustained the findings and conclusions of the master in regard to the same, and held that G. E. Proctor or Eli Proctor was the owner in fee of the said tract of land, subject to the life estate of his mother. (8) It was error in the circuit judge to overrule the findings of fact and conclusions of the master, but he should have confirmed the same in all particulars."

We will now pass upon the exceptions in their order.

1. An examination of the testimony fails to support this exception. Certainly his (J. A. Proctor) own testimony, to a large extent, supports this finding of fact, for he admits that, under the permission of his brother, G. E. Proctor, he did cut timber, and also that he sold some himself and through others. Much timber has already been cut, and, until

the arm of the law reached out to stop him, he claimed the right to cut this timber on any part of the land. This exception is overruled.

2. It accords with common sense that the original forest, and even the second growth, adds much to the value of lands in such a county as Greenwood. Whatever value attaches to this timber belongs to the owner in fee. This exception is overruled.

3. So far as this third exception is concerned, it may be remarked that, although G. E. Proctor is not a formal party to this action, his brother, J. A. Proctor, who is a party, bases his right to cut timber on the lands—20 acres—which Susan Proctor conveyed to him, G. E. Proctor, on the 31st October, 1889, upon the express authority of said G. E. Proctor, and that both parties (J. A. and G. E.) so testify. It becomes necessary to answer this testimony by showing that, although Mrs. Susan Proctor did execute a deed to G. E. Proctor on the 8th day of October, 1889, while G. E. Proctor was a minor, in his twenty-first year, yet that the deed was never recorded in the office of the register of mesne conveyances, and that on the 31st day of October, 1889, owing to the necessities of said G. E. Proctor, in his presence, with his full knowledge of his rights, for a full and valuable consideration (which consideration was paid, every dollar, into his hands and receipted for by him), Mrs. Susan Proctor conveyed said land to the plaintiff, which deed was placed on record in March, 1890, in the office of the register of mesne conveyances for Edgefield county, S. C., which at that date was the proper county in which such deed should have been recorded. All this was done a little more than four months before G. E. Proctor reached his majority. To show how completely G. E. Proctor so testified, we will reproduce this testimony, because, to our mind, as was the case with the circuit judge, it has a crushing effect upon the rights of said G. E. Proctor in this land, and destroys any right on his part to authorize J. A. Proctor or anybody else to destroy timber growing on this land. "G. E. Proctor, sworn, says: I am the G. E. Proctor spoken of in the testimony. Receipt shown me, that is my name signed to it. That money was received for my mother. Never got any money from Mrs. Kinard on account of that tract of land for myself, but I got a part of the money from my mother; my mother gave me some of it. I never made a deed to any one for this tract of land. I sold Mrs. Kinard another tract of land—123 acres. I knew the boundaries of the 20-acre tract. J. A. Proctor cut wood from that tract. I don't know that any wood was cut from any other tract. I live 15 miles from there. There was some stock timber on 20-acre tract. I gave my brother permission to cut this. My mother is 74 years old, and she lives with me. She is too feeble to come here to-day. Cross-

examined: I signed this receipt for my mother. That money was paid for the 20-acre tract. It was paid to me for her; that is, the 20-acre tract, known as the 'Eli Proctor tract.' Don't know how much of the money she gave me. I don't know whether my mother was present or not when I received the money from Mrs. Kinard. My mother made Mrs. Kinard at that time a deed to the 20 acres. I knew what the money was being paid for. Redirect: I was born February 17, 1869. G. E. Proctor." While it is admitted that G. Eli Proctor lacked nearly four months of reaching his majority when this deed was executed to the plaintiff by Mrs. Susan Proctor, yet for more than 13 years he has remained silent, never in all that time returning, or offering to return, the purchase money, or seeking to upset the said deed. The authorities cited in the decree of the circuit judge are ample to bind the said G. Eli Proctor to the deed of conveyance made by his mother to the plaintiff. When a man can speak, and should speak, before another takes a step by which a claim to property is asserted in violation or disregard of his rights in said property, he shall ever afterwards hold his peace. It is true he was a minor, lacking a few months of his majority, yet he helped to consummate the sale of his lands, just as was done by a minor in the case of *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468. This last-cited case is authority for the position that the life estate of his mother, Mrs. Susan Proctor, in these lands would not protect G. Eli Proctor from his failure to take steps, at some time within the 13 years after he had attained his majority, to vacate this deed. For the court inere said, at page 304, 27 S. C., page 470, 3 S. E.: "But it was urged that there was such obstacle [the mother's life estate]; that the plaintiff, being only a remainderman, had no right to claim actual possession of any portion of the Rice Hope Plantation until after the death of Mrs. Ihley, the life tenant, and, as a consequence, he could not make application to have his deed annulled until that time [1885], and, that being the case, it could not properly be said that he 'acquiesced' in that which it was out of his power to avoid. It may be that the death of the mother was the time at which the land was to be divided amongst the children. But we do not understand that the plaintiff was thereby precluded from making application to set aside his deed, signed, as alleged, when he 'was under age,' at any time after he attained his majority. The two matters in point of time are not necessarily identical. He had a salable interest in Rice Hope during the life of his mother, and, having conveyed that interest to Allen, we know of no reason why he could not have assailed the deed, executed when he was under age, at any time after he came of age, and that whether his mother was living or dead. In the view, that it was his intention to make that question, it was due

to fair dealing to the purchaser and all concerned that it should have been made promptly after he attained his majority." This exception is overruled.

4. From the testimony it is clear that G. Eli Proctor made a complete ratification and confirmation of the deed in question to the plaintiff. This and the next (the fifth) are disposed of in our discussion of the third exception. Accordingly they are overruled.

6. We have carefully examined the testimony, and we fail to find any error in the finding of the circuit judge that there was no testimony in support of the fifth article of the answer. We have quoted it in full. Mrs. Susan Proctor was not examined as a witness, and she was the person with whom it was alleged that the agreement was made. G. Eli Proctor does not state any such agreement in his testimony. This exception is overruled.

7. From what we have already held, it is clear that the deed of Mrs. Susan Proctor to the plaintiff for the 20 acres belonging, in October, 1889, to G. Eli Proctor, ratified and confirmed by G. Eli Proctor, operates to carry the fee in the 20 acres of land to the plaintiff. This exception is overruled.

8. This exception is too general to require notice. It is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 318)

STATE v. EDWARDS.

(Supreme Court of South Carolina. March 26, 1904.)

CRIMINAL LAW—INDICTMENT—DEMURRED—MOTION TO QUASH—MOTION IN ARREST—INSTRUCTIONS—HOMICIDE.

1. An objection to the act of a solicitor in noli prosequing a count in an indictment for murder, charging defendant with carrying concealed weapons, cannot be first raised on motion in arrest, but must be taken advantage of by demurrer or motion to quash, under Cr. Code, § 57.

2. Defendant does not waive his right to raise the question on motion in arrest, that the indictment was found by a grand jury illegally drawn, by pleading to the indictment and going to trial.

3. On trial for murder, where no issue was raised as to the right of a person to interfere when he sees a felony about to be committed, a charge on such right, if erroneous, is harmless as to defendant.

Appeal from General Sessions Circuit Court of Greenville County; Dantzer, Judge.

James D. Edwards was convicted of murder, and appeals. Reversed.

Cothran, Dean & Cothran, for appellant. Julius B. Boggs, for the State.

JONES, J. The defendant, under an indictment for the murder of Frank Neeley, was found guilty, with recommendation to mercy, and was sentenced to life imprisonment in the penitentiary, from which he now appeals.

The first, second, and third exceptions allege error in overruling motion in arrest of judgment. This motion was based upon the grounds (1) that the jury law under which the grand jury, which found a true bill, was organized, is unconstitutional, null, and void, and that the defendant has therefore been convicted under a void indictment; (2) that the indictment, when it was handed to the jury, did not contain a count for carrying concealed weapons, as required by the Criminal Code. Judge Dantzer, who tried the case, refused the motion upon the ground that the same had not been made before the jury were charged with the trial of the case. It appears that the appellant was represented on said trial by counsel, but no objection was made to the indictment before trial or return of verdict.

We will first briefly notice the second objection above, which is the foundation of the third exception. An examination of the indictment, a copy of which is set out in the "case," shows that it did contain a special count for carrying concealed weapons, in conformity with section 131, Cr. Code, which provides: "In every indictment for murder * * * and in every case where a crime is charged to have been committed with a deadly weapon of the character specified in section 130, there shall be a special count in said indictment for carrying concealed weapons, and the jury shall be required to find a verdict on such special count." After the finding of a true bill on said indictment, the solicitor withdrew or nol. pross'd the charge of carrying concealed weapons. Whether the solicitor has the right to withdraw such special count, when he finds that it cannot be sustained, is not involved in this appeal. If the striking out of such special count rendered the indictment defective, as not in accordance with section 131, it was a defect apparent on the face of the indictment, and cannot be raised for the first time on motion in arrest of judgment. Section 57, Cr. Code, provides that "every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn in and not afterwards."

The other objection is more serious. The "case" shows that during the month of January, 1901, the names of persons to serve as grand and petit jurors for that year were selected and put in the jury box, under act approved February 19, 1900, entitled "An act to amend sections 2236, 2237 of the General Statutes, relating to the drawing and term of service of jurors in the circuit courts of this state, and to validate the jury lists already prepared," and that, in accordance with the provisions thereof, the names of the required number of persons were thereafter drawn to serve as grand jurors for the county of Greenville during said year

of 1901, and they were drawn, summoned, and impaneled in accordance with said act; that thereafter, at the May term, 1901, of the court of general sessions for Greenville county, the grand jury so drawn, summoned, and impaneled returned a true bill upon the indictment in this case. This act under which the grand jury was created was held unconstitutional in the case of *State v. Queen*, 62 S. C. 250, 40 S. E. 553. Const. art. 1, § 17, provides that "no person shall be held to answer for any crime, where the punishment exceeds a fine of \$100 or imprisonment for thirty days with or without hard labor, unless on a presentment or indictment of a grand jury of the county where the crime shall have been committed." It must follow that a conviction and sentence based upon an indictment by a void grand jury cannot stand, unless the defendant has waived his right by not interposing his objection in proper time. The case of *State v. Falle*, 43 S. C. 52, 20 S. E. 798, shows that the accused may waive his rights to insist upon a constitutional provision like the one quoted above by expressly waiving objection to amendment to an indictment without re-submission to a grand jury. We suppose there is no doubt that one may waive a statutory or unconstitutional provision for his benefit and protection, unless public policy requires its enforcement, but the intention to waive should clearly appear. Was the failure to interpose the objection as to the invalidity of the grand jury before plea to the merits or verdict a waiver of such objection? In answering this question properly, we must keep in mind that there is a broad distinction between want of power and a defective exercise of power; between objections which assail the validity of a grand jury as a body, and objections which merely go to a particular member of a grand jury; between what is absolutely void and what is merely irregular. There are a number of cases which hold that objections to the qualification of a particular grand juror come too late after plea of not guilty. *State v. Blackledge*, 7 Rich. Law, 327; *State v. Rafe*, 56 S. C. 379, 34 S. E. 680; *State v. Boyd*, 56 S. C. 384, 34 S. E. 661; *State v. Berkeley*, 64 S. C. 194, 41 S. E. 961. These irregularities in the venire, or in the drawing, summoning, or impaneling of grand jurors, are certainly waived if objection be not made before verdict. Civ. Code, § 2947; *State v. Stephens*, 11 S. C. 319; *State v. Jeffcoat*, 26 S. C. 114, 1 S. E. 440. But the objection here goes deeper. It does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in doing which the law requires, which assumes power to act; but it goes to existence of the grand jury as a body, that it is void as such, and that its indictment is therefore a nullity. A writ of venire to grand or petit jurors is a part of the record

of conviction, and, when it is void, the judgment will be arrested. *State v. Dosier*, 2 Speers, 211; *State v. Williams*, 1 Rich. Law, 188. Judgments were arrested in the cases of *State v. Jennings*, 15 Rich. Law, 42, and *State v. Pratt*, 15 Rich. Law, 47, because the petit jurors were so illegally drawn as not to constitute lawful bodies. So, also, in the case of *State v. Harden*, 2 Rich. Law, 533. In the case of *State v. Turner*, 63 S. C. 548, 41 S. E. 778, an appeal was sustained which assigned error in overruling a motion in arrest of judgment made upon the ground that the jury lists were illegally prepared, not having been drawn publicly, as required by the statute. In the case of *State v. Garrett*, 64 S. C. 250, 42 S. E. 108, this court set aside a conviction because the act authorizing the grand jury which found "True bill" was unconstitutional, and would be entirely conclusive of this question, but for the fact that a motion to quash the indictment on the same ground had been made. The correct rule is thus stated in *Ex parte Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513, declaring the effect of the decision in *U. S. v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857: "A defect in the construction or organization of a grand jury which does not prevent the presence of twelve competent jurors, by whose votes the indictment is found, and which could have been cured if the attention of the court had been called to it at the time, or promptly remedied by the impaneling of a competent grand jury, is waived, if the defendant treats the indictment as sufficient, pleads 'Not guilty,' and goes to trial on the merits of the charge." In this case the grand jury was not a lawful body. Its indictment was a nullity and incurable. Therefore a plea of not guilty is not a waiver of such a fatal defect. The motion in arrest of judgment should have been sustained.

With respect to the exceptions which allege error in the charge in declaring the right of a person to interfere when he sees a felony is about to be committed, and in declaring the rights of a host to interfere for the protection of his guest, we have only to say the case as presented does not show any harmful error in these particulars. The defendant testified that he had shot Neeley to save his (defendant's) life, as Neeley was advancing on him with a knife, and his defense was on that line. We do not see how he could be prejudiced by a charge made with reference to the right to prevent the commission of a felony upon another, or the right of a host to protect his guest. It is true, the circuit court, at request of defendant's counsel, charged on the subject, and charged generally in accordance with defendant's request, but with some modifications. Whether the charge was in every respect accurate is not material to any issue raised by the evidence.

For error in not sustaining motion for

new trial, and error of judgment as alleged in the first and second exceptions, the judgment of the circuit court is reversed, and the case remanded for a new trial.

(135 N. C. 178)

MARTIN v. CLARK.

(Supreme Court of North Carolina. April 26, 1904.)

COUNTY TREASURER—PAYMENT OF WARRANT ON SPECIAL FUND—MONEY DEMAND—MANDAMUS—SUMMONS—AMENDMENT.

1. Mandamus to compel a county treasurer to pay a warrant out of a specific fund is not an action to enforce a money demand, and the summons may be returnable before the judge at chambers, and not to the regular term.

2. Where the county commissioners have allowed a claim, and have issued a warrant for its payment by the county treasurer out of a specific fund, it is his duty to pay, if he has such funds applicable to the claim.

3. Where a summons was improperly made returnable before the judge at chambers, instead of to the regular term, the judge should not dismiss the action, but transfer it to the civil issue docket, making the necessary amendments therefor.

4. The issuance of an alternative mandamus to compel a county treasurer to pay a warrant, with an order to the treasurer to show cause why a peremptory writ should not issue, is not prejudicial to the treasurer, for, on his showing that he has no money applicable to the warrant, or that the warrant is in contravention of the Constitution, or any other lawful reason for not paying it, the peremptory writ will not be granted.

Appeal from Superior Court, Montgomery County; W. R. Allen, Judge.

Action by M. S. Martin against W. D. Clark. From a judgment for plaintiff, defendant appeals. Affirmed.

R. T. Poole, for appellant. W. A. Cochran, for appellee.

CONNOR, J. The commissioners of Montgomery county issued a warrant upon the treasurer for the sum of \$600, payable to the plaintiff "on building bridge at Martin's mill to be paid out of the special tax funds." The order was presented to the treasurer, who refused to pay it. Thereupon the plaintiff began this action by issuing a summons returnable before the judge at chambers. In his complaint and in his reply to the defendant's answer the plaintiff alleges that the defendant treasurer has in his hands, subject to said warrant, an amount more than sufficient to pay the same. He asks that a mandamus issue, directing and commanding the defendant to pay said warrant. The defendant demurred to the complaint for that the plaintiff's alleged cause of action was a "money demand," and that the summons should have been returnable to the regular term. The court overruled the demurrer, and the defendant excepted. He thereupon filed an answer. The defendant moved in this court to dismiss the action for the same cause as that set out in his demurrer.

While the authorities are not entirely clear,

we think the action was properly brought. The warrant or order directs the payment of a specific amount out of specific funds—"the special tax funds." The treasurer is a ministerial officer charged with the duty of holding the public funds, and paying them out on the warrant of the commissioners. This court, in answer to the same objection made in *Bearden v. Fullam*, 129 N. C. 477, 40 S. E. 204, said: "This is a proceeding, not to litigate a matter to obtain a judgment for money, not to ascertain the defendant's liability on an issue of whether he is indebted to the plaintiffs or not, but to compel a public officer to deposit public funds in his hands in a public depository. It is not a money demand in the sense in which that word is used in the statute." The commissioners having audited and allowed the claim, and having issued a warrant for its payment by the treasurer out of a specific fund, it is his duty to do so, provided he has such funds in his hands applicable to such claim. The law commits to the board of commissioners the power and duty of auditing and passing upon the validity of claims. If they refuse to audit or act upon a claim, mandamus will lie to compel them to do so. *Bennett v. Commissioners*, 125 N. C. 468, 34 S. E. 632. If, after the hearing, they refuse to allow or issue a warrant for its payment, an action will lie against the commissioners to establish the debt, and for such other relief as the party may be entitled to. *Hughes v. Commissioners*, 107 N. C. 598, 12 S. E. 465. If, however, the summons was improperly made returnable before the judge at chambers, he should not dismiss the action, but transfer it to the civil issue docket for trial; making such amendments to process and pleading as might be necessary. *Ewhank v. Turner*, 134 N. C. —, 46 S. E. 508. His honor properly ordered the alternative mandamus to issue, with the order to the defendant to show cause at the next term of the superior court why a peremptory writ should not issue. The judgment is but an order to show cause, and can do no possible harm to the defendant. If he shall show that he has no money in hand applicable to the order, or that the special tax is by law applicable to some other purposes, or any other good and lawful reason for not paying the warrant, the court will refuse the peremptory mandamus, and the plaintiff will proceed as he may be advised. It cannot be within the power or duty of the treasurer of the county to refuse to pay a county order issued by the board of commissioners because he does not think it a just or lawful claim, or for any other reason, which has been passed upon by the board, and within its power to act. It is different with the State Treasurer. He may refuse to pay a warrant of the auditor if it appear that the law under which it is issued is unconstitutional, or the claim not within the terms of the statute. Const. art. 14, § 3. If the county treasurer deem the warrant drawn in

contravention of a constitutional provision or limitation, he should refuse to pay it. If the court should so adjudge upon the return to an alternative mandamus, no peremptory writ would issue.

The judgment is affirmed.

(135 N. C. 198)

FISHER v. BROWN et al.

(Supreme Court of North Carolina. April 28, 1904.)

GUARDIAN AND WARD—ACCOUNTING BY GUARDIAN—WRONGFUL USE OF FUNDS—COMMISSIONS—EVIDENCE—ADMISSIONS—HARMLESS ERROR.

1. Where a guardian's answer in a suit for an accounting contained an admission that he had used the funds of his ward in his own business and for his own benefit, the introduction of evidence of an admission to the same effect, made by the guardian in a proceeding instituted for his removal, was harmless error.

2. Where, during a portion of the time covered by a guardianship, Code, § 3835, permitting 8 per cent. to be charged by a special contract, was in force, it was not error for the court to charge the guardian, who had wrongfully used the funds in his own business, interest at that rate, until the same was changed by statute, and at the highest legal rate thereafter.

3. Where, though a guardian wrongfully used his ward's money in his own business, he made regular returns of his acts under the guardianship throughout the whole period thereof, charging himself with 6 per cent. interest thereon, he was entitled to commissions on the interest or income from the funds in his hands during his guardianship.

Appeal from Superior Court, Cabarrus County; Neal, Judge.

Action by the state, on relation of J. V. Fisher, guardian of the estate of Lilly Ury, a minor, against R. A. Brown and others. From an order overruling exceptions to a referee's report, defendants appeal. Modified and affirmed.

W. G. Means and Pou & Fuller, for appellants. Montgomery & Crowell and Self & Whitener, for appellee.

MONTGOMERY, J. The defendant R. A. Brown had been removed from the guardianship of Lilly Ury, and this action was then brought by the plaintiff, as the newly appointed guardian, against the defendant R. A. Brown and the other defendants, sureties on his guardian bond, for an account and settlement of the guardianship. The case was referred to the clerk of the superior court to state the account. The report of the referee was filed and confirmed by the court.

The first exception of the defendant which we will consider is the one of the receiving by the referee, as evidence, of an admission made by the defendant R. A. Brown, in the proceeding instituted for his removal as guardian, to the effect that he qualified as guardian of Lilly Ury for the purpose of using the funds belonging to her in his own

¶ 2. See *Guardian and Ward*, vol. 25, Cent. Dig. § 252; *Interest*, vol. 29, Cent. Dig. § 61.

business, and that he applied the same to his own purposes. We do not deem it necessary to discuss that exception, any further than to say that it was error on the part of the referee to have received that admission in evidence. In any aspect of the case, it is harmless error. The defendants in their answer in the present case admitted that the defendant R. A. Brown used the guardian funds in his own business and for his own benefit.

The next exception was to a conclusion of law of the referee, affirmed by the court, that the defendant R. A. Brown, because of his having used the funds belonging to the estate of his ward in his own business, should be charged with 8 per cent. per annum on the fund up to February 21, 1895 (the date of the change of law of interest), and after that time with 6 per cent. per annum. The exception cannot be sustained. The point is expressly decided in *Carr v. Askew*, 94 N. C. 194. There the defendant guardian had neglected to invest the fund, and had applied it to his own purposes; and the court decided that he should be charged with interest at the highest rate. At that time 6 per cent. per annum was the general rate, but under section 3835 of the Code as much as 8 per cent. interest was allowed to be charged and collected, if there was a special contract in writing, signed by the party to be charged therewith or by his agent to that effect. The referee in that case had made a finding that in Wake county, where the guardian resided, he could have loaned the fund out on proper security at 8 per cent. per annum, but that, taking into consideration the interval occurring between the taking in and reloading of moneys, a continuous rate of 7 per cent. per annum would have been the maximum that could have been realized. In that case, on the subject of the rate of interest with which the guardian should have been charged, the court said: "These exceptions, we think, cannot be sustained, * * * and for the further reason that the evidence taken by the referee upon that matter varies from 6 to 8 per cent., and we think it was reasonable and just under the proofs that the intermediate sum of 7 per cent. should be adopted as the average and maximum of interest with which the defendant should be charged, compounded until the death of his ward in 1883, and with simple interest after that time. As a general rule, when a trustee has not only neglected to invest the fund, but has applied it to his own purposes, as by using it in his trade, he may be charged with interest at the highest rate. *Adams*, Eq. 664. But in this case the defendant had annually made a fair return for 13 years, and for a good portion of that time charged himself with 8 per cent. interest. That is a circumstance which might very properly have been taken into consideration by the referee in exonerating him from being charged with the highest

rate of interest." That language is conclusive that the court was of opinion that the guardian there would have been chargeable with 8 per cent., the special rate allowed by the proviso in section 3835 of the Code, but for the findings of the referee, and that the guardian had charged himself with 8 per cent. for a considerable part of the time. The rate of interest allowed in special contracts under section 3835 is what the court meant by the "highest rate of interest."

The only other one of the exceptions of the defendant necessary to be considered was a conclusion of law, arrived at by the referee and affirmed by the court, that the defendant R. A. Brown, having used his ward's money in his own business and having never otherwise invested it, should not be allowed commissions on the interest or income from the fund in his hands belonging to the estate of his ward. That exception must be sustained on the authority of *Carr v. Askew*, supra. On a similar exception to the one raised in the case before us, the court there said: "We think this exception should be sustained. It was held by this court in *Burke v. Turner*, 85 N. C. 504, 'that a guardian is not entitled to commission on money collected and used by him in his own business'; but that was a case where the guardian not only used the money in his own business, but was guilty of gross negligence in not making his returns. * * * In this case, although the guardian used the money of his ward for his own purpose, he made his annual returns with strict punctuality and fairness for 13 years, so that it might be seen at all times for what sum he was liable to his ward, and he and his sureties were perfectly responsible. Although he violated the law, and abused the trust reposed in him, by the use of his ward's money, we do not think it was such gross malfeasance as should exclude him from the right to be allowed commissions." In the case before us the defendant R. A. Brown, guardian, made regular returns throughout the whole period of his guardianship and charged himself with 6 per cent. interest. The cases are similar on the point of commissions to be allowed, and the exception is sustained.

We have examined the other exceptions of the defendant, and find that they are without merit, and ought not to be sustained. The parties to this action can, when the certificate of this opinion is received in the court below, by consent, have the judgment of the superior court modified to the extent of having commissions allowed to the defendant Brown as above set out, to save the trouble and expense of having the matter recommitting to the referee to make the allowance of commissions.

Modified and affirmed.

CLARK, O. J. (concurring). The rule laid down in *Carr v. Askew*, 94 N. C. 194, and reaffirmed in this case, that when a fiduciary

has used the trust funds in his own business he is to be charged with the highest rate of interest, unless he is shown to have made more, when he is chargeable with the actual profits made, is based upon the sound reasons given in the opinion of the court. It is also sustained by the precedents. In the absence of all evidence as to profits, the fiduciary in such cases is chargeable with the highest permissible rate at which he could have loaned the money, and the burden is on him to show that he made less (3 Williams, Ex'rs [7th Am. Ed.] 404, and cases cited), though in all cases, when he himself uses the money, he is chargeable not less than the ordinary rate of interest, even though he should not have made so much. Wedderburn v. Wedderburn, 20 Beavan, 100; Treves v. Townshend, 1 Bro. C. C. 384; Heathcote v. Hulme, 1 J. & W. Ch. 135, which last directed "an inquiry whether the account of interest or profits will be most advantageous to the infants." In the English cases, 3 per cent. is taken as the usual, and 5 per cent. as the highest, allowable rate (corresponding to the 6 and 8 per cent. under our former statute); and in all cases the fiduciary using trust funds is charged with 5 per cent. unless his profits therefrom were greater, in which case he is chargeable with them, or unless he shows the profits were less, in which case he is charged therewith, but never less than 3 per cent., at which it was his duty to have loaned the money. Lord Cramworth, in Robinson v. Robinson, 1 De G., M. & G. 257. Where the fiduciary does not use the money, but merely fails to loan it or to invest it, he is chargeable only with the ordinary and usual rate of interest, the amount which he should have made for the trust fund, if he had not been negligent. *Rocke v. Hart*, 11 Ves. 61. The whole doctrine is summed up and restated as above by James, L. J., in *Vyse v. Foster*, L. R. [1872-73] 8 Ch. App., at page 329, and in 3 Williams, Ex'rs, ut supra.

CONNOR, J. (concurring). The referee does not find as a fact, nor is there any suggestion, that the guardian could have loaned the money of his ward at 8 per cent. interest. I am of the opinion that, in the absence of this finding, he should not be charged with more than the legal rate of 6 per cent. In *Carr v. Askew*, 94 N. C. 194, the referee found as a fact that the guardian could, during the period of his guardianship, have loaned the money in Wake county upon safe personal security or real estate mortgage at 8 per cent. This finding clearly distinguishes the two cases. In that case the referee also found that, taking into consideration the intervals occurring between the taking in and relending of loans, a continuous rate of 7 per cent. would have been the maximum that could have been realized. The court, adopting this conclusion, charged the guardian with only 7 per cent., notwithstanding the fact that he

used the money in his own business. In that case the entire sum of \$10,000 came into the hand of the guardian from an insurance policy, whereas in this case the guardian entered upon the duties of his office with less than \$2,000, and, receiving rents, income, etc., in small amounts, has so managed his trust that, after educating his ward, he has in hand for her \$6,000. If he is to be punished for the use of the money in his own business, which was clearly improper, it would seem that, accounting for every cent which came into his hands, with interest for every day, would be a sufficient reminder of the duties which he assumed as guardian. For these reasons we cannot concur in the opinion of the court by which he is charged with 8 per cent. interest.

WALKER, J., concurs in opinion of CONNOR, J.

(134 N. C. 236)

CHEEK v. OAK GROVE LUMBER CO.
(Supreme Court of North Carolina. April 27, 1904.)

For former opinion, see 46 S. E. 488.

CLARK, C. J. (concurring). Fires set by locomotives are so disastrous that all reasonable means should be used to prevent them. The cut of a locomotive used in *Williams v. Railroad*, 130 N. C., at page 125, 40 S. E. 979, has been very useful to the profession and the court in the trial of actions for damages for fires alleged to have been caused by sparks thrown out by locomotive engines. It may be useful, and therefore not inappropriate in a concurring opinion in this case, in which the spark arrester was taken off because with it the engine did not steam well, to add to the cut used in 130 N. C., 40 S. E., ut supra, the following description and cut of a successful device used on several European railroads to prevent fires being caused from locomotive sparks, taken from an official government publication (U. S. Consular Reports 1904, p. 702): "The device consists of a series of three grates set one above another in a square iron or steel frame of such size and form as to fit into the smoke chamber of the locomotive. The arrangement of the three tiers of grate bars is shown by the illustration below. Each bar is about two inches wide by one-tenth of an inch thick, and is ingeniously set into the frame so as to be held in place against any shock or pressure, and at the same time to be free to expand or contract with changing temperatures. As shown by the diagram, the middle tier or grate contains twice as many bars as the top and bottom tiers, and the arrangement of bars and spaces is such that, while a free passage is secured for the gases of combustion, no spark or ember more than 0.16 inch in thickness can escape; and these are so small that they are self-extinguished with-

in a few feet after escaping into the open air, and cause no danger. This ingenious arrangement of the bars, together with the readiness with which they expand and contract under varying temperatures, acts to dislodge the adhering particles, and prevents the arrester from becoming clogged, at the same time permitting a draft so open and free that the steaming capacity of the engine is said to be visibly greater than with any other type of spark catcher heretofore used."



It is there said that this design has solved the problem, which "has been to devise a metallic network fine enough in mesh to effectively sift the glowing sparks from the blast of a locomotive without so obstructing the draft as to compromise its steaming capacity. Hitherto the bars or filaments of network spark arresters have been mainly round, and fixed in place—conditions which always entail more or less danger of choking and clogging whenever the space between bars or meshes is small enough to really prevent the escape of sparks and glowing embers of dangerous size." This device occupies the space, E, E, E, in the cut in 130 N. C., at page 125, 40 S. E. 979; but, instead of being a flat mesh, as there used, it consists of three tiers or sets of bars, each 2 inches deep by one-tenth of an inch thick, making a total thickness of six inches, through which the sparks must pass, with such distance between the bars as prevent, but without clogging, the passage of any cinders more than one-sixth of an inch in thickness.

(136 N. C. 159)

BROOKS & TAYLOR v. TRIPP et al.

(Supreme Court of North Carolina. April 26, 1904.)

GAME—SHELLFISH—PROTECTION—POWERS OF STATE—POLICE REGULATIONS—STATUTES—TAXATION—UNIFORMITY—EXPORT TAX.

1. An act to protect and promote the shellfish industry of a certain county is within the police powers of the state.

2. Laws 1903, p. 723, c. 414, is entitled "An act to protect and promote the shellfish industry of B." It provides for the enforcement of the laws protecting shellfish during the "close season"; the Governor being authorized to appoint a shellfish commissioner at a prescribed salary, to be paid by a tax levied on oysters and clams "shipped out of the county," and, if any surplus remains, the county treasurer is required to pay the same into the state treasury. Held, that the tax so imposed was not for the purpose of raising revenue for the state treasury, but was merely to pay for the enforcement of the statute, which was not, therefore, unconstitutional on the ground that the tax was not uniformly laid.

3. Since the ownership of game and fish is in the state, and a license to hunt or fish is not an immunity or privilege of the citizens of

the state, the state Legislature has power to forbid residents or nonresidents to take shellfish from the waters of a particular county in the state.

4. The tax imposed by Laws 1903, p. 723, c. 414, on shellfish taken and "shipped out of the county," is not an export tax, and is, therefore, not unconstitutional for that reason.

Douglas, J., dissenting.

Appeal from Superior Court, Brunswick County; Ferguson, Judge.

Suit by Brooks & Taylor against L. C. Tripp and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

Russell & Gore, for appellants. Cranmer & Davis, for appellees.

CLARK, C. J. This is an action to restrain the execution of chapter 414, p. 723, Laws 1903; its unconstitutionality being averred on the ground that it lays a tax of three cents per bushel on clams, two cents per bushel on oysters in the shell, and two cents per gallon on shucked oysters "shipped out of said county," and not also upon the shellfish situate, dug, or consumed within said county, and that the said tax amounts to an impost or export tax, and is not levied for the purpose of inspection.

The act in question is entitled "An act to protect and promote the shellfish industry of Brunswick." If such is its true purport and object, it is within the police power of the state, and a tax levied for such object would be legal, although laid only upon shellfish in that county. If levied upon shellfish in that county only for the purpose of raising revenue for the state treasury, it would be forbidden by the Constitution, because not laid by "uniform rule." *State v. Moore*, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472. But the presumption is that a statute is constitutional unless the contrary clearly appears. *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 963. An examination of the statute shows that for the purpose of enforcing the laws and regulations to protect shellfish, and especially the prohibition of disturbing their beds during the prescribed "close season," the Governor is authorized to appoint a shellfish commissioner at a salary of \$400 per annum, and such commissioner is empowered to appoint "two or more" sub-shellfish commissioners to aid him in his work, who shall receive \$25 each per month while so employed, and that the fund raised by the above tax is to be paid to the county treasurer, and the surplus (if any) shall be paid by him into the state treasury, after "first deducting" the salaries of the aforesaid officers. It is further provided that such officers shall receive no compensation whatever, except out of said funds. From the title and general purport of the act, and especially the provision for the appointment of an unlimited number of deputies, it is clear that there was no expectation or intention to raise any money for the state treasury (and none has been paid into the state treasury from this source), but that the

object was solely to provide salaries for those engaged in enforcing the regulations for the protection of shellfish in Brunswick county. It must clearly appear that the object was not that recited, but was in fact to raise revenue for the state, before the act can be declared unconstitutional. The statute may be unguarded in not restricting the number of sub-shellfish commissioners; but the Legislature may have thought this was sufficiently done by providing that the officers should receive no compensation, except from this fund. If there is a defect in this regard, making the act liable to abuse, this is a matter for legislative correction; but it does not render the statute unconstitutional.

The tax required for the enforcement of a police regulation is not a tax, within the meaning of our Constitution, requiring uniformity and equality of taxation, but "is a proper mode of providing for the compensation" of an officer designated to enforce such regulation in the prescribed territory, "and the payment of any expenses incidental to this" duty. *State v. Tyson*, 111 N. C. 687, 16 S. E. 238. Local legislation in the nature of police regulation has always been sustained. See, as to the sale of liquor, sale of seed cotton, fence laws, cattle running at large, working public roads, and such legislation for many other purposes, the authorities collected in *State v. Sharp*, 125 N. C. 632, 34 S. E. 264, 74 Am. St. Rep. 663. In fact, this statute applies uniformly to all citizens of Brunswick, and all others, whether residents or nonresidents of this state, who go to that county to take shellfish for shipment.

But, even if the act had forbidden nonresidents of this state to take shellfish in that county, it would have been competent for the Legislature to so enact; for the ownership of game and fish is in the state, and license to hunt or fish is not an immunity or privilege of the citizens of this state. *State v. Gallop*, 126 N. C. 983, 984, 35 S. E. 180, and cases cited; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. Ed. 248. In *Chambers v. Church*, 14 R. I. 398, 51 Am. Rep. 410, it is held that a state "may forbid nonresidents from catching fish in its waters for manure and oil, and manufacturing manure and oil from fish caught in its waters." In *Haney v. Compton*, 86 N. J. Law, 507, in the matter of prohibiting nonresidents from gathering oysters within the waters of New Jersey, the court says: "Such enactment for the protection of property must be considered as a matter of internal police, and not a regulation of commerce with foreign nations or among the states. Neither does it controvert the provisions of the United States Constitution that the citizens of each state shall be entitled to all the privileges of citizens of the several states." But this statute in fact makes no discrimination in favor of the citizens of North Carolina.

It is further and chiefly contended that the act is unconstitutional in that it levies the

tax solely upon shellfish shipped out of the county, and not also upon the other shellfish situate, dug, or consumed in said county. The tax could not be levied upon all the shellfish "situated" in Brunswick county, because there is no possible means to ascertain this. It would also be difficult to ascertain the number dug and consumed. The ascertainment of the number shipped out of the county is more practical, and the levy of a tax thereon is a reasonable method of deriving funds for the enforcement of the regulations for the protection of shellfish, and is not for revenue. It is not unreasonable that no tax is laid upon shellfish consumed for the sustenance and support of the people residing in the county. The tax laid is not an export tax, but is simply the method chosen by the Legislature, as the least onerous and most practicable system of raising the necessary funds to defray the expenses of protecting the shellfish industry in the county of Brunswick. The regulation of fishing and hunting is, as above said, a matter entirely within the discretion of the state. *Lawton v. Steele*, 151 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 885; *State v. Gallop*, 126 N. C. 984, 35 S. E. 180.

In refusing to hold the statute unconstitutional there was no error.

DOUGLAS, J. (dissenting). The opinion of the court rightly says: "If [the tax were] levied upon shellfish in that county for the purpose of raising revenue for the state treasury, it would be forbidden by the Constitution, because not laid by uniform rule." The opinion further says, and I think correctly so, that "from the title and general purport of the act, and especially from the provision for the appointment of an unlimited number of deputies, it is clear that there was no expectation or intention to raise any money for the state treasury (and none has been paid into the state treasury from this source), but that the object was solely to provide salaries for those engaged in enforcing the regulations for the protection of shellfish in Brunswick county." The act provides that "the tax so collected is to be paid to the county treasurer of Brunswick county, and by him paid to the state treasurer, after first paying the shellfish commissioner a salary of \$400 per annum, and the sub-shellfish commissioners," etc. The act further provides that "the shellfish commissioner shall be one of the qualified voters of Brunswick county," and that he in turn "shall have the power to appoint two or more sub-shellfish commissioners out of the qualified voters of Brunswick county." No other qualifications appear to be required, and, while their general duties "shall be to protect and promote the shellfish interests of Brunswick county," their special duties seem to be to collect sufficient tax to pay their salaries. It seems to be conceded that, if the tax were a source of revenue to the state, the act would be unconstitutional. I gravely doubt whether the

constitutionality of an act of the Legislature should ever be made to depend upon the absorptive powers of any set of officers. However, it is due to them to say that so far they seem to have effectually maintained its constitutionality under the test indicated in the opinion of the court. I cannot bring my mind to assent to the validity of such legislation, which in my opinion substitutes the will of the draftsman for that of the General Assembly. It is due to the Legislature to say that the act was passed in the closing days of its session.

(135 N. C. 118)

In re BRIGGS.

(Supreme Court of North Carolina. April 19, 1904.)

CONSTITUTIONAL LAW — COMPELLING WITNESS TO GIVE EVIDENCE AGAINST HIMSELF—PARDON BY LEGISLATURE—CONTEMPT—REVIEW.

1. Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, is a restriction solely on the federal government or courts.

2. Const. art. 1, § 11, declaring that no person shall be compelled to give evidence against himself, is not violated by Code, § 1215, providing that no person shall be excused on any prosecution from testifying touching any unlawful gaming done by himself or others, but no discovery made by the witness on such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him.

3. The pardon granted by Code, § 1215, to a witness who testifies on a prosecution of another for a gambling offense in which he participated, is within the power of the Legislature.

4. Whether the ruling adjudging a witness guilty of contempt, under Code, § 648 (6), in not answering a question, should be presented for review by habeas corpus or by appeal, as was done, not being raised by any exception, should not be discussed by the court *ex mero motu*.

Appeal from Superior Court, Wilson County; Moore, Judge.

R. G. Briggs was adjudged guilty of contempt, and appeals. Affirmed.

This is an appeal from a judgment for contempt from Moore, J., at February term, 1904, Wilson superior court. In the case of *State v. Geo. Morgan*, who was indicted for keeping a gaming house, with a second count for playing cards for money, in violation of chapter 29, p. 55, Laws 1891, R. G. Briggs was sworn as a witness for the state. The solicitor asked the witness: "(1) Have you been in the defendant's room on the west side of Goldsboro street, in Wilson, N. C., within the last two years?" The witness stated that he declined to answer the question on the ground that his answer might tend to criminate him. Before the witness finally declined to answer this question, the solicitor asked him the following additional questions: "(2) Describe the room. (3) Have you within the last two years seen a game of cards played in the defendant's room for money or other thing of value, in which you

did not participate? (4) Have you within the last two years seen a game of cards played in the defendant's room for money or other thing of value, in which you did participate?" The witness declined to answer each and every of these questions for the reason first given. The court, being of opinion that, under section 1215 of the Code, the witness is not privileged from answering the questions, and all pertinent questions relating to the charge against the defendant, but should be compelled to answer, informed the witness that he must answer the questions. The witness again declined to answer, whereupon the court adjudged the witness guilty of a contempt of court, and imposed a fine upon him, and ordered him in custody of the sheriff until the fine was paid. The witness excepted and appealed.

John E. Woodard, for appellant. The Attorney General, for the State.

CLARK, C. J. Section 648 of the Code provides that "any person guilty of any of the following acts may be punished for contempt: * * * (6) The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory." The fourth question was, "Have you within the last two years seen a game of cards played in the defendant's room for money or other thing of value, in which you did participate?" As already stated, the witness declined to answer on the ground that his reply would tend to criminate him. The court, being of opinion that under Code, § 1215, the witness was not privileged from answering this, or any other pertinent questions relative to the charge against the defendant, directed the witness to answer, and, upon his refusal, adjudged him in contempt, and imposed a fine, and ordered him into custody until it was paid, from which judgment and order the respondent appealed.

Code, § 1215, is as follows: "No person shall be excused on any prosecution from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him." The respondent contends that this statute is unconstitutional, in that:

(1) It violates the fifth amendment to the Constitution of the United States, which provides that "no person * * * shall be compelled in any criminal case to be a witness against himself." We have already, at this term, in *State v. Patterson*, 47 S. E. 808, called attention to the well-known historical fact that the first 10 amendments were passed as restrictions solely upon the federal government and courts, and that the United States Supreme Court has uniformly held that they do not apply to the state governments or courts. In *Barron v. Baltimore*, 32

U. S. 243, 8 L. Ed. 672, Marshall, O. J., referring to the first 11 amendments, said: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." This repeatedly and uniformly has been so held by that court ever since, and among the cases are *Peryear v. Com.*, 72 U. S. 480, 18 L. Ed. 608; *Twitchell v. Com.*, 74 U. S. 325, 19 L. Ed. 223; *U. S. v. Cruikshank*, 92 U. S. 552, 23 L. Ed. 588; *Presser v. Ill.*, 116 U. S. 265, 6 Sup. Ct. 580, 29 L. Ed. 615; *Spies v. Ill.*, 123 U. S. 166, 8 Sup. Ct. 21, 22, 31 L. Ed. 80, in which it is said that it is well settled that the first 10 amendments to the federal Constitution were not intended to limit the powers of the states; *Hallinger v. Davis*, 146 U. S. 319, 13 Sup. Ct. 105, 36 L. Ed. 986, and numerous other federal and state decisions collected in 3 *Rose's Notes to U. S. Reports*, 368-372, and 6 *Rose's Notes to U. S. Reports*, 986, 987.

(2) That the statute (section 1215) violates article 1, § 11, of the Constitution of North Carolina, which declares that no person shall "be compelled to give evidence against himself." The same point of alleged unconstitutionality has been repeatedly presented in state and federal courts as to similar statutes, and the ruling has generally been that, even where the statute merely provides that the evidence elicited from the witness cannot be used against him, he can be required to testify. *State v. Quarles*, 13 Ark. 307; *Wilkins v. Malone*, 14 Ind. 153; *Ex parte Buskett*, 106 Mo. 602, 17 S. W. 753, 14 L. R. A. 407, 27 Am. St. Rep. 378, and cases therein cited; *Kneeland v. State*, 62 Ga. 395; *People v. Kelly*, 24 N. Y. 74. There are cases which hold that he cannot be required to testify unless total immunity is guaranteed him, because clues may be discovered by the evidence, which may be followed up to the prisoner's subsequent conviction, without putting in evidence his declarations made when a witness. *Smith v. Smith*, 116 N. C. 387, 21 S. E. 196; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22. But when, as in our state, the statute provides that the witness in such case shall have absolute immunity from punishment in regard to his participation in the offense as to which he has been required to testify, the rule is universal that he may be compelled to testify. Among the cases clearly stating this are *Hirsch v. State*, 67 Tenn. 89; *Warner v. State*, 81 Tenn. 52; *State v. Nowell*, 58 N. H. 314; *People v. Foundry* (1903) 201 Ill. 236, 66 N. E. 349. In our own state the point here presented was decided, and the witness was required to answer, in *La Fontaine v. Underwriters*, 83 N. C. 132, and *State v. Morgan*, 133 N. C. 745, 45 S. E. 1033, in which last it is said that the witness "was properly made to answer the questions. Code, § 1215." This was said as to another witness in this same case. Though the fifth amendment to the United States Constitution does not apply to the state courts, that

amendment is so nearly in the words of the similar provision in the state Constitution that the above distinction cannot be more clearly indicated than by reference to two well-known decisions of the United States Supreme Court. In *Counselmen v. Hitchcock*, 142 U. S. 457, 12 Sup. Ct. 195, 35 L. Ed. 1110, the protective statute (Rev. St. U. S. § 800 [U. S. Comp. St. 1901, p. 661]) was merely that "no evidence given by the witness shall be in any manner used against him, in any court of the United States, in any criminal proceeding"; and it was held that the witness was not compelled to answer, for the statute fell short of the constitutional provision, in that the disclosure of the circumstances, sources, and means of the offense might be used effectually in a subsequent prosecution against the witness for his participation in that very offense, without using his answers on the witness stand as evidence against him on his trial. That case cites (page 579, 142 U. S., page 204, 12 Sup. Ct., 35 L. Ed. 1110) the decision in *La Fontaine v. Underwriters*, 83 N. C. 132, as based upon a statute (Code, § 1215) giving such full and complete protection that the witness could properly be required to testify. In *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, Congress had, under the intimation in *Counselmen v. Hitchcock*, supra, amended the law by chapter 83, Act Feb. 11, 1893, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173], which provided that the witness required to testify in the cases designated should not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matters or things, concerning which he may testify." This was held to give absolute immunity against prosecution for the offense to which the questions related, and deprived the witness of his constitutional right to refuse to answer. The court said (page 595, 161 U. S., page 648, 16 Sup. Ct., 40 L. Ed. 819) that, if this were not so, "the practical result would be that no one could be compelled to testify to a material fact in a criminal case unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith." The court cites authorities (pages 598, 599, 161 U. S., page 647, 16 Sup. Ct., 40 L. Ed. 819) that, if prosecution would be barred as to the witness by the statute of limitation or a pardon, he would not be privileged to refuse to answer, and says this statute gives him the same protection, and deprives him of the privilege which he no longer requires for his protection. Our statute (Code, § 1215) is more explicit than the federal statute passed upon in *Brown v. Walker*, supra. It provides that the evidence adduced shall not be used against the witness "in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him." In *State v. Blalock*, 61 N. C. 242, this court sustained an act of the Legislature granting "amnesty and par-

don," and speaks of special pardons and general pardons by legislative act. In *State v. Keith*, 63 N. C., at page 143, the court recognizes again the validity of a pardon by legislative enactment, citing 4 Blk. 401, and Marshall, C. J., in *U. S. v. Wilson*, 32 U. S. 163, 8 L. Ed. 640, who state that the courts must take judicial notice of "a pardon by act of Parliament, because it is considered a public law, having the same effect as if the general law punishing the offense had been repealed or amended." It was evidently held in *State v. Blalock* and *State v. Keith*, supra, that article 3, § 6, of the Constitution, conferring on the Governor "the power to grant reprieves, commutations and pardons, after conviction, for all offenses [except in cases of impeachment] was not the grant of an exclusive power, and did not deprive the General Assembly of the power to pass special or general acts of pardon, like the English Parliament, even before conviction." The same view is expressed in *Brown v. Walker*, 161 U. S., at page 601, 16 Sup. Ct. 644, 40 L. Ed. 819, which holds that a similar act of Congress "securing to witnesses immunity from prosecution is virtually an act of general amnesty, and within the power of Congress, although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.'" The court further says (citing *Knott v. U. S.*, 95 U. S. 152, 24 L. Ed. 442) that the distinction between amnesty and pardon is of no practical importance, and that the decisions in this country and in England as to the legislative power to grant pardons, with one or two exceptions in this country, are unanimous in favor of their constitutionality.

The witness was properly required to answer.

Whether the ruling below, on the facts of this case, should be presented for review by habeas corpus or by appeal, is a question not raised by any exception, and we do not think we should discuss the point *ex mero motu*.

The judgment below is affirmed.

DOUGLAS, J. (concurring). We are met in limine with the vital question as to the defendant's right of appeal. If he has no right of appeal, it makes no difference what questions might be decided if the appeal were entertained. Under the facts of this case, and the principles of law applicable thereto, I think the defendant has a right of appeal. In fact, under all the circumstances, I think this the proper and most convenient proceeding in the case at bar. It is true, the defendant—properly so called, as this is a criminal prosecution—might sue out a writ of habeas corpus, but this course might be liable to grave inconveniences. One judge of the superior court might feel great hesitation in annulling the judgment of another judge, especially in a matter so nearly affecting the integrity of the court. If the writ were issued by a member of this court, returnable before himself, the same hesitation might exist, though perhaps to a less degree, while to make the writ returnable before a full bench

would be too cumbersome to insure prompt and adequate relief, as is hereinafter shown. A writ of certiorari might be equally inadequate. Much stress is laid upon the delay resulting from an appeal. A writ of certiorari would, and a writ of habeas corpus might, cause the same delay. It should be borne in mind that the defendant appeals at his peril. If this court affirms the judgment of the court below, his sentence will remain in full force and effect. In any event we think he is entitled to prosecute his appeal, and the fact that it will avail him nothing is no legal reason for its denial. The Constitution (article 4, § 8) says that "the Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference * * * and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Section 945 of the Code is in the exact words of the said section of the Constitution. As far as I can see, no distinction is made either in the Constitution or the statute as to cases of contempt. "Any matter of law or legal inference" are terms of most direct and comprehensive meaning, and, if they mean anything, mean what they say. It must follow that in all cases of contempt, where any question of law is involved, the defendant—for such he becomes when attached for contempt—is entitled to an appeal to this court. The only possible ground upon which he can be denied an appeal is that of absolute necessity, and it is clear that such a principle can never extend beyond the necessity that alone brought it into existence. "*Necessitas non habet legem*," or, as it is perhaps more properly stated, "*Necessitas vincit legem*," is a maxim which, however beneficial in some cases, is in its ultimate tendency destructive of all law, and therefore should be rarely invoked. We are not partial to maxims which tend to abridge the liberty of the citizen, or to deprive him of the equal protection of the law.

I am aware of the distinction attempted to be made in some jurisdictions between civil and criminal contempts, but I must confess that this classification is by no means clear, and has not always been rendered clearer by the learning of the books. Learning is not always wisdom. I am also aware of the distinction created in this state between "contempt" and "as for contempt," and the decisions of this court that in the latter class of cases an appeal will lie, while it will not in the former. This ruling, which has no foundation in the statute, arises purely *ex necessitate*, and is based upon the inherent right of self-defense attaching to the court as well as to the individual. Therefore the power of summary punishment can never exceed the limits of the necessity, and, in dealing with the liberty of the citizen, this necessity must be actual, and not constructive. The individual has inherent rights as well as the court, and it was primarily for the protection of those rights that courts themselves were instituted. The old idea that the individual is a mere atom of the state, having no rights except those that have been granted to him by the sovereign, has no application in this country. Here the state is the creature of the citizen, who holds his personal rights inherently and inalienably.

I will freely admit that if the conduct constituting the contempt is such as to actually

obstruct the business of the court, as in *Mott's Case*, no appeal would lie, as the consequent delay would prevent the prompt action rendered absolutely necessary for the protection of the court. But where a man creates no disturbance whatever, and is guilty of no act which can be construed into contempt, beyond a respectful insistence upon a constitutional right, he is, in my opinion, entitled to an appeal, by every just principle of law. What other protection can he have? It has been suggested that he might obtain a writ of "habeas corpus," issued probably by one member of this court before the full bench." I am not aware of any such provision of law, but, suppose it were so, would it give him an adequate remedy? He would be compelled to go to jail until he could reach a member of this court, and remain in jail until the next term of this court, if it were not then in session. Was it ever contemplated that the great prerogative writ of habeas corpus should be disposed of in any such manner? What good would it do the defendant, if his petition were not heard until after the expiration of his term of imprisonment?

So far, I have relied upon the reason of the thing. "Reason," says Coke, "is the soul of the law. The reason of law being changed, the law is also changed." I think, however, than an examination of the statutes and the decisions of this court will show that in this case reason and authority point to the same conclusion.

The contention of the state seems to be based entirely upon section 648 of the Code, apparently ignoring section 654, which provides that courts "shall have power to punish as for contempt . . . (4) all persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn or answer as such witness." Such refusal comes under section 648 only when it is "the contumacious and unlawful refusal to answer any legal and proper interrogatory." To make a person guilty of contempt under that section, the question must be both legal and proper, and the answer both unlawful and contumacious. Admitting that the questions were all proper, and the defendant's refusal to answer consequently unlawful, there is no evidence whatever that such refusal was contumacious. The court below evidently did not consider it so, because it fined the defendant \$1. It is true that the provision of section 650 that "the court shall cause the particulars of the offense to be specified on the record" does not of itself give to the defendant the right of appeal, but it does give to this court the means of ascertaining whether or not the appeal was properly taken. It is evident that any refusal of a witness to answer must necessarily be in the immediate presence of the court, and yet, when not contumacious, it is punishable only as for contempt, under section 654. The refusal of the witness to answer did not in any way tend to disturb the proceedings of the court, or even necessarily cause a continuance of the case, as the state might have proceeded without his testimony. At most, it could only have caused such delay as results from any other appeal. He could cause the same delay by going to jail and applying for a writ of habeas corpus, as suggested in the contentions of the state, or he could cut the Gordian knot by failing to attend. In the latter event he could be punished only as for contempt, with the admitted right of appeal. I am assuming that the witness unlawfully refused to answer. If his refusal had been lawful and

proper, then no power on earth should compel him to answer. In *Re Bonner*, 151 U. S. 242, 259, 14 Sup. Ct. 323, 326, 38 L. Ed. 149, the Supreme Court of the United States has well said that "the law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one, except as specifically authorized."

A brief review of the cases relied upon by the state, I think, will sustain the view I entertain in this case. In *State v. Woodfin*, 27 N. C. 199, 42 Am. Dec. 161, *State v. Mott*, 49 N. C. 449, and *Ex parte Summers*, 27 N. C. 149, the offenses were committed in *facie curiæ*; the two former being fights, and the last a positive refusal, in contemptuous language, to return process, after the direct order of the court. *Scott v. Fishplate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696, was a civil action for damages, and did not involve the right of appeal. In the cases of *In re Daves*, 81 N. C. 72, *In re Deaton*, 105 N. C. 61, 11 S. E. 244, *State v. Aiken*, 113 N. C. 651, 18 S. E. 690, and *In re Robinson*, 117 N. C. 533, 23 S. E. 453, 53 Am. St. Rep. 596, the appeal was entertained, and the judgment of the court below was reversed and set aside. In *re Gorham*, 129 N. C. 481, 40 S. E. 311, the judgment was specifically affirmed. In *re Daves*, 81 N. C. 72, this court says on page 75: "The plaintiff insists that an appeal does not lie from a judgment imposing a penalty for contempt. This is true as to that class of contempts which are committed in the presence of the court, or so near as to interfere with its business, and the reasons for which are justly set out by Nash, C. J., in the opinion in *State v. Mott*, 49 N. C. 449. But in cases like the present, where the right to punish depends upon a 'willful disobedience' of 'any process or order lawfully issued,' the lawfulness of the power exercised is a proper subject of review in this court." Why does not this decision apply to the case at bar, where the right to punish for contempt, under section 648, depends upon the "contumacious and unlawful" refusal of the witness to answer any "legal and proper interrogatory"? The state in the case at bar, as the court has done in some other cases, lays great stress upon the reasons given by Nash, C. J., in *State v. Mott*. What are those reasons? This court has well said in *Walton v. Gatlin*, 60 N. C. 810: "When the stream becomes too muddy to see the bottom, the surest way to find truth is to go up to the fountain head; that is, 'to the reason and sense of the thing.'" In *Mott's Case*, Nash, C. J., speaking for the court, says (49 N. C. 450): "For good reasons, the law does not authorize an appeal in such cases. To constitute a contempt, the act done must be in the presence of the court, or so near thereto as to obstruct the administration of justice. From the nature of the offense, it is difficult to see how another judge can estimate the nature of the act. The evil requires prompt action to its removal. Let us suppose a case: A man comes into court, and by his noisy behavior obstructs the business. The judge orders him to be fined and imprisoned for the contempt. The delinquent appeals to the court above. The appeal, of course, annuls the judgment; but the individual remains in the courthouse, and still continues his disorderly conduct. The court again interferes by a judgment of fine and imprisonment, and again the right of appeal is interposed, and so on, as long as the obstinacy and folly of the tree

passer continues, to the entire suspension of the public business and in utter contempt of the judicial authority." Do any of these reasons apply to the case at bar? If not, then why should we follow the decision in that case as an authority?

We come now to a consideration of the case upon its merits, and I find no difficulty in arriving at a conclusion. I do not see how the first question could tend to criminate the witness, and we might place our affirmance of the judgment upon his failure to answer it alone; but, as he was asked all the questions at the same time, and the action of the court below is founded upon his refusal to answer all the questions, I deem it proper to consider them. Indeed, it would seem that the propriety of the last question is the real matter sought to be determined in this appeal. It certainly presents its most important phase.

I think that all the questions should have been answered by the witness, including the one involving his own participation, although it does not appear that the court informed him of the protection afforded by the statute as clearly he should have done.

The Constitution of this state, in section 11 of article 11, provides that "in all criminal prosecutions every man has the right to be informed of the accusation against him; * * * and not be compelled to give evidence against himself." The scope of this protection is explained by this court in *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196, as follows: "We think the provisions of our Constitution ought to be liberally construed, to preserve personal rights and to protect the citizen against self-incriminating evidence. It is conceded and settled that a single unlawful act of sexual intercourse is not a criminal offense, but the question presented is, would the admission by the witness of a single act tend to criminate him? Our opinion is that it does, and that the witness ought not to be compelled to answer the question, for the reason that the admission may be the connecting link of a chain of evidence disclosing other facts and other circumstances leading to clear proof of a crime which would not have been known without the admission. The usual reply is that his admission cannot be used against him in any future prosecution, and that he is therefore protected. This fails to reach the mark, for, although it cannot be used against the witness, it may be the means, the link, by which other sufficient evidence has been discovered, which could not have been done without the admission. No one knows what facts and secrets are locked up in the bosom of a witness, and we think the true intent of the Constitution is that the witness shall not be compelled to disclose anything that may lead to criminal conduct, without absolute protection against future prosecution."

Section 1354 of the Code provides that: "Nothing in this chapter, except as provided in the preceding section, * * * shall render any person compellable to answer any question tending to criminate himself." Section 1353 has no bearing upon the question before us. Hence it follows that, were it not for section 1215 of the Code, the fourth question, and perhaps the second and third, would be incompetent under the laws as well as the Constitution of this state. Section 1215 is as follows: "No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery,

made by the witness upon such examination, shall be used against him, in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done, or participated in by him." The constitutionality of this section depends upon whether it gives to the witness the full measure of his constitutional protection. Its wording is not the best that might be selected to express its legal effect; but I think that it is sufficiently clear to justify our conclusion that it protects the witness from any prosecution or molestation of any kind on account of any offense concerning which he may be required to testify. Anything less than this would fail to give him adequate protection, and hence would fail to meet the constitutional requirement.

Whether the Legislature could grant pardons in analogy to the English Parliament is not before us, but there can be no doubt of its authority to pass acts of amnesty relating to certain classes of offenses. This power rests equally in reason and authority, its exercise being occasionally demanded by dominating necessities of public policy. This is clearly recognized in the cases of *State v. Blalock*, 61 N. C. 242, and *State v. Keith*, 63 N. C. 140. The latter case, holding that an act of amnesty was not only valid, but created a vested right of immunity, which could not be repealed even by a constitutional convention, was decided in 1869 by a court all of whose members had been elected at the same election at which the Constitution itself was adopted, and one of whose justices was a distinguished member of the convention which framed the Constitution. If the oft-cited principle of contemporaneous construction has any force, it is peculiarly applicable to that case, in which occurs the celebrated sentence: "These great principles are inseparable from American government and follow the American flag." See, also, *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

It has been repeatedly held that the fifth amendment to the federal Constitution is a restriction only upon the power of the United States, and not upon that of the states, but its provisions in this respect are so nearly identical with those of our own Constitution that the decisions thereon may well be cited in analogy. The said amendment provides that "no person * * * shall be compelled in any criminal case to be a witness against himself." Its scope was stated by Chief Justice Marshall, when presiding at the trial of Aaron Burr, as follows: "Many links," he says, "frequently compose that chain of testimony which is necessary to convict an individual of crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and, to every effectual purpose, accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. The fact of itself would be unavailing, but all other facts, without it, would be insufficient. While that remains concealed in his own bosom he is safe, but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

The question as to how far Congress may deprive a witness of his constitutional privilege

of refusing to testify, by protecting him from the consequences of his testimony, has been fully and elaborately discussed by the Supreme Court in several cases, and especially in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; and *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. Section 860 of the Revised Statutes [U. S. Comp. St. 1901, p. 661], taken from the act of February 25, 1868, c. 13, 15 Stat. 37, was as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture." In *Counselman's Case* the court held that the witness could not be compelled to testify, because the protection afforded by the statute was not equivalent to that of the Constitution. It says on page 585, 142 U. S., page 206, 12 Sup. Ct., 35 L. Ed. 1110: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case*, in Massachusetts, than to that of *People v. Kelley*, in New York; and we consider that the ruling of this court in *Boyd v. United States*, supra, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony, which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." In view of this decision, Congress passed the act of February 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]. It was held in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, that the act deprived the witness of his constitutional right to refuse to answer, inasmuch as it afforded absolute immunity against prosecution, federal or state, for the offense to which the question related. It is interesting to note that this case was decided by a bare majority of the court; Justices Field, Shiras, Gray, and White dissenting on the ground of the absolute sanctity of the constitutional provision. While I am deeply impressed with the force of the dissenting opinions in that case I feel compelled to hold, on grounds of the highest public policy, that the witness may be required to testify where the statute affords him in fact, as well as in theory, absolute immunity from prosecution or molestation of any kind on account of all transactions referred to in his involuntary testimony. At the same time, I feel the full responsibility of holding that in any case constitutional provisions securing the rights and liberties of the citizen can be changed or modified by legislative enactment. I realize the danger pointed out by the

Supreme Court of the United States in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, where it says: "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'Obsta principiis.'"

The above opinion, written tentatively before the opinion of the court assumed its present shape, is now filed as an expression of my individual views. Speaking for myself, it is perhaps proper to add that my views of the protection afforded by article 1, § 11, of the Constitution of this state, are somewhat broader than those generally adopted by the courts, though held by some distinguished jurists. I believe there is something dearer to the human heart than the mere money involved in a fine, something more terrible even than going to jail. To compel a man to reveal the innermost secrets of his life, that would destroy his reputation, render him infamous in the eyes of his fellow men, or tend to break up a happy home, might inflict suffering upon the innocent, as well as the guilty, equal to any punishment known to the law. Tears shed by a faithful wife over a dishonored bed are bitterer than those over an honored grave. Among the great jurists who have expressed similar views I will quote but one extract from the dissenting opinion of Justice Field in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, where he says, on page 631, 161 U. S., page 653, 16 Sup. Ct., 40 L. Ed. 819: "The amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution. It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But I do not agree that such limited protection was all that was secured. As stated by counsel of the appellant: 'It is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that, in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him in all such cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect.' * * * It is true, as counsel observes, that 'both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of personal respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal

compulsion upon witnesses to make confessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others. What can be more abhorrent * * * than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was in ignorance." In the case at bar none of the questions tend to subject the witness to infamy or disgrace. However dangerous in its tendencies and demoralizing in its results, gaming is not generally regarded as disgraceful in this state. I do not intend by this statement to justify gambling in the slightest degree, but my duty to the defendant requires me to state facts as they are, no matter how abhorrent to my personal sense of moral obligation.

I must confess some hesitation in conceding that the doctrine of statutory substitution can ever apply to constitutional guaranties, and I am induced to do so in this case only upon controlling principles of public policy, and upon the assurance that absolute immunity is guarantied to the witness. It is significant that the case of *Brown v. Walker* was decided by a bare majority of the court; Justices Field, Shiras, Gray, and White dissenting in most vigorous terms, on the ground that no statute requiring the witness to testify could be, legally or in fact, the full equivalent of the constitutional protection of absolute silence. Justice Field says, on page 630, 161 U. S., page 652, 16 Sup. Ct., 40 L. Ed. 819: "The constitutional amendment contemplates that the witness shall be shielded from prosecution by reason of any expressions forced from him whilst he was a witness in a criminal case. It was intended that against such attempted enforcement he might invoke, if desired, and obtain, the shield of absolute silence. No different protection from that afforded by the amendment can be substituted in place of it. The force and extent of the constitutional guaranty are in no respect to be weakened or modified, and the like consideration may be urged with reference to all the clauses and provisions of the Constitution designed for the peace and security of the citizen in the enjoyment of rights or privileges which the Constitution intended to grant and protect. No phrases or words of any provision securing such rights or privileges to the citizen in the Constitution are to be qualified, limited, or frittered away. All are to be construed liberally, that they may have the widest and most ample effect. No compromise of phrases can be made by which one of less sweeping character and less protective force in its influences can be substituted for any of them. The citizen cannot be denied the protection of absolute silence which he may invoke, not only with reference to the offense charged, but with respect to any act of criminality which may be suggested." Justice Shiras, with the concurrence of Justices Gray and White, says, on page 610, 161 U. S., page 656, 16 Sup. Ct., 40 L. Ed. 819: "It is too obvious to require argument that, when the people of the United States, in the fifth amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress." Again the same Justices say, on page 621, 161 U. S., page 660, 16 Sup. Ct., 40 L. Ed.

819: "As already said, the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against any act professing to dispense with the constitutional privilege." Again they say, on page 627, 161 U. S., page 662, 16 Sup. Ct., 40 L. Ed. 819: "If, indeed, experience has shown, or shall show, that one or more of the provisions of the Constitution has become unsuited to affairs as they now exist, and unduly fettered the courts in the enforcement of useful laws, the remedy must be found in the right of the nation to amend the fundamental law, and not in appeals to the courts to substitute for a constitutional guaranty the doubtful and uncertain provisions of an experimental statute. It is certainly speaking within bounds to say that the effect of the provision in question, as a protection to the witness, is purely conjectural. No court can foresee all the results and consequences that may follow from enforcing this law in any given case. It is quite certain that the witness is compelled to testify against himself. Can any court be certain that a sure and sufficient substitute for the constitutional immunity has been supplied by this act; and, if there be room for reasonable doubt, is not the conclusion an obvious and necessary one?" They conclude by saying, on page 628, 161 U. S., page 663, 16 Sup. Ct., 40 L. Ed. 819: "But surely no apology for the Constitution as it exists is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit."

I am deeply impressed with the meaning of those words, and whenever I give my assent to any statutory substitution it is only upon the condition that it gives to the witness an equal protection, which is always completely within his reach.

WALKER, J. (concurring). The correctness of the views expressed in the opinion of the court, as written by the Chief Justice, has been demonstrated both by principle and authority. The question as to the respondent's right of appeal is not presented on this record. It appears to me, after careful consideration of the facts as they are shown in the transcript, that the case was brought here only for the purpose of having construed the statute (Code, § 1215), which provides as follows: "No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery, made by the witness upon such examination, shall be used against him, in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done, or participated in by him." While the judge finds that the witness was "contumacious" in refusing to answer, it is evident that he did not intend to use that word in the sense that the witness was actually disrespectful to the court, and refused obstinately and perversely or without any reason to answer the question, after the law had been fully explained and made clear to him. There appears to have been some doubt entertained in the court below as to the true construction of the statute, and the formal finding of facts was made in order to obtain the opinion of this court as to the law, and to have a final and authoritative interpretation of section 1215 of the Code, so that there may be no doubt in the future as to whether or not a witness is fully protected in answering any

question which would otherwise tend to criminate him. This conclusion is justified not only by the manner in which the finding is stated, but by the fact that only a nominal fine—\$1—was imposed upon the witness. In view of this state of the record, it seems very clear that the question as to the witness' right of appeal from the judge's order is not presented. In regard to contempts, it is provided by Code, c. 14, § 648 (6), that the contumacious and unlawful refusal of any person to answer any legal and proper interrogatory shall subject him to punishment "for contempt," and not "as for contempt"; and the proceeding by which the facts are ascertained, and the particulars of the offense specified and spread upon the record, and the punishment is imposed, "may be summary," when the alleged contempt is committed "in the immediate view and presence of the court." By Code, § 654 (4), it is provided that any person summoned as a witness, and refusing to attend or to be sworn or to answer as such witness, may be attached and punished "as for contempt." The different phraseology of the two sections upon the same subject-matter raises an important and interesting question as to the right of appeal. It will be observed that section 660 provides that the court "may" punish summarily when the contempt is committed in its immediate view and presence, not that it "shall" do so; and when it does decide, under the circumstances of the particular case, that summary punishment shall be imposed, it is required to find the facts and "specify them on its record," but the requirement does not of itself give the right to have the judgment of the court reviewed by appeal or certiorari. *State v. Mott*, 49 N. C. 449. We are not now privileged to express an opinion as to how far, if at all, the principle of that case should control in this. Whether, if there is any method of review, it is by appeal, certiorari, or habeas corpus, is not, it seems to me, before us for decision; and, when the question is properly presented, the solution of it will be attended with some difficulty, as the language of the two sections of the Code to which reference has been made is not altogether free from ambiguity. As the question of the right of appeal is not, therefore, free from doubt, and is one fit for careful and serious consideration, it is well not to anticipate a decision of it by the slightest intimation as to the answer that it should receive. It is not only important, but it is expressly required by the statute, that the court should "specify" the facts and particulars of the offense on the record; and then the reviewing tribunal, if the decision of the court is reviewable, may for itself decide whether a contempt has been committed.

In this connection the language of the court in *Ex parte Summers*, 27 N. C. 149, may be pertinent. Since that decision was made, the law has been amended so as to require the facts to be stated on the record. The court in that case said: "It befits every court which has a proper tenderness for the rights of the citizen, and a due respect to its own character, to state facts explicitly, not suppressing those on which the person might be entitled to be discharged, more than it would insert others, which did not exist, for the sake of justifying the commitment. A court which knows its duty, and is not conscious of violating it, will ever be desirous of putting upon the record or in its process the truth of the case, especially as thereby a higher court may be able to enlarge a citizen illegally committed or fined. But if the commitment or fine be in a general form for a contempt, all other courts are bound by it, and the party can only free himself by purging the contempt before the court that has adjudged it." And again, "referring to the appeal which the re-

spondent had taken in that case, the court says: "But in truth this is not, we think, the proper method of contesting the propriety or lawfulness of this order, if there be any such method. From the very nature of contempts, and in order that the punishment may be efficacious, the punishment must be immediate and peremptory, and not subject to suspension by appeal at the mere will of the offender, nor by any proceeding in the nature of an appeal. Suppose one to come into court and abuse the judge on the bench. Or suppose a sheriff with a writ in his hand, in the presence of the court, positively refuses to return it, so that the party's action will be discontinued. What would sentences for these contempts be worth if the culprit could supersede them by appeal, certiorari, or writ of error? Manifestly, nothing, and the authority of the court would really be contemptible if it could be thus eluded and prostrated. There is no instance, therefore, of the re-examination of an order committing or fining a person for a contempt, with the view of hearing the evidence and trying the question *de novo*, nor directly to reverse or quash an order of commitment, or imposing a fine for an intrinsic insufficiency. If there be such insufficiency upon the face of the order, the party has his remedy by habeas corpus, and by action against those who act on the order, either against his person or property." The same may be said of *Summers' Case* as was said of *State v. Mott*, *supra*. Whether its principle should apply to a state of facts such as is disclosed in this record must be left for the present, at least, as an open question, for the reasons we have already given.

In the present case the facts are not fully stated, and it is not shown what was the manner or demeanor of the witness; and this omission was proper, for it sufficiently appears that nothing more was put upon the record because it was the purpose to present the single question as to the meaning of section 1215 of the Code. A similar question was before this court for its consideration in *La Fontaine v. Underwriters' Association*, 83 N. C. 132, in which the court construed section 488 (5) of the Code; the provision of that section in regard to exemption from prosecution being much less broad and comprehensive in affording protection to the witness than is the provision of section 1215. It is as follows: "But his [the witness'] answer shall not be used as evidence against him in any criminal proceeding or prosecution." This was held in that case to be a sufficient exemption from criminal liability, and exposed the witness to punishment for contempt if he refused to answer any proper and legal question upon the ground that it would tend to convict him of a criminal offense. There was a full discussion in that case of the question whether the answer of the witness, while not tending directly to criminate him, might not furnish a clew which would lead to the discovery of evidence against him, or supply one link in the chain, so that it would, in connection with other facts, have that tendency, or whether it would not disclose some fact which, though not in itself any evidence of guilt, or even a circumstance tending to show guilt, might disclose other facts and circumstances which would form a complete chain, and lead to his conviction. The court reached the conclusion, after a consideration of this view of the matter, that the testimony of the witness cannot be used directly or indirectly, either in the pending proceeding or in any other prosecution, and that if any evidence attempted to be used in any such proceeding against the witness can be traced to a statement made by him while on the stand, as the cause which led to its discovery, the witness will be protected, and can plead or otherwise avail himself of the fact in

bar of the prosecution. We all agree, as I understand, that the first three questions did not tend to criminate the witness, and he was bound to answer them. The ground taken by the respondent, that those who participated in the game, and whose names he would disclose if he answered the questions, might in their turn give evidence against him, has been held to be untenable; the doctrine being grounded more on the fear of retaliation than on any sound principle of law. *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *La Fontaine v. Underwriters*, supra. The fourth question tended to criminate the witness, but he was fully protected and pardoned by the statute, "and his constitutional right, therefore, to give evidence against himself, was maintained intact." *La Fontaine v. Underwriters*, supra. The clause of the Constitution (article 3, § 6) which confers power on the Governor to pardon persons convicted of criminal offenses does not seem to have been intended as an exclusive grant of such power, and the Legislature may exercise the right of pardon in the form in which it is authorized to do so by the statute under consideration. This court has decided that the Legislature may grant amnesty (*State v. Blalock*, 61 N. C. 242), which has been defined to be "a sovereign act of pardon and forgetfulness for past acts of a criminal nature" (*Black's Law Dict.*, p. 68). It is at least coextensive in its meaning with the word "pardon," so far as its effect is concerned, because it effaces or wipes out the offense which has been committed; "the difference between the two being that a pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction, and the court takes no notice of it unless pleaded or in some way claimed by the person pardoned, and it is usually granted by the crown or by the executive; but amnesty is extended to those who may be guilty, and is usually granted by Parliament or the Legislature, and to whole classes before trial. Amnesty is an abolition or oblivion of the offense. Pardon is its forgiveness." *State v. Blalock*, supra. In that case this court virtually held that the Legislature can pardon an offense, and it certainly must have the power to do so when that power is exercised in furtherance of the prosecution of crimes and of the detection and punishment of criminals. As soon as the witness testifies in a case which brings him within the protection of the statute, he is at once pardoned of his own offense, the same as if it had never been committed, and he is in no danger of being prejudiced by any self-crimination. Even when the witness is not protected by the statute, the question which tends to criminate him is not for that reason incompetent. The right to refuse to answer any such question is a personal privilege of the witness, and, if he voluntarily relinquishes the privilege and chooses to answer, no party to the suit can complain. *State v. Allen*, 107 N. C. 805, 11 S. E. 1016; *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 830; *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033. It has also been ruled to be a question of law for the judge to decide whether the testimony of the witness may criminate him. If in no possible view it can have that tendency, the court decides the question as one of law; but if it may subject him to prosecution, depending upon the answer he gives to the question, it has been said that the witness has the right to decide whether it will or not. For example, when the question calls simply for an affirmative or negative response, the wit-

ness must be the judge, for he only knows what the answer will be—whether "Yes" or "No"—but it is manifestly the duty of the court to inform him as to his rights and his privilege, and to instruct him as to how he may claim and exercise the same. When, however, he is fully informed by the court that the law compels him to answer, and that he has no privilege, or that the question which is asked has no possible tendency to criminate him, he must answer it, or his refusal to do so will be at his peril, for the plain reason that the court must decide that question as one of law, and the witness must submit to that decision. If he persists in his refusal to answer, he may be summarily punished for his contumacy. 29 Am. & Eng. Enc. (1st Ed.) p. 43; Code, § 648. And right here the question will arise whether he has the right to a review of the proceedings by appeal. Whether he has or not, it would be the duty of the court in such a case to state fully in the record "the particulars of the offense," and then pronounce its judgment, so that the witness may avail himself of any remedy open to him for a review of the court's decision by appeal or otherwise, if the decision can be reviewed, or so that a revising tribunal may determine whether the judgment is warranted by the facts so specified in the record. When we have before us a record thus made up, we will be called upon to decide what is the procedure in such a case, if there is any, for reviewing or revising the judgment of the court. The contempt committed in the case at bar, as shown in the record, is more technical than actual; and it is not incumbent upon us to do more under the circumstances than affirm the judgment, which, by the way, is all that is asked to be done by the Attorney General in his well-considered brief.

The other questions are so fully and ably discussed in the opinion of the court, delivered by the Chief Justice, that it is not necessary for any reference to be made to them in this opinion.

(135 N. C. 63)

STATE et al. v. ARMOUR PACKING CO.
(Supreme Court of North Carolina. April 19, 1904.)

TAXATION—LICENSE TAXES—FOREIGN CORPORATIONS—STATUTES—ENACTMENT—MODE—PROOF—LEGISLATIVE JOURNALS—IMPEACHMENT—CONSTRUCTION OF STATUTE—FINDINGS OF FACT.

1. Where the trial judge found the facts with reference to the enactment of a statute claimed to have been erroneously enacted, the Supreme Court on appeal could not consider any extraneous facts, though agreed on, for the purpose of rebutting the presumption of regularity arising from the ratification of the act.

2. Where the trial court in an action to recover license taxes under the revenue act of 1901 (Acts 1901, p. 143, c. 9) found that it appeared by the legislative journals that such act was read as a whole on three several days in each house, and that the ayes and noes were entered on the journals on the second and third readings, a further finding that after the bill had passed the House it was amended by the Senate, the amendments affecting about 30 sections of the bill, and, after being sent to a conference committee, was adopted, and as thus adopted was not read on three several days in each house, nor were the ayes and noes entered on the journals on the second and third read-

ings, did not establish the invalidity of such enactment, in the absence of a showing that any of the amendments were of such a kind as were required to be passed and the ayes and noes recorded in the manner prescribed by Const. art. 2, § 14.

3. On an issue as to whether or not a statute was passed in the method provided by the Constitution, the legislative journals required to be deposited in the office of the Secretary of State by Code, § 2867, or a certified copy thereof, are the only evidence admissible to overcome the presumption arising from the ratification of the act that it was properly passed, and such journals cannot be contradicted by extraneous proof.

4. Acts 1901, p. 148, c. 9, § 91, providing that an annual franchise tax shall be assessed on each and every corporation organized under the laws of the state or doing business within the state, payable in the county where such corporation has its principal office, is not limited to domestic corporations, but applies as well to foreign corporations doing business within the state.

5. Laws 1901, p. 152, c. 9, Schedule C, provides for the imposition of license taxes on a designated class of corporations, including railroads, banks, etc., to be fixed at a certain per cent. of their gross earnings, and a tax on other corporations in proportion to capital stock. Section 87 provides that the taxes assessed by such schedule shall be for the privilege of carrying on business, and shall be subject to the other regulations mentioned in section 35, which expressly provides that a tax may be imposed by the county in addition to the state tax on the subjects of taxation mentioned in that section; and section 102 declares that, when a specific license tax is levied for the privilege of carrying on any business, the county may levy the same tax, unless a provision to the contrary is made in the section levying the specific tax. *Held* that, since section 91, providing for the levy of a license tax on corporations other than those specified in Schedule C, to be paid in the county where such corporation has its principal office, contained no such exemption clause, a corporation subject to taxation under such section was liable to the state, and also to the county where its principal office is located.

Appeal from Superior Court, New Hanover County; Brown, Judge.

Action by the state and the commissioners of New Hanover county against the Armour Packing Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

This action was brought to recover license taxes alleged to be due by the defendant to the plaintiffs under section 91 of the revenue act of 1901 (Acts 1901, p. 148, c. 9). A jury trial was waived, and the court found as facts that the defendant is a corporation of the state of New Jersey, with a capital stock of \$1,000,000, and was engaged during the years 1901 and 1902 in the business of selling, dealing in, and distributing meats, canned goods, and other articles of trade at wholesale in this state, with its principal office at Wilmington, and three offices at other places in this state, all office reports being sent directly to Kansas City; that license taxes under said section were duly levied by the proper authorities of New Hanover county for the years 1901 and 1902, and a demand made upon the defendant for the payment of the same, and a similar demand also made by the state for its taxes for those years, but

payment was refused; that the revenue act of 1901 appears by the Senate and House journals to have been read as a whole on three several days in each house of the General Assembly, and the ayes and noes were entered on the journals upon the second and third readings; that the bill was amended in the Senate, it appears in the journal, as to several sections, but there is nothing in the entries on the journal to show that section 91 was one of the sections so amended. The defendant introduced in evidence the original bill filed in the State Librarian's office, and from the entries therein it appears that the bill was amended in the Senate by inserting in what was section 88, between the words "corporation" and the words "railroad," the words "organized under the laws of this state," and that section 85, as thus amended, became section 95, and that thereafter section 95 was amended by inserting after the word "state" and before the word "railroads" the words "or doing business in this state," and by adding to the section the words, "provided, further, that the tax provided for under this section shall be payable in the county of this state where it has its principal office"; that said amendments were reported from a committee of conference, and concurred in without a vote, on three several days, and without entering the ayes and noes on the journals, and section 95 was then numbered 91; that the defendant has paid the taxes due under section 86 of said act, and imposed upon all agents of packing houses doing business in this state. No point was made in the court below as to the joinder of the plaintiffs, the state and the county, in one action. *State v. Georgia*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485. The court gave judgment for the plaintiffs, and the defendant appealed.

J. D. Bellamy, for appellant. Geo. Rountree and J. O. Carr, for appellees.

WALKER, J. (after stating the case). The contentions of the defendant in this case relate to the validity and the interpretation of section 91 of the revenue act, it being chapter 9, p. 148, of the Acts of 1901, and are as follows: (1) That section 91 was not passed in accordance with the provisions of the Constitution, art. 2, § 14, as the said section was amended, after the original bill had passed its several readings in each house, by the insertion of the words "or doing business in this state," and of the proviso, which is as follows: "Provided further, that the tax provided for under this section shall be payable in the county of this state where it has its principal office." And that, after the bill was thus amended, it was not read three several times in each house, nor were the ayes and noes on the second and third readings entered on the journal, as required by the said article and section of the Constitution. (2) That neither the state nor any coun-

ty thereof can collect the tax, because section 91 of the revenue act of 1901 applies only to corporations organized under the laws of this state. And (3) that, even if the state can collect the tax under section 91 of said act, no county can do so, as it is a tax on the franchise of the corporation, and not a license or privilege tax, and the act confers no authority upon a county to collect such a tax. We will consider these propositions in the order above stated.

In the Constitution of the state (article 2, § 14) it is provided "that no law shall be passed to impose any tax upon the people of the state or to allow the counties to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." Assuming, for the sake of the argument, that the defendant, a nonresident corporation, and not a citizen of this state, can avail itself of any noncompliance with the provisions of that section (which, by its terms, applies only to a law imposing a tax upon the people of the state), for the reason that it is entitled to the rights and privileges of the citizens of this state, or to the equal protection of its laws (*Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432), and assuming further that the section embraces an amendment to a bill, as well as the bill itself, if it is a material one, and imposes a new tax or increases a tax already provided for in the bill, we do not think that the defendant has succeeded in showing that the bill was not passed in strict accordance with the provisions of that section, or that any amendment to the bill, imposing the license taxes which the plaintiffs seek to recover in this case, was passed without a compliance with the requirements of the Constitution as contained in that section. The judge below found the facts by consent of the parties, a jury trial having been expressly waived, and any decision we may make must have reference to those facts as found and set out in the case, and can rest on them alone. We are not at liberty to consider any extraneous facts, or any evidence of such facts, nor any facts, even if they have been agreed upon, provided the law forbids them to be used for the purpose of rebutting the presumption of regularity arising from the ratification of the act; nor can the defendant show in any other way, or by any other evidence than that which the law says shall be the only kind of proof, the fact that the requirements of the Constitution were not observed. The judge finds "that the revenue act of 1901 appears by the Senate and House journals to have been read as a whole on three several days in each house of the General Assembly, and that the yeas and noes

were entered on the journals upon the second and third readings." It is true he further finds that the bill, after it passed the House, was amended in the Senate, the amendments affecting about 30 sections of the bill; that a conference committee was appointed; and that its report recommending that the House concur in a large number of the Senate's amendments, and that the Senate recede from certain of its amendments, was adopted; and that the bill, as thus amended, was not read upon three several days in each house, nor were the yeas and noes entered upon the journals on the second and third readings. But it nowhere appears by any competent proof or by the admission of facts which we can consider that any of those amendments were of such a kind as to require them to be passed in the manner provided in article 2, § 14, of the Constitution, if that section applies to amendments to a bill—which it is not now necessary for us to decide.

We have, then, the ratification of the bill, which imports that it has become a law in due course of procedure, and its authentication as a bill that has passed the proper legislative body is complete and unimpeachable (*Scarborough v. Robinson*, 81 N. C. 409; *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Pangborn v. Young*, 32 N. J. Law, 29; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023) unless the Constitution requires that it should be passed in a certain way, which must appear in the journals, in which case reference may be had to the journals, as evidence in the court below, to determine whether it passed in that way. *Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966. We have the further fact, which was found by the judge, that the bill was read "as a whole" on three several days in each house, and the yeas and noes on the second and third readings duly entered on the journals. In order to show that this tax was imposed by an amendment in the Senate, the defendant asks us to consider the facts found by the judge as to the entries on the original bill which is filed in the State Librarian's office. This we are not permitted to do, although it may appear therefrom that such an amendment was adopted without compliance with article 2, § 14. The Constitution requires that it should appear, not from the entries on the original bill, but from the journal, that the bill was properly read, and that the necessary entry of the yeas and noes was made. If the journal shows that the bill was regularly passed, no evidence will be received to contradict what is therein recorded. The law requires the journals of the General Assembly to be deposited with the Secretary of State (Code, § 2867), and these journals, or a copy of them, certified as provided by law, are the only evidence that can be resorted to in order to overcome the presumption arising from the ratification of the

act, and to invalidate it. It can be done in this way, but in no other. If it does not appear in the journals that the bill has been passed as required by article 2, § 14, the act is invalid; and if it appears that it has so passed, then it is valid. In neither case can the journals be contradicted by extraneous proof. In *Gatlin v. Tarboro*, 78 N. C. 119, this court, by Rodman, J., in discussing the necessity of proving that 30 days' notice of the application to pass a private bill had been given, says: "We cannot accept the agreement of the parties that no notice was in fact given as proof that it did not appear to the Legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois. *Happel v. Brethauer*, 70 Ill. 163, 22 Am. Rep. 70. If any weight were allowed to admissions of this sort, the law might change as each case was presented." In the case of *Happel v. Brethauer*, just cited, the court held that, if the Constitution had not been complied with in the passage of a bill, the fact must be shown by reference to the journals; and the court says, "In no other mode can we be properly advised." In *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640, it was held that on a question touching the validity of an act the court can look beyond the authentication of the act to the journal of either branch of the Legislature to see if the bill passed by the required number of votes, and that the legislative declaration upon that question is conclusive. In *Wise v. Bigger*, 79 Va. 269, where a learned discussion of the question will be found, the court held that the Constitution required a journal to be kept of the proceedings of the Legislature, and that journal showed that the bill then under consideration had passed by the requisite majority. "In the face of the solemn record," says the court, "in which the Senate certifies its proceedings, in a matter of fact relating to its own conduct—in the apparent performance of its legal functions—this court is asked to inquire into or to dispute the veracity of the certificate. To do this would be to violate both the letter and the spirit of the Constitution, to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the Legislature." In 1 Greenleaf on Evidence (16th Ed.) § 491, we find it stated that "the journals of either house are the proper evidence of the action of that house upon all matters before it." To the same effect are the following authorities: *Cooley's Const. Lim.* (7th Ed.) p. 201; *Black's Const. Law*, 60; *Odranoux's Const. Lim.* 382; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Detroit v. Wentz*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *White v. Hinton* (Wyo.) 30 Pac. 953, 17 L. R. A. 86; *Op. of Justices*, 52 N. H. 622. In *State v. Smith*, 44 Ohio St.

343, 7 N. E. 447, 12 N. E. 529, it is said: "There are two rules in this country as to what evidence is admissible to authenticate the passage of a statute. One is according to the English doctrine, which is that it is not competent to go behind the parliamentary rolls; the other is that it is competent to go behind the enrollment of the statute to the journal. There is no sanction or authority for receiving evidence beyond the enrollment and the journal, and these records are conclusive and binding upon the courts." Numerous cases decided in this country are cited by the court to sustain its conclusion. The burden is always on the party who alleges that a statute was not passed according to the constitutional requirements, and he must furnish the competent evidence necessary to overcome the presumption arising from the ratification of the act. This proof must appear in the record. *Railroad v. Wren*, 43 Ill. 77; *Larrison v. Railroad*, 77 Ill. 11. We do not think that such proof as is sufficient to impeach section 91 of the act has been introduced in this case, if we exclude the entries on the original bill as incompetent, which we must do, as the provision of the Constitution is designed "not only to compel each member present to assume as well as to feel his due share of responsibility in legislation," but also to furnish "definite and conclusive evidence whether the bill has been passed by the requisite majority or not." *Cooley on Stat. Lim.*, supra.

Having concluded that the revenue act, including section 91, is a valid enactment, we must next inquire whether that section applies only to corporations organized under the laws of this state. It is provided in the section that "on each and every corporation organized under the laws of this state or doing business in this state an annual franchise tax shall be assessed." The contention of the defendant's counsel is that the word "or" should be construed to mean "and," as it is further provided in the section that any corporation failing to pay the tax shall forfeit its charter, which provision could not apply to the defendant, as it is a nonresident, and that the tax shall be payable in the county "where it has its principal office," the defendant having its principal office outside the state, though its principal office in this state—where it has four offices—is in Wilmington. The object in the interpretation of all statutes is to ascertain the meaning and the intent of the Legislature, to the end that the intent may be enforced; and the construction must be according to the language employed, if it is not ambiguous, as it must be presumed that such language has been used by the Legislature as fit and suitable to express its will correctly. *Black, Int. of Laws*, 35. We cannot change words or insert one word for another unless it is necessary to do so in order to make that clear or intelligible which otherwise will be ambiguous or meaningless. We find no such

necessity in this case. The Legislature, in our opinion, has said precisely what it meant, and has expressed that meaning with sufficient clearness by its language to enable us to see and understand it without interfering with the phraseology, or the form of expression, which it chose to use in declaring its purpose. No good reason can be assigned why the Legislature should tax domestic corporations, and not tax those of other states who seek to do business in this state, and who thus come in competition with our home institutions. Such a course would seem to be a clear discrimination against the latter, and, if lawful, would not be fair and just; and we would not impute such a motive to the Legislature without the use by it of language which would leave no other construction possible. We do not think the considerations urged as reasons why we should adopt plaintiff's interpretation of the section are sufficient to induce us to change the words of the statute so as to give it a meaning of which it is not now susceptible.

The third ground of objection to the tax is equally untenable. It is true that section 91 provides for an annual franchise tax; but this section is in Schedule C, and section 87 of the act, which is the first section of Schedule C, provides that taxes imposed by that schedule "shall be for the privilege of carrying on the business or doing the act named and shall be subject to the other regulations mentioned in section 35 under Schedule B." Turning to section 35, we find it to be expressly provided that a tax may be imposed by the county, in addition to the state tax, upon the subjects of taxation mentioned in that section. It is provided by section 102 of the act (Schedule C) that, when a specific license tax is levied for the privilege of carrying on any business, the county may levy the same tax, unless a provision to the contrary is made in the section levying the specific license tax. Schedule C provides for what is called "license taxes" to be paid by a designated class of corporations, such as railroads, banks, building and loan associations, insurance, telegraph, telephone, and express companies, the amount of the tax being fixed at a certain per cent. on gross receipts or earnings; and on other corporations a tax is levied for carrying on their business, the assessment of which is graduated according to the capital stock paid in or subscribed, and this is called a "franchise tax," but it is nevertheless, by the very terms of section 87, a privilege or license tax. It is to be observed, in this connection, that sections 89 and 90, which provide for the tax on the first class of corporations we have mentioned, contain a clause exempting those corporations from a county tax, and the taxes imposed by those sections are paid directly to the State Treasurer; but section 91 contains no such clause of exemption, so as to bring it within the operation of the proviso to section 102, and the tax, by section 91,

is required to be paid in the county where the corporation has its principal office, which would indicate that a county as well as a state tax was contemplated. Upon a review of the several sections of the revenue act relating to this matter, we are constrained to think that the defendant is liable for the taxes sought to be recovered in this action. But it is only liable, under the act, to the state, and to the county where it has its principal office if the latter has seen fit to impose the tax.

It must be certified that there is no error in the judgment of the superior court. No error.

DOUGLAS, J., concurs only in result.

(135 N. C. 164)

HELMS v. HELMS et al.

(Supreme Court of North Carolina. April 26, 1904.)

DEEDS — CONSTRUCTION — CONDITIONS SUBSEQUENT — COVENANTS — ESTOPPEL IN PAIS — MUTUAL MISTAKE — EVIDENCE — TRIAL — ISSUES.

1. The refusal to submit issues, the answers to which will not affect the result, is not error.

2. On the issue whether, by mutual mistake, a provision that the grantor's deed should be void if grantee failed to support grantor was omitted from the deed, evidence that the grantor stated to the grantee, at the time, and before delivery of the deed, that it should be void if grantee failed to support grantor, is insufficient to support such claim.

3. A provision in a deed, that it shall be void on the grantee's failure to support the grantor, is a condition subsequent, a breach of which is available only to the grantor.

4. A clause in a deed, following the statement of a nominal consideration of one dollar, reciting, "and for the further consideration of the support during" the life of the grantor by the grantee, is not a condition subsequent, but a matter of consideration, or at most a covenant.

5. An owner conveyed land by deed, which required the grantee therein to support the owner for life. Thereafter the owner conveyed the same land to a third person. *Held*, that one claiming under such third person was not subrogated to the owner's right to enforce her claim against the grantee for support, which claim arose after the execution of the deed to his grantor.

6. A declaration, by a grantee in a deed duly recorded, to the effect that he does not claim any interest in the land conveyed, does not operate as an estoppel in pais in favor of a subsequent grantee from the same grantor, having actual notice of the prior deed.

Clark, C. J., dissenting.

Appeal from Superior Court, Union County; Bryan, Judge.

Action by William L. Helms against Hane Helms and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Adams, Jerome & Armfield, for appellants. Redwine & Stack, for appellee.

CONNOR, J. Elmira Helms, being the owner of an undivided one-sixth interest in the locus in quo, executed a deed on the 14th day of August, 1897, to William L. Helms, conveying such interest to him, in considera-

tion of "one dollar to her paid by William L. Helms, the receipt of which is hereby acknowledged, and the further consideration of the support during the natural life of the party of the first part." Following the covenant of warranty are these words: "And it is further understood and agreed between the parties that the above lands shall stand good for the support and maintenance of the said Elmira Helms during her natural life." This deed was recorded August 14, 1897. On the 17th of August, 1898, the said Elmira conveyed her one-sixth interest in a part of the land to Gabriel W. Helms. This interest was afterwards conveyed to defendant Haney Helms. Elmira died February 3, 1903. W. L. Helms on April 7, 1903, brought this special proceeding, making the other tenants in common parties defendant, for the partition of the land, claiming one-sixth interest therein by virtue of said deed from Elmira. The defendant Haney Helms filed a separate answer, denying that the said William L. owned any interest in the land, for that, in the execution of the deed, it was understood and agreed that the consideration thereof was the future support and maintenance of the said Elmira by him, and that he undertook and agreed that he would support her during her natural life, and, if he failed to do so, said deed would be void. He also says that such condition should have been inserted in the deed, but was omitted by "inadvertence or otherwise" of the draughtsman; that he never supported the said Elmira, and disclaimed having any interest in said land. He sets up the deed from Elmira to Gabriel, and the heirs of Gabriel to himself, for her undivided interest in the land. He further says that the real owners of said land have made partition thereof and are in possession of their respective shares. He asks that the deed from Elmira to the plaintiff be canceled, etc. By an amended answer the defendant Haney says that the plaintiff failed and refused to support the said Elmira, and that in her last sickness she required attention, etc., amounting in value to \$10 per month, and that by reason thereof the land became subject to a charge of several hundred dollars; that by the deed of Elmira to Gabriel Helms, and from the heirs of Gabriel to him, he is subrogated to the rights of Elmira "in and to the charge on the land for the support," etc., "of said Elmira"; and he hereby pleads the same as an estoppel or bar to any claim for the said land by the said W. L. Helms. The plaintiff filed a reply to the new matter set up in the answer, denying same. The cause was transferred to the civil issue docket for trial. The plaintiff tendered the following issue: "Is the plaintiff the owner and entitled to be let into possession of the one-sixth interest in the land described in the complaint?" The defendant tendered several issues directed to the inquiry whether there was an agreement between Elmira and

W. L. Helms that the deed should be void if W. L. Helms failed to support said Elmira, and whether such agreement was omitted by the mutual mistake or ignorance of the parties or of the draughtsman; also whether W. L. Helms supported said Elmira, and the value of such support. His honor declined to submit the issues tendered by the defendant, and adopted that tendered by the plaintiff. Defendant excepted.

In respect to the first two issues tendered by the defendants, it is sufficient to say that, if found in the affirmative, such finding could not have affected the result or judgment. It would have amounted simply to a finding that the parties made an agreement and that they failed to insert it in the deed. The proposition is stated by the defendant when he placed M. L. Flow upon the stand, and proposed to prove by him that he "drew the deed, and that Elmira stated to W. L. Helms at the time, and before delivering the deed, that the deed should be void if W. L. Helms failed to provide for and take care of Elmira." There is no suggestion in the evidence offered that there was any agreement or understanding that the provision should be put in the deed, or that the draughtsman was instructed to do so. *Green v. Sherrod*, 105 N. C. 197, 10 S. E. 986, is exactly in point, as are also *Norris v. McLam*, 104 N. C. 159, 10 S. E. 140, and *Frazier v. Frazier*, 129 N. C. 30, 39 S. E. 634. If the deed had contained the words suggested, they would have constituted a condition subsequent. Could advantage have been taken of its breach by any one except the grantor, and is there any allegation that she did so? The exception to his honor's refusal to submit these issues cannot be sustained.

The other issues tendered were immaterial. The only questions upon which the decision of the cause depended are whether the words, "and for the further consideration of the support during the natural life of the party of the first part by the party of the second part," create a condition subsequent, and, if so, whether, in the light of the pleadings, the said Elmira availed herself of the breach, or whether her deed vested in the defendant the power to enter for condition broken. The defendant Haney Helms was introduced by the plaintiff. The defendants, upon cross-examination, proposed to show by him that the plaintiff never supported, cared for, or maintained Elmira in any way whatever, or contributed thereto, after the execution of the deed; that he admitted he did not claim any interest in the land in controversy; that such admissions were made before and after the death of Elmira; that in consequence of such statements he took the deed from the heirs of Gabriel Helms; that W. R. Williams and wife supported Elmira; that the plaintiff never took exclusive possession of said land, but simply went on the same to live with Elmira a short time after execution of the deed, and remained there only six

months, and abandoned all claim to the land, etc. To all of this evidence the plaintiff objected, and upon the objection being sustained the defendant excepted. Defendant moved to dismiss the proceeding under the Hinsdale Act, and to his honor's refusal to allow the motion excepted. Defendant introduced M. L. Flow, and proposed to ask him the question hereinbefore set out; also, as to conversations with plaintiff in regard to the land, before and since the death of Elmira. All of this proposed evidence was, upon objection, excluded, and defendant excepted. The defendant offered to show by the tax list that plaintiff had not listed the land for taxes. This was excluded. Defendant renewed his motion to dismiss, and to his honor's refusal excepted. The court instructed the jury that if they believed the evidence, which was documentary, to answer the issue, "Yes," and to this the defendant excepted.

The defendant assigns a large number of errors. They all involve the same question, and must be disposed of upon the same principle. Does the language of the deed operate as a condition subsequent, the breach of which entitles the grantor to avoid the deed and divests the title out of plaintiff, or does it operate as a covenant to furnish support, a breach of which constitutes a charge upon the land? The rule of construction is thus stated: "Conditions subsequent are not favored in the law, and are construed strictly, because they tend to destroy estates." Kent's Com. (13th Ed.) *130. "If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is far preferable to the tenant." Id. *132. "A conveyance in consideration of support to be furnished the grantor or another person does not create a condition, unless apt words of condition are used; and even then it will not be held to create a condition, unless it is apparent from the whole instrument that a strict condition was intended." Jones, Law of Conveyances, p. 534, § 646.

In Laxton v. Tilley, 66 N. C. 327, the deed recited that it was made "for and in consideration of \$200 and the faithful maintenance of T. L. and wife, P. L." Held, that the maintenance was a charge upon the land. In McNeely v. McNeely, 82 N. C. 183, the land was devised "to my son Billy, at the death of his mother, by him seeing to her." It was held that the words "by him seeing to her" did not operate as a condition to terminate or impair his estate. Smith, C. J., says: "The words are in themselves vague and indefinite, and, if an essential and defeating condition of the gift, would be very difficult of application. What is meant by a 'seeing to' the widow, and what neglects fall short of that duty? * * * And how is the dividing line to be run between such omissions as are, and such as are not, fatal to the devise? * * * Titles would be rendered very precarious and uncertain if such

matters in pais were allowed to defeat a vested estate." In Gray v. West, 93 N. C. 442, 53 Am. Rep. 462, the language was "that A. G. should have support out of the land." Held, that the support was a charge on the rents and profits. In Misenheimer v. Sifford, 94 N. C. 592, the devise was to A., "provided he maintain his mother during life comfortably, and shall give her house room and firewood during her life or widowhood." Held a charge on the rents and profits, and not a condition. In Outland v. Outland, 118 N. C. 138, 23 S. E. 972, the language was construed a charge on the land. Wall v. Wall, 126 N. C. 405, 35 S. E. 811. The language in Tilley v. King, 109 N. C. 461, 13 S. E. 936, was: "And if P. H. T. stays with us until after our deaths, then I give this land to him." This was held (Shepherd, J., delivering the opinion) a condition precedent. He says: "The words used by the testator are words of strict condition." The learned justice distinguishes the case from those "where a devising clause is followed by or coupled with a proviso that the devisee shall pay to another a specific sum, or to support or maintain a certain person," citing Misenheimer v. Sifford, supra. Erwin v. Erwin, 115 N. C. 366, 20 S. E. 520, which appears to hold otherwise, is overruled in Allen v. Allen, 121 N. C. 333, 28 S. E. 513; Montgomery, J., saying "that, being in doubt, we are disposed to adopt the first view, because the law favors the vesting of estates, and leans to the view of a charge, rather than a condition precedent."

Looking to other jurisdictions, we find the same trend of thought. In Lindsey v. Lindsey, 62 Ga. 546, Jackson, J., says: "The consideration of the deed is the continued support of the father by his son, to whom it is made. This is not a condition precedent." In McCardle v. Kennedy, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85, it is said: "The failure to pay the purchase money, or the failure to maintain and support the grantor, if that be the consideration, is not a sufficient reason for rescinding the contract of sale." In Pownal v. Taylor, 10 Leigh, 172, 34 Am. Dec. 725, Tucker, P., says: "There is nothing, I think, in the proposition that the provision for support and maintenance constituted a condition for the breach of which the grantor might re-enter. It was a charge, not a condition. It was a declaration of a beneficial interest, or a trust, which might be enforced in equity, but which was perfectly consistent with the existence of the fee in the grantee." Speaking of the right of the grantor to re-enter, he says: "This cannot be, unless the grantor had expressly reserved the right to re-enter upon failure of the grantee to fulfill the purposes of the grant." A deed was made "in consideration of natural love and affection, as well as for the better maintenance and support" of the grantor. It was held that the maintenance, etc., was the consideration, and not a condition subsequent.

etc. *Risley v. McNiece*, 71 Ind. 434. The same view is expressed by the Supreme Court of Illinois, the judge saying: "There is nothing in the form of the language here employed to indicate that it was intended that the conveyance was upon a condition. The words 'upon condition' do not appear. There is no clause providing that the grantor shall re-enter in any event, and these are the usual indications of an intent to create a condition subsequent." *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511. In *Ayer v. Emery*, 14 Allen (96 Mass.) 67, the same principle is announced; *Bigelow, O. J.*, saying: "But it is perfectly well settled that an estate on condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation." See, also, *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201.

While several of the cases cited arose upon the construction of wills, we find no distinction made, and no reason for making any, between wills and deeds. The difficulties which readily occur in treating provisions of this kind as conditions are numerous. The uncertainty into which titles would be thrown is a strong reason for construing provisions for support as covenants, and not conditions, is recognized by the courts. To treat them as mere personal covenants, having no security for their performance save the personal liability of the grantee, would often lead to injustice, leaving persons who had made provision for support in old age or sickness without adequate protection or relief. The courts have almost uniformly treated the claim for support and maintenance as a charge upon the land, which will follow it into the hands of purchasers. In this way the substantial rights of both grantor and grantee are preserved. "The grantee, by accepting the deed and entering into possession under it, becomes bound by the agreement providing for the support of the grantor, and the provision for support thus becomes equivalent to a life annuity." *Devlin on Deeds*, § 807. It is also said that courts of equity will freely rescind conveyances by parents to sons upon breach of the agreement to support. *Buffalow v. Buffalow*, 22 N. C. 241; *Jones on Conveyances*, 646.

The last clause in the deed from Elmira to plaintiff, we think, shows that the parties understood that her support was to constitute a charge on the land. It was in this way that the land was to "stand good for the support and maintenance" of said Elmira during her natural life. We therefore conclude that she was during her life entitled to charge upon the land her support. It may be that in the light of the conduct of the plaintiff a court of equity would have declared him a trustee, and directed reconveyance of the land; but she sought neither remedy. *Buffalow v. Buffalow*, supra. The legal title was in the plaintiff, and could not be divested by a subsequent conveyance to some other person. "The grantor cannot rescind a

deed, in consideration of support for his life, by exacting a subsequent conveyance, without the consent of the grantee, for the reason that the support has been withheld. He must resort to his action either for the value of the support withheld or to rescind on equitable grounds." *Devlin on Deeds*, 975; *McCaudle v. Kennedy*, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85.

To the suggestion that the defendant was subrogated to the right of Elmira to enforce any claim that she had for her support, it may be said that such claim originated after the execution of the deed to his grantors. If the defendant had actually paid out money for her support, which it was the duty of the plaintiff to have furnished, it may be that equity would have subrogated him to such claim, to be enforced as a charge upon the land in some appropriate proceeding. This question is not presented, because there is no allegation that the plaintiff supported her. Whatever rights Williams may have had in this respect did not pass to the plaintiff by his conveyance. The declaration of the plaintiff as to his interest in the land could not operate as an estoppel in pais. It was proposed to show that he simply said that he did not claim any interest in the land. His deed was on record, and the defendant had notice of it. It would seem that he had actual notice. He took the risk of buying with the facts before him. There is nothing in the conduct of the plaintiff commending his claim to the favor of the court. His conduct is another illustration of the necessity for carefully safeguarding the rights of persons who convey their land to secure a support in their last days. In the reported cases of this and other states, as well as the experience of most lawyers, is found painful proof of the danger of weak and unusually ignorant persons making such dispositions of their property. Courts of equity will relieve them upon slight evidence of fraud, and courts of law will protect them as best they can by charging the support on the land. It would, however, render titles uncertain and precarious to construe into a condition that which is a matter of consideration, or at most a covenant.

We have carefully examined the numerous exceptions of the defendant, and find no error in his honor's rulings.

No error.

OLARK, C. J. (dissenting). Elmira Helms, being desirous of obtaining a support in her old age in exchange for her land, conveyed it to William Helms, in consideration of "one dollar and the further consideration of the support during the natural life of the party of the first part"; and then in her poor way she added, "and it is further understood and agreed between the parties that the above lands shall stand good for the support and maintenance of the said Elmira Helms during her natural life." She was not a learn-

ed and technical lawyer. Had she been, the instrument would have been worded differently; but it is impossible not to see that these parties "understood and agreed" upon something different from an absolute and untrammelled conveyance, and that, in fact, the consideration being for the grantor's support, the grantee was not to have the land absolutely unless and until such consideration was fully paid. It was agreed that the "lands shall stand good for the support and maintenance of said Elmira Helms during her natural life." The parties understood this, and expressed it intelligibly, though not in words of technical art. The plaintiff, being out of possession, cannot recover, certainly not in a court combining equity with law, without showing a compliance with his contract. *Dreibach v. Serfass* (Pa.) 17 Atl. 513, 3 L. R. A. 836; *Williams v. Bentley*, 27 Pa. 294. In fact, the court would adjudge upon the evidence that, by the abandonment of the performance of his part of the contract by the plaintiff, the instrument became null and void. *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434. Upon the face of the agreement, if there was no support whatever, there was to be no conveyance in exchange. The contract was in the nature of a conveyance reserving the vendor's lien till the purchase money was paid, whereupon only the title should become absolute. Till then it "stood good"—was retained—to secure such payment. In many states the vendor's lien exists till the purchase money is paid, though there be no reservation in the deed, and such was formerly the law in this state. *Wynne v. Alston*, 16 N. C. 163, later overruled by *Womble v. Battle*, 38 N. C. 182, upon the sole ground that our registration law was intended to destroy all secret liens or reservations, not upon the face of the deed. The reasoning does not apply here, where the condition is expressed, nor to the grantee in the instrument; for, as to him, the agreement is binding, with or without registration. There is no reason the parties cannot, and in such cases as this there is every reason why they should, retain title till the consideration is paid. Such provision, showing the manifest intent of the parties, should be construed according to the actual understanding and agreement of the parties, and upheld in this court of equity, however it might have been in a court of law. It is not technical language that we should seek, but to effectuate the true agreement and understanding of the parties.

In fact, the grantee never took possession of the land at all, nor listed it at any time for taxation, nor paid any part of the consideration. He admitted such facts, both before and since Elmira's death, and, in consequence of such default and abandonment of the contract, Elmira executed another deed to Gabriel Helms, under whom the defendant Haney Helms claims, to secure her support, which she thus obtained. The de-

fendants offered this evidence; and, in view of the contract that the "lands shall stand good for the support of Elmira Helms during her natural life," the evidence should have been admitted. It matters little whether these words constituted an inartificially expressed mortgage, or a retention of the vendor's lien, or a defeasance upon failure of consideration. The important consideration is to effectuate the true and manifest agreement of the parties, which requires that the plaintiff, who has paid nothing whatever for the land, shall not recover it in spite of his agreement that the land "shall stand good" for the purchase money against those who paid the stipulated consideration after the plaintiff had abandoned and wholly failed to execute the contract. The evidence offered and excluded went to show that proper technical words to make this instrument a conveyance on condition or a mortgage were omitted by "ignorance or mistake"; grounds held sufficient in *Green v. Sherrod*, 105 N. C. 197, 10 S. E. 966, *Norris v. McLam*, 104 N. C. 159, 10 S. E. 140, and *Frazier v. Frazier*, 129 N. C. 30, 39 S. E. 684. Indeed, when, as was offered to be shown here, it was agreed between the parties at the time the deed was delivered that it should operate as a mortgage as against the original grantee, the court will so decree, though the defeasance clause was not omitted through ignorance, mistake, fraud, or undue advantage. *Waters v. Crabtree*, 105 N. C. 394, 11 S. E. 240; *Watkins v. Williams*, 123 N. C. 170, 31 S. E. 388; *Porter v. White*, 128 N. C. 42, 38 S. E. 24; *Fuller v. Jenkins*, 130 N. C. 554, 41 S. E. 706. In *Laxton v. Tilley*, 66 N. C. 827, the words, "In consideration of \$200 and the faithful maintenance of T. L. and wife," were held a charge upon the land, and there are several cases to like purport. But here the clause is added, "stand good for the support of" the grantor during her natural life, which is stronger, and, taken in connection with the evidence offered, that the grantee never accepted or acted upon such contract, but immediately abandoned and altogether failed to act upon the contract, the judge should not have instructed the jury to return a verdict for the plaintiff; but he should have left it for them, in view of the ignorance of the grantor and the evidence of language cotemporaneous with the execution of the deed, to say whether the intention was to make a conveyance subject to the grantor's lien. If so, the purchase money not having been paid, the title remained vested in the grantor, and passed by her subsequent conveyance to the grantor of the defendant. There was an allegation in the complaint that technical words to express the "condition precedent" were omitted by ignorance or inadvertence. It was error to refuse to submit such issue and evidence to prove it. *Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718.

This was a conveyance upon condition.

"The land was to stand good"—remain the property of the grantor until and unless its owner, Elmira, was "supported during her natural life" by William Helms. Not having complied with this condition, and not having paid a dollar to the support of Elmira, but having stood by while others were supporting her under a similar contract made after his abandonment of this agreement, William Helms should not now recover the land from those who did support Elmira. It would be unconscionable. Being in possession, Elmira could not re-enter for condition broken. *Frost v. Butler*, 22 Am. Dec. 199. It is not conceivable that Elmira contracted that if William Helms did not support her, and should refuse to execute the contract altogether, she reserved the privilege to bring suit and have him declared a trustee and ordered to reconvey. She had neither the knowledge nor the means to do this, and where would she have gotten a support during the years of such litigation? Her contract, both written and verbal, was dictated by common sense. "The land was to stand good" for her support, and, if William Helms did not give the support, the land was good. It was to remain hers till the support was completed. No other construction can reasonably and justly be placed upon this agreement of the parties. Construed otherwise, it is a nullity.

(135 N. C. 181)

SIGMAN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 23, 1904.)

APPEAL—CASE—RECORD—INDEX—EXCEPTIONS—
RAILROADS—PERSONAL INJURIES—FEL-
LOW SERVANTS.

1. Appeals will be dismissed where no index is sent up in the record and printed, and no marginal references prepared, as required by rules 10 and 28 (27 S. E. vii, viii).

2. Under Code, § 550, and Supreme Court rule 27 (27 S. E. viii), it is imperative that the exceptions be briefly and clearly stated and numbered in the case on appeal.

3. Under Supreme Court rule 22 (27 S. E. viii), providing that irrelevant matter not needed to explain exceptions or errors assigned shall not be included in the record on appeal, only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict, and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary.

4. An exception that "the court erred in its charge to the jury" is too broad to be considered.

5. Under Priv. Laws 1897, c. 56, p. 83, declaring that, where any servant or employé of a railroad company is injured in the course of his service or employment in the said company, the fact that the injury is due to the negligence of a fellow servant shall not be a defense, a workman injured by the negligence of a fellow servant while engaged in repairing a railroad bridge is within the terms of the statute.

Appeal from Superior Court, Iredell County; Allen, Judge.

Action by E. M. Sigman against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. O. Caldwell, for appellant. Furches, Coble & Nicholson and R. B. McLaughlin, for appellee.

CLARK, C. J. No index was sent up in the record and printed, nor any marginal references, as required by rules 19 (2), 19 (3), and 28 (27 S. E. vii, viii). As provided by rule 20, it was therefore optional with the court to dismiss the action or to postpone its consideration, and in the meantime to refer the record to the clerk, "to put the record in the prescribed shape," with an allowance to him of \$5 therefor, and an order that execution issue forthwith for that amount, and for the cost of printing the additional matter. The court in this case chose the latter alternative. But these rules are required for the prompt consideration of the business coming up to this court, and, if they are not carefully complied with, it will become necessary hereafter to dismiss in cases of their nonobservance. The fullest notice to this effect has heretofore been given. *Alexander v. Alexander*, 120 N. C. 474, 27 S. E. 121; *Lucas v. Railroad*, 121 N. C. 508, 28 S. E. 285; *Pretzfelder v. Insurance Co.*, 123 N. C. 168, 31 S. E. 470, 44 L. R. A. 424; *Baker v. Hobgood*, 128 N. C. 152, 35 S. E. 253; and *Brinkley v. Smith*, 130 N. C. 226, 41 S. E. 106, in which last attention is called to the fact that these requirements must be observed even in pauper appeals, except only the requirement as to printing.

The record is also defective in not containing the marginal references required by rule 21, nor are the exceptions "briefly and clearly stated and numbered" in the case on appeal as required by the Code, § 550, and also by rule 27 (27 S. E. viii). This is imperative, and the attention of the profession is called to this requirement as to stating the exceptions in the case on appeal. The statute and rule would not have been made if experience had not demonstrated that this provision was necessary for the prompt and orderly dispatch of the business coming before us. On the other hand, some records infringe upon rule 22 by sending up "irrelevant matter not needed to explain the exceptions or errors assigned." *Durham v. Railroad*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; *Mining Co. v. Smelting Co.*, 119 N. C. 415, 28 S. E. 27; *Hancock v. Railroad*, 124 N. C. 228, 32 S. E. 679. As, for instance, in some cases the transcript is incumbered with pages of entries of continuances from term to term and other proceedings at terms prior to the trial term, which are often sent up; when they throw no possible light upon the exceptions assigned. The appellate court does not need a complete history of the cause, but only enough of the record to show

§ 5. See *Master and Servant*, vol. 24, Cent. Dig. § 365.

that the case is properly constituted, and the summons, pleadings, verdict, and judgment, which are the "record proper," and the case on appeal, which should set out so much of the proceedings at the trial as will throw light upon the exceptions taken. The above, when properly indexed, with marginal references, and printed, will present to the court all that is necessary for the proper consideration of an appeal. More than this is an unnecessary expense to the appellant, and a hindrance, rather than a help, to the court, while less than the above moderate requirements is just ground for dismissal or other appropriate action. It is the duty of the appellant to see to it that the requirements as to the appeal are complied with. Cases cited, Clark's Code (3d Ed.) p. 921.

The record in this appeal having been put in shape by the clerk to whom the transcript was referred, and the additional matter printed, the exceptions have now been fully considered. The first exception, that the court erred in not nonsuiting the plaintiff at the close of the evidence, is without merit. The second exception is that "the court erred in its charge to the jury." This is "broadside," and cannot be considered. See numerous cases collected in Clark's Code (3d Ed.) pp. 513, 514, 773, 921. Neither the appellee nor the court can be thus called on to grope through the entire charge, when the appellant does not specifically point out by an exception wherein he has been hurt by an error therein. It admits of some surprise that an exception in such terms should still appear in any case sent to this court.

The other exceptions are to giving special instructions asked by the plaintiff, and for refusing certain instructions asked by the defendant, and for modification of the defendant's third prayer. Upon careful consideration of these matters, we find no error therein, and nothing requiring discussion in this opinion, as the propositions of law involved have been well settled by numerous decisions which the judge below carefully followed.

The plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow-servant law (chapter 56, p. 83, Priv. Laws 1897) applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service. In *Mott v. Railroad*, 131 N. C., at page 237, 42 S. E. 602, it is said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained (in the words of the statute) by 'any servant or employé of any railroad company * * * in the course of his services or employment with said company.' The plaintiff was an employé, and was injured in the course of his service or employment." To same effect, *Railroad v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585,

39 L. Ed. 675; *Tullis v. Railroad*, 175 U. S. 352, 20 Sup. Ct. 136, 44 L. Ed. 192; *Railroad v. Harris*, 33 Kan. 416, 6 Pac. 571; *Railroad v. Koehler*, 37 Kan. 463, 15 Pac. 567; *Railroad v. Stahley*, 62 Fed. 363, 11 C. C. A. 88; and many other cases.

No error.

(125 N. C. 204)

DRUM v. MILLER.

(Supreme Court of North Carolina. April 26, 1904.)

TORTS — NEGLIGENCE — LIABILITY — NATURAL CONSEQUENCE OF ACTS — UNFORESEEN CONSEQUENCES — SCHOOLS — RELATION OF TEACHER TO PUPIL — RIGHT TO CHASTISE.

1. An act done by a teacher in the exercise of his authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably have foreseen that a permanent injury would naturally or probably result from the act.

2. Where an act is itself lawful, liability depends not on the particular consequences or results that may flow from it, but upon whether a prudent man, in the exercise of ordinary care, would have foreseen the injury or damage that would naturally or probably have resulted from the act.

3. In order to render one who does a lawful act negligently liable, it is not necessary that he should have been able to have foreseen the injury in the precise form in which it in fact resulted, or that he should have anticipated the particular consequence which did actually flow from his act, but it is sufficient that the act is one which the perpetrator should, in the exercise of ordinary prudence, have foreseen would probably result in harm or injury of some kind.

4. In an action against a teacher for injuries to pupil caused by the teacher throwing a pencil at the pupil, which permanently injured his eye, an instruction that, unless the jury found that a reasonably prudent man might reasonably, or in the exercise of ordinary care, have expected that the injury complained of would result from his act in throwing the pencil, defendant should be found not liable, was erroneous, as requiring defendant to foresee not only that the injury would result, but that the particular injury would be the probable consequence of his act.

Appeal from Superior Court, Catawba County: Shaw, Judge.

Action by Arthur Drum against Abel S. Miller. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action brought by the plaintiff to recover damages for an injury to one of his eyes, which is alleged in the complaint to have been caused by the wrongful and negligent act of the defendant. There is not much dispute about the facts. At the time the injury was received the defendant was a teacher in a public school of Catawba county, and the plaintiff was one of his pupils. While the school was in session, and plaintiff's class was reciting one of its lessons, the attention of the plaintiff was attracted by some disturbance in the schoolroom, and when he turned his head to see what it was the defendant threw at him a pencil, which he at the time had in his hand. The plaintiff turned his head back just at the time the pencil

reached him, and it struck him in the eye, inflicting a very painful and serious wound, and causing partial, if not total, blindness. The plaintiff insisted that the act of the defendant in throwing the pencil was done maliciously, and that, even if there was no malice, the injury to the plaintiff was a permanent one, and, in either view of the case, the defendant was liable to him, without regard to any question of negligence or of proximate cause. The defendant contended, on the contrary, that there was no malice, and that, if a permanent injury was the result of the act, he threw the pencil at the plaintiff for the purpose of attracting his attention, and in the exercise of his right of correction and discipline, without intending to cause any injury to the plaintiff, and not foreseeing at the time that such a result would flow from his act. Without objection, the court submitted to the jury two issues, as follows: "(1) Did the defendant wrongfully injure plaintiff, as alleged in the complaint? (2) What damage, if any, is plaintiff entitled to recover?"

There were no prayers for instructions asked by the plaintiff. The court charged the jury as follows: That, if they believed the evidence, they should find "that the defendant was a school teacher, and that plaintiff was his pupil, and was reciting his lesson at the time of his alleged injury. A teacher has the authority to inflict upon his pupil such punishment as, in his judgment, may be necessary for the purpose of correction; and unless such punishment shall seriously endanger the life, limb, or health of the pupil, or shall disfigure him, or cause some permanent injury to him, or was inflicted not in the honest discharge of his duty as a teacher, but under the pretext of duty to gratify his malice, then the teacher would not be responsible for the injury to the child; or, if the injury was not the proximate cause of the punishment, the teacher would not be responsible therefor. An act is the proximate cause of an injury either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when, in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. A party is presumed to have intended the necessary as well as the natural and probable consequence of his acts." The court then explained to the jury what is malice, and further charged them that, if the plaintiff was inattentive, and defendant threw the pencil at him for the purpose of punishing him, and inflicted a permanent injury upon him, or if he threw the pencil at the plaintiff for the purpose of gratifying his malice, and injured him, and the injury was proximately caused by the throwing of the pencil, they should answer the first issue "Yes"; but if they found that the pencil was thrown not for the purpose of punishing the plaintiff, but to recall his attention to the recitation, and they further found from all the surrounding

circumstances that a reasonably prudent man, in the exercise of ordinary care, would not have foreseen that an injury would likely have resulted therefrom, then they should answer the first issue "No," although they should further find that the plaintiff was permanently injured, for, if injured under such circumstances, it was an accident; an accident being an event from a known cause. The jury were further instructed that, unless they found from the evidence that plaintiff's injury was the natural and probable consequence of defendant's act in pitching or throwing the pencil, and unless they found that a prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury would likely result from the defendant's act, they should answer the first issue "No." The court then gave the defendant's second prayer for instructions, as follows: "Unless you find from the evidence that the plaintiff's injury was the natural and probable consequence of the defendant's act in pitching or throwing the pencil, it will be your duty to answer the first issue 'No;'" and also the defendant's third prayer, as follows: "Unless you find from the evidence that a reasonable prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury complained of would likely result from the defendant's act in throwing or pitching the pencil, you should answer the first issue 'No.'" The jury answered the first issue "No," and therefore did not answer the second. There was a judgment in accordance with the verdict in favor of the defendant, and the plaintiff appealed.

T. M. Hufham, for appellant. Self & Whitener, for appellee.

WALKER, J. (after stating the case). Several exceptions were taken by the plaintiff to the judge's charge, only two of which we deem it necessary to notice. One of these exceptions is based upon the plaintiff's contention that, if he was permanently injured by the act of the defendant, he is entitled to recover, whether that act was the proximate cause of the injury or not, or could or could not reasonably have been foreseen. We cannot agree with the plaintiff in this contention. It is undoubtedly true that a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously, or inflicts a permanent injury; but he has the authority to correct his pupil when he is disobedient or inattentive to his duties, and any act done in the exercise of this authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result from the act. There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the

injury is in itself unlawful, or is, at least, a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends, not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man, in the exercise of proper care, can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen. Cooley, in his work on Torts (2d Ed.) p. 74, states the rule thus: "(1) In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. (2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause. (3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But, if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Pollock, in his treatise on Torts, pp. 14 to 35, discusses with great clearness and apt illustration this subject of proximate cause in its relation to the liability of persons for civil wrongs, and the following general principles (the most of them expressed in his words) may be gathered therefrom: A tort is an act or omission (not being merely a breach of duty arising out of a personal relation, or undertaken by contract), which is related to harm suffered by a determinate person in the following ways: (1) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.

(2) It may be an act in itself contrary to law or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting. (3) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented. (4) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent. A special duty of this kind may be (1) absolute, (2) limited to answering for harm which is assignable to negligence. In some positions a man becomes, so to speak, an insurer to the public against a certain risk; in others he warrants only that all has been done for safety that reasonable care can do.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment. Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequence of disobedience, there is some default in the mere fact that the law is disobeyed (at any rate, a court of law cannot admit discussion on that point), and the defaulter must take the consequences. "Then we have the general duty of using due care and caution. What is due care and caution under given circumstances has to be worked out in the special treatment of negligence. Here we may say that, generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence." In cases of tort the primary question of liability may itself depend, and it often does depend, on the nearness or remoteness of the harm or injury, and the liability itself must be founded on an act which is the immediate cause of the harm, or injury to a right, the rule of the law being that the proximate, and not the remote, cause is to be regarded. For, says Bacon: "It were infinite for the law to judge the causes of causes, and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." For the purpose, therefore, of civil liability, in the law of torts, those consequences and those only, are deemed immediate and proximate or natural and probable, which a person of average competence and knowledge, being in the like case of a person whose conduct is in question, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular con-

sequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was immediate or not does not matter. That which a man actually foresees is to him, at all events, natural and probable. Pollock on Torts, p. 21. In the case of willful or intentional wrongdoing we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter under the general rule of liability and assuming that no just cause of exception to it is present. "It is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and, having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end." The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts. The doctrine of natural and probable consequence is most clearly illustrated, however, in the law of negligence, for there the substance of the wrong itself is failure to act with due foresight. It has been defined as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do," and for the purpose of civil liability the definition is sufficient and adequate, perhaps, to indicate the kind of act, or failure to act, which may be regarded as the immediate or proximate cause of any consequent harm or injury; for the prudent man, to whose ideal behavior we are to look as the true standard of duty, will be guided by a reasonable estimate of probability, and will not neglect what he can forecast as probable, but will order his precaution by the measure of what appears likely in the known course of things. If he fails so to order his conduct, and injury results, he is justly held to be the responsible author of it.

While, as we have just said, a person charged with negligence is liable only for those injuries which a prudent man in the exercise of care could have reasonably foreseen or expected as the natural and probable consequence of his act or his omission of duty, it must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty. "It is not an essential element of negligence that the defendant should have anticipated, or have had reason to anticipate, that his carelessness would injure another person. The improbability of injury to another is a circumstance that might be taken into account, but which is not conclusive of the question.

If, however, no reasonable person could have anticipated that injury to another might ensue, we think that there could be no negligence. It is certainly not essential that the negligent person should have anticipated injury to the particular person who was in fact injured, or the particular kind of injury produced." 1 Shear. & Redf. on Neg. (4th Ed.) § 21. It is quite sufficient to satisfy the principle and to bring any case within its operation that the party complained of should be able, in the exercise of the care of a man of ordinary prudence, to foresee that harm or injury will result, without reference to the particular kind. If he had or should have had this foresight, he is in no better case than the man who intends to do and actually does harm, so far as liability for the natural and probable consequence of his act or conduct is concerned. We believe this to be the doctrine to be gathered from the teachings of the text-writers and the decided cases, and the principle that a man is liable for those consequences only which an ordinarily prudent man can foresee as likely to flow from his acts, is, when thus restricted and understood, undoubtedly the correct one. It seems to be in consonance with a just appreciation of the causal connection which should exist between the act and the consequence of it in order to create civil liability. There is no sound or valid reason, so far as we are able to see, why the very injury that was inflicted by the wrongful or negligent act should have been foreseen, for, if the person complained of actually intended any harm to him who was injured by his act, it is conceded that he is liable, without regard to the particular nature of the injury, and there is no way of distinguishing such a case from one in which an act is negligently done, which the party doing it could well see at the time would cause harm, or injury, in its general sense, to another. There may be a difference in degree, but not in principle. In the one case there is an actual intention, while in the other there is an implied intention, which the law will not ordinarily permit to be contradicted, because it is a just and reasonable rule, as it is a maxim of the law, that a person is presumed to intend that which is the natural consequence of his act. When, therefore, a willful wrong is committed, or a negligent act which produces injury, the wrongdoer is liable, provided in the latter case he could have foreseen that harm might follow as a natural and probable result of his act; for, if he can presume that harm might naturally and probably follow, he must necessarily intend that it should follow, or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that, when one does an illegal or mischievous act, which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the

light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor, indeed, any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed, and many authorities cited to support it, in 21 A. & E. (2d Ed.) p. 487: "In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." It is not essential, therefore, in a case like this one, in order that the negligence of a party which causes an injury should become actionable, that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the party sought to be charged with liability for the negligence should have foreseen by the exercise of ordinary care that some mischief would be done. 1 Thomp. Com. on Neg. § 59. In determining whether due care has been exercised in any given situation of the party alleged to have been negligent, reference must be had to the facts and circumstances of the case and to the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct if he had been similarly situated. Hill v. Windsor, 118 Mass. 251.

Applying these general principles to the case in hand, we find that the defendant occupied that relation toward the plaintiff, who was his pupil, which entitled him to use such means for the purpose of correction and discipline as, in his judgment, were required under the circumstances, provided that he

neither acted from malice nor inflicted permanent injury. State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 418; State v. Long, 117 N. C. 791, 23 S. E. 431. The law on this subject is thus well stated: "It is the duty of the teacher to enforce the rules and regulations adopted for the government of a school, and to maintain discipline in the school, and in order to maintain discipline and compel obedience to any lawful regulation the teacher may inflict corporal punishment upon a pupil, since the teacher for the time being stands, to some extent at least, in loco parentis, and has such a portion of the powers of the parents delegated to him, namely, that of restraint and correction, as may be deemed necessary to answer the purposes for which he is employed." A. & E. Enc. (2d Ed.) p. 244. And by another writer it is thus stated: "The teacher has the power to enforce obedience to the rules and to his commands. One of the means recognized by the law is corporal chastisement. He may thereby inflict temporary pain, but not seriously endanger life, limbs, or health, or disfigure the child, or cause any other permanent injury. He cannot lawfully beat the child, even moderately, to gratify his own evil passions. The chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands. Plainly, if the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree. It is impossible he should inflict it without." Bishop on Noncontract Law, § 596, p. 269. If, when the case is again tried, the jury find that the defendant acted maliciously, he will, of course, be liable to the plaintiff for the consequent injury and damage, as was fully and clearly explained in the charge of the judge at the last trial; but if he inflicted a permanent injury in attempting to enforce the discipline of his school, and in so doing failed to exercise ordinary care, he will still be liable to the plaintiff if the jury further find that the injury was the natural and probable result of his negligence, and that the defendant, in the light of the attending circumstances, and in the exercise of ordinary care, ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act.

The court had charged the jury correctly, in accordance with the foregoing principles, until it gave the instruction contained in the defendant's third prayer. By that instruction the jury, before they could return a verdict for the plaintiff, were required to find that the defendant was, at the time, able to foresee, by the exercise of ordinary care, not only that injury would result, but that the particular injury which was received by the plaintiff would be the natural and probable consequence of his act. It is very likely that this instruction had great weight with the jury in deciding the case against the

plaintiff, and we can well see how he might have been, and no doubt was, seriously prejudiced thereby. The language of Gaston, J., in *State v. Pendergrass*, 19 N. C., at page 367, 31 Am. Dec. 416, will be appropriate in this connection, as he states the rule of responsibility in such cases with his usual clearness: "We think that the instruction on this point should have been that, unless the jury could clearly infer from the evidence that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child, it did not exceed the limits of the power which had been granted to the defendant. We think, also, that the jury should have been further instructed that, however severe the pain inflicted, and however, in their judgment, it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet, if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act honestly in the performance of duty, according to her sense of right, but, under the pretext of duty, was gratifying malice." There the liability was made to depend upon the question whether the act charged to have been negligent threatened lasting injury. We can add nothing to what is so well said by that wise and learned judge. There was error in giving the defendant's third prayer for instruction, which entitles the plaintiff to another trial. We cannot consider this error as cured by the other parts of the charge though in themselves correct. *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 780; *Id.*, 132 N. C. 101, 43 S. E. 585; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 480. The rule in this respect is well settled in those cases.

New trial.

DOUGLAS, J., concurs in result *arguendo*.

(194 N. C. 749)

STATE v. GARLAND, Sheriff.

(Supreme Court of North Carolina. May 8, 1904.)

SHERIFFS—MALFEASANCE IN OFFICE—PURCHASE OF COUNTY CLAIMS—CONSTRUCTION OF STATUTE—PURCHASE FOR COUNTY—INVALID DIRECTION OF COMMISSIONERS.

1. Pub. Laws 1868-69, p. 607, c. 260, entitled "An act to declare it a misdemeanor for any county officer to speculate in county claims," which now appears as Code, § 1009, under the caption "County Claims, Speculation in, Indictable," provide that if any clerk, sheriff, or other officer shall purchase county claims at a less price than their true value, or speculate in such claims, he shall be guilty of a misdemeanor. *Held*, that the intention of the statute is to prevent county officials from buying for their own benefit claims due by the county of which they are officials, and the act does not extend to a sheriff who purchases county claims, at the direction of the county commissioners, solely for the benefit of the county.

2. The fact that under Laws 1901, p. 352, c. 214, § 3, providing that no part of a special tax

fund of a county should be paid out by the county commissioners without the concurrence of the finance committee, the county commissioners had no power to delegate to the sheriff the duty of passing on the validity of county claims which they directed him to buy, did not make the sheriff criminally responsible for following the instructions of the commissioners, so as to render him subject to prosecution under Code, § 1009, for purchasing county claims at less than their true value.

Appeal from Superior Court, Mitchell County; Shaw, Judge.

O. Garland, sheriff, was convicted of purchasing claims against the county at a less price than their full value, and appeals. Reversed.

S. J. Ervin, for appellant. The Attorney General, for the State.

MONTGOMERY, J. The defendant was indicted in the superior court of Mitchell county for purchasing, while holding the office of sheriff of that county, willfully and unlawfully, certain claims against the county of Mitchell at a less price than their full value. The jury returned a special verdict, the substance of which, as to its material parts, is as follows: The county of Mitchell has been for many years largely in debt, and the General Assembly has enacted at various sessions laws authorizing the commissioners to levy special taxes to be used in compromising and settling the floating indebtedness of the county at less than its face value. Through those years it has been a custom of the several sheriffs of the county to take up such indebtedness as was offered by creditors, at 50 cents on the dollar, either in payment of taxes due to the county, or from the special tax fund at that rate—the sheriff having been instructed in each case to do so by the board of county commissioners; and, on settlements between the sheriffs and the county commissioners, they would be allowed credits for the claims at the rate they paid for them. The defendant in the present case was directed and instructed by the commissioners to accept all claims due by the county, and offered by the holders, at the rate of 50 per cent. of their face value, and to pay therefor, either in tax receipts or in cash, out of the special fund; and the defendant, under these instructions, acting as the agent of the board of commissioners, did in June, 1902, accept from a holder two certain claims, particularly numbered and specified, due and owing by the county, and he paid for the claims at the rate of 50 per cent. of their face value. The claims were paid for partly in tax receipts and the balance by a check. That amount was charged by the defendant on his books against the special tax fund, but paid by check drawn by him, as sheriff, on a bank in which the special and general tax fund was deposited under one account to his credit as sheriff. Thereafter, on a settlement between the sheriff and the commissioners, he produced the claims taken up by him from the holder, and he received a credit for the

same as sheriff and tax collector only to the amount he had paid the holder, and no more. The jury further found that, in taking up the claims from the holder, the defendant, who at the time was sheriff of the county, "acted as the agent of and for and in behalf of Mitchell county, and under instructions and directions of the commissioners of Mitchell county, and not for or in his own behalf, and that, in settlement with the county, he was credited only with the amount he had paid Tappan [the holder] therefor."

The statute under which the defendant was indicted (Code, § 1009) is chapter 280, p. 607, Pub. Laws 1868-69. The act of 1868-69 had for its caption "An act to declare it a misdemeanor for any county officer to speculate in county claims." The caption of the Code section is, "County Claims, Speculation in, Indictable." The purchase of claims against the county by a county officer is not prohibited by the statute if a full price is paid therefor. If such an officer pays full price for a claim against the county, he has as much right to buy it as has anybody else. It is only when he buys such claims at less than their face or full value that the law interferes and declares such act a misdemeanor. The reason for this prohibition is apparent. If such conduct were allowed, the county officers might refuse to pay the indebtedness of the county at the full value of the claims, although the money might be in the treasury for that purpose, to the end that those who held such claims might be compelled to take less than their face value, or commence litigation for their collection. The intention and meaning of the statute therefore are to prevent county officials from buying for their own benefit claims due by the county of which they are officials. But if the meaning, from the context, was doubtful, the caption of the act of 1868-69, and that of Code, § 1009, might be invoked to aid in the construction of the law; and, as we have seen, those captions declare that the object of the law is to prevent county officers from speculating in claims due by their counties. They themselves are not allowed, under the pains of indictment, either to buy a claim due by the county, or to be interested in any sale or purchase by any other person or persons of such claims.

The defendant in this case, as we have seen, was directed by the county commissioners to buy these claims for the county, and he bought them, not for himself, but for the county. The county got the benefit of the purchase, and not one cent of profit in any way went into the pocket of the defendant. In fact and in law, as the jury found, he did not buy for himself, but for the county, through the direction of the commissioners. It was contended by the Attorney General in this court that under the act of 1901, p. 352, c. 214, no part of the special tax fund of the county could be used for any purpose, except by the joint act of the board of commissioners and the finance committee of Mitchell

county, and that therefore the direction of the commissioners to the defendant was a nullity, and the action of the sheriff was on his own responsibility. It is true that the passing upon the validity of claims of the county of Mitchell by the commissioners and the finance committee was an act judicial in its character, and it could not be delegated to the sheriff, who virtually passed upon the claims which he bought, as both valid in law and due by the county; and it might be in some civil procedure that the holders of the claims which the sheriff purchased might be made to return the money and take back their claims, or it may be that any holder of claims against the county of Mitchell might, by due process of law, prevent the authorities of that county from preference among its creditors, because of a willingness on the part of some to compromise their claims against the counties. But all that is a very different matter from indicting and punishing the defendant, who is sheriff of the county, for following an invalid instruction. He has reaped no benefit. He made no purchase for himself, and the county alone was benefited. The judgment of guilty pronounced by his honor upon the special verdict was erroneous.

Reversed

(135 N. C. 258)

BERNHARDT v. CAROLINA & N. W. R. CO. et al.

(Supreme Court of North Carolina. May 8, 1904.)

RECOVERY OF PAYMENT—PROTEST—VOLUNTARY CONTRACTS.

1. Where a consignee who had facilities for the transportation of lumber from the terminus of an initial carrier to his own yard by wagon and horses, but, for his own convenience, made a contract with a connecting carrier which had a switch leading into his yard, by which the cars were to be transferred from the initial carrier and brought directly into his yard, and was apprised at the time of making the contract what the charges would be, and objected to the same as extortionate, and stated that he would pay them under protest, but afterwards availed himself of the contract and paid the charges, he could not recover back the transfer charges so paid.

Appeal from Superior Court, Caldwell County; Shaw, Judge.

Action by J. M. Bernhardt against the Carolina & Northwestern Railroad Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Edmund Jones, for appellant. W. C. Newland, C. E. Childs, and J. H. Marion, for appellees.

MONTGOMERY, J. The plaintiff alleged in his complaint that he was a dealer in lumber in the town of Lenoir, and that from November, 1899, to August, 1902, he received on his lumber yard a large number of cars loaded with lumber, which had been hauled over the road of the defendant the Caldwell

& Northern Railroad Company to the terminus of its track at Lenoir, and then delivered it to the defendant the Carolina & Northwestern Railroad Company; that the Carolina & Northwestern carried the cars a fourth of a mile over their track to the plaintiff's lumber yard, and for that service the plaintiff paid to the Carolina & Northwestern 50 cents per car, and in addition thereto the sum of 25 cents per car, as demurrage, for each and every day that such car remained unloaded, including the day next after, and also the day of its arrival; that the plaintiff was compelled to pay, and did pay under protest, the demurrage on the cars for the next day succeeding the day of their arrival, and also after on the day of their arrival, amounting to \$225. The plaintiff further alleged that the demand of the defendants, and the compelling by them of the plaintiff, to pay the \$225 demurrage for fractions of days, was tortious, wrongful, and unwarranted by law, and ought to be refunded to the plaintiff. The defendant the Carolina & Northwestern denies any knowledge of the number of cars delivered to the plaintiff, or that any amount was paid to them under protest for such service, and further avers that it had no concern with the matters and transactions set forth in the complaint, except as the agent of the Caldwell & Northern Railroad Company in collecting the charges of that company for the time cars were held by and for the plaintiff at Lenoir, and that all such charges so collected of the plaintiff were for the use and benefit of the Caldwell & Northern, and were collected and paid over to that company under instructions of that company. The defendant the Caldwell & Northern Railroad Company denied in its answer that the plaintiff ever paid any amount to the Carolina & Northwestern Railroad Company for the use and benefit of this defendant, and further averred that it had an agreement with the Carolina & Northwestern by which this defendant was to pay said company 50 cents per day for all box cars and 25 cents per day for all flat cars handled by this defendant, belonging to said company, and the Carolina & Northwestern was to pay this defendant the sum of 50 cents per day for all box cars and 25 cents per day for all flat cars handled by the said company, belonging to this defendant; that this defendant never had any contract whatever with the plaintiff about delivering cars to his lumber yard, and has never delivered any cars to his yard; and that the plaintiff has never paid this defendant anything whatever for delivering cars to his yard."

At the trial, by consent, a jury trial was waived, and the court found the facts. Such of them as are necessary to the decision of the case will be stated:

The Carolina & Northwestern Railroad Company switched the cars over its own track to the switch track extending to the plaintiff's lumber yard, and thence along

said switch track to the plaintiff's lumber yard, for which the plaintiff paid that company 50 cents for each car so switched. The defendants entered into a contract in writing with each other with reference to the interchange of cars, by which platform cars were to be interchanged on the basis of 25 cents per day of 24 hours, or fraction thereof; no mileage to be charged in either instance. The Caldwell & Northern Railroad Company looked to the Carolina & Northwestern Railroad Company for the 25 cents per day for each day that the cars stayed on Bernhardt's siding, and that the Carolina & Northwestern Railroad Company would collect from Bernhardt accordingly. That agreement between the two companies was sent to and received by the plaintiff. The plaintiff wrote to the companies that the 25 cents per day for each day that the cars might be on his yard, Sundays not counted, would be satisfactory, or, in his own words, "I will pay for the day they are being unloaded, or as many days as I may delay them by not unloading." In reply to that letter, and before the matters complained of had arisen, the plaintiff received a letter from the superintendent of the Carolina & Northwestern Railroad Company in the following words:

"Dear Sir: Yours 4th inst. in reference to car interchange. When the C. & N. deliver you cars to us at Lenoir to go in your track, we will put them over there, and when you notify us, we will take them out and place them back on the C. & N. track, but the C. & N. people will charge us for these cars from the time they are delivered to you until they are placed back on their track, and we will have to look to you for the amount. If the failure to place them back promptly is due to any carelessness on our part, then it will be for you to show the fact, but as the C. & N. holds us responsible for these cars, we will have to hold you to whatever amount they hold us, as we are doing this business at accommodation price, we cannot afford to lose anything in it. As above stated I shall do what I can to move these cars for you, but there will sometimes be failures (such as delayed trains) to place your cars that we cannot be responsible for. In such cases we propose to give our work preference.

"Now if at any time you notify our road that these cars are ready to be moved out, and they are not, if you will notify me, I will endeavor to push them out, but I am not on the grounds and cannot undertake to lose anything by failures.

"I would advise that you ask for C. & N. W. cars to go on C. & N. track, when you want lumber from them to your yard, in order that the cars when unloaded may be loaded by you out and save an extra switch, and relieve the possibility of not getting these cars back promptly after you unload them."

And in reply to that letter the plaintiff

wrote that he would pay the 25 cents per day for cars required by it in the letter, but would do so under protest, and that he would endeavor to have it repaid to him, as he did not consider it a just or reasonable charge. The plaintiff afterwards paid the amounts, with full knowledge of all the terms and conditions existing between the two roads as to the charge on cars, and there was no agreement on the part of either of them to repay the same. The bills were made out by the Carolina & Northwestern against the plaintiff for the charges; the charges being for detention, and embracing fractions of days. The Carolina & Northwestern collected of the plaintiff the amount of the charges (\$225), and accounted to the Caldwell & Northern for the same, along with all other of the Caldwell & Northern cars that went over the Carolina & Northwestern road, as the plaintiff had requested the Caldwell & Northern to do. The plaintiff could have unloaded the cars at the station in Lenoir, and hauled the lumber with wagons to his yard at a cost of 50 cents per car, but it was more convenient for him to have them switched to his yard by the Carolina & Northwestern. The charge was for a rental or car-service charge.

From all the facts found in the case, it is clear that the charges made for the detention of the cars against the plaintiff were not the ordinary charges for demurrage, and the rules governing that subject do not apply. The plaintiff had ready facilities for the transportation of lumber from the terminus or depot of the Caldwell & Northern to his own yard by wagon and horses, but, for his own convenience, he made a contract with the defendant companies, fixing the amount which should be due on the detention of cars upon the switch leading to his yard. The contract seems to be clear and explicit. The plaintiff knew what it meant—that is, that the charge for each car should be 25 cents a day, and 25 cents for each fraction of a day—and he protested against it before any charge had been incurred. But nevertheless afterwards he availed himself of the contract because of its greater convenience to him. If there had been room for misunderstanding between the parties as to the meaning of the contract when it was entered into, that became an immaterial matter when afterwards the plaintiff, upon presentation of bills containing charges for fractions of days, paid the charges. This is not a case where one under peculiar conditions is compelled to pay an extortionate demand, such as would shock the conscience—unconscionable and unreasonable—or suffer great injury to his person or property if he does not yield. The plaintiff, according to the findings of fact, as we have seen, had other facilities for carrying his lumber to his yard at a reasonable cost, and he only chose the method he adopted because it was more convenient to him. There was no mistake here about

the facts. They were all known, and, if the plaintiff had reluctantly and under protest paid the charges, it was nevertheless his voluntary act, and he cannot recover them back. *Devereux v. Ins. Co.*, 98 N. C. 6, 8 S. E. 639. "Money voluntarily paid with a knowledge of all the facts cannot be recovered back, although there is no debt. *Commissioners v. Commissioners*, 75 N. C. 240; *Commissioners v. Setzer*, 70 N. C. 426. Nor, if thus paid, can it be recovered back, though paid in satisfaction of an unjust demand, or one that had no validity." *Brummitt v. McGuire*, 107 N. C. 351, 12 S. E. 191.

The court gave judgment that plaintiff take nothing and that defendants recover their costs, and the same is affirmed.

Affirmed.

(135 N. C. 296)

GILLIS et al. v. ARRINDALE.

(Supreme Court of North Carolina. May 2, 1904.)

MINES—SALE OF MINERAL INTEREST—CONTRACT—DEED—FRAUD—ACTION BY SELLER—NATURE OF ACTION—ISSUES—JUDGMENT—AMENDMENT OF COMPLAINT.

1. Where the owners of land were induced by the fraud of defendant to execute to him a deed of the mineral rights in the land for an expressed consideration of \$500, when they supposed they were executing, pursuant to a prior agreement, a contract giving defendant an option to purchase such interest for the sum of \$3,000, and defendant entered on the land, and removed timber, etc., and subsequently the owners sued for cancellation of the deed, they were entitled to judgment for such damages as defendant may have done to the land, but not to damages as of the amount of the agreed purchase price.

2. Defendant was entitled to set up, by way of reducing plaintiffs' damages, the enhanced value of the land owing to any improvements placed thereon by him.

3. Plaintiffs alleged that they had been induced by the fraud of defendant to execute to him a deed of their mineral rights in lands for an expressed consideration of \$500, when they supposed they were executing an option to purchase such interest for \$3,000. The complaint prayed for judgment that the deed be canceled, and for damages to the amount of \$3,000. Issues were submitted to the jury as to whether the execution of the deed was obtained by fraud, whether the plaintiffs had been damaged, and as to the value of the improvements. The verdict on all the issues, save the one as to the fraud, which was found for plaintiffs, was set aside, and on further proceedings an issue was submitted as to what was the true consideration. *Held*, that the submission of such issue was proper.

4. The verdict found that the deed was procured by fraud, and that the consideration agreed to be given was \$3,000. *Held*, that on the allegations and verdict plaintiffs' equity was one for reformation, and not for cancellation.

5. Though the complaint had not sought a money judgment, it was error to refuse to permit plaintiffs to amend so that judgment might be entered not only for reformation, but for the sum of \$3,000.

6. Several tenants in common contracted to give defendant an option to purchase their mineral interest in lands at a specified price, but by the fraud of defendant they were induced, when they supposed they were executing such a contract, to execute a conveyance for a sum less than that agreed on. Prior to such conveyance one of the tenants had mortgaged his

share, and by foreclosure and deed such share had passed to another one of the tenants, and thereafter the tenants sued for a reformation of the deed to defendant. *Held*, that the purchasing tenant could not compel defendant to take the foreclosed share at the price agreed on between the parties.

7. In case defendant should elect to take such share under the deed as reformed, the purchasing tenant would be entitled to the compensation on the basis of reformation.

8. In a suit by tenants in common for the reformation of a deed of the mineral interest in the lands on the ground that it expressed a less consideration than that which had been agreed on by the parties, and that it had been obtained by the fraud of defendant, one of plaintiffs was asked what was the fair value of the property, to which he responded that it was worth the price that plaintiffs claimed had been agreed on, and that he never would have agreed to anything else, and that all the owners in common with him had agreed on such price. *Held*, that the testimony was competent for the purpose of corroborating plaintiffs' contention as to the agreed price.

9. In a suit for the reformation of a deed of mineral interests in lands on the ground that it had been fraudulently procured, and expressed a less consideration than had been agreed on, defendant tendered in writing to plaintiffs before the trial a proposition to compromise, and in open court tendered the money in accordance therewith. *Held* that, the offer not being in compliance with plaintiff's claim, plaintiffs were under no obligation to accept the proposition, but were entitled to stand upon their rights under the contract.

Appeal from Superior Court, Person County; O. H. Allen, Judge.

Suit by R. H. Gillis and others against John A. Arringdale. From a judgment in favor of plaintiffs, all parties appeal. Reversed on plaintiffs' appeal, and affirmed on defendant's.

Kitchin & Carlton, for plaintiffs. Rountree & Carr and Manning & Foushee, for defendant.

Plaintiffs' Appeal.

CONNOR, J. The plaintiffs alleged that prior to the 1st day of May, 1900, they owned the tract of land in controversy as tenants in common, and that prior to said day the said land had been partitioned between them; that the portion of it allotted to the plaintiff J. J. Gillis had been mortgaged to T. O. Brooks; that during the month of May, 1900, the plaintiffs agreed with the defendant, through his agent, in consideration of \$150 to give him a 10-year option to buy the minerals on said land at the price of \$3,000; that some time thereafter the said agent, in whom the plaintiffs had great confidence, procured their signatures to a paper writing upon the representation that it correctly set out the terms of said contract, the agent paying to each of the plaintiffs the sum of \$25; that, relying upon the representation of the agent, they signed the said paper writing; that by such representation the agent prevented the plaintiffs from reading the paper; that the plaintiffs always thought said paper set forth the true contract price until the month of May, 1901, when the defendant offered to

settle with them by paying the sum of \$500 for the minerals on the entire tract of land, instead of the true contract price of \$3,000—being \$500 to each of them—which the plaintiffs refused to accept; that upon examining the paper writing, which had been recorded in the office of the register of deeds of Person county, they discovered that it was not the contract or option as they had been led to believe, but, on the contrary, it was a deed conveying said mineral interest for the sum of \$500. The said deed contains the following clause: "That the said parties of the first part for and in consideration of the sum of \$150, the receipt whereof is fully acknowledged, have bargained, sold and conveyed and by these presents do bargain, sell and convey unto the said party of the second part, his heirs and assigns, all the mineral rights, metals and minerals to be found in, on or under the tract of land in Holloway's township, Person county, North Carolina, as described as follows." (Here follows a description of the land.) The said paper writing also contains the following clause: "It is further understood between the parties to this deed that said John A. Arringdale or his heirs and assigns shall commence to develop said mines by searching and prospecting for the same within six months from the date hereof, and he shall have ten years within which to search for, prospect for and open up any mine or mines on said land, and after making search for and opening up the same, if the said John A. Arringdale shall find any mine or mines that he will care to operate, then he shall pay to the parties of the first part or their authorized agent, or deposit in the Bank of Virgilina, which shall constitute a lawful tender, the additional sum of \$500 to their credit, after having notified the parties of the first part that he intends to operate the same." The plaintiffs further allege that the defendant went into possession of the land and cut and destroyed a large quantity of timber. They demand judgment, first, that the deed be declared void and canceled; second, for \$3,000 damages.

The defendant admits that he procured from the plaintiffs an option for the sum of \$150, and that he was represented in the negotiation by his agent. He further says that the terms of the option were correctly set forth in the deed, and denies that any fraud was practiced upon the plaintiffs by his agent. He also denies each and every allegation of fraud or misrepresentation as to the terms of the deed, and admits that he went into possession of the land, and says he spent many thousands of dollars in prospecting for minerals and putting up machinery on the land; that all of the improvements were put on it by the defendant before the plaintiffs made any claim or allegation that there was any mistake in the deed, or any fraud practiced upon them. The cause came on for trial at August term, 1902, before Judge McNeill, when the issues submit-

ted to the jury were as follows: (1) Was the execution of the deed obtained from the plaintiffs by the fraud and misrepresentation of C. S. Garner, as alleged in the complaint? (2) If so, were the plaintiffs damaged thereby? To both of these issues the jury responded in the affirmative. (3) What is the value of the improvements placed upon the land by the defendant for mining the same? The jury responded "\$4,000." His honor set aside the verdict upon the second and third issues, and made an order retaining the cause for further proceedings. The defendant excepted, and entered notice of appeal, but, being of opinion that such appeal was premature, it was, by consent, dismissed.

The cause came on again for trial before Judge Allen at August term, 1903, when the following issue was submitted to the jury: "What was the true consideration agreed upon between the plaintiffs and the defendant for the mineral rights and privileges conveyed? Ans. \$3,000." The plaintiffs thereupon tendered a judgment upon the verdict, adjudging that: "Upon consideration of the verdict and of the admissions of the defendant * * * and allegations of the plaintiffs, the plaintiffs recover of the defendant the sum of \$3,000, with interest," etc., and that said judgment be declared a lien on the land. His honor refused to sign the judgment, indorsing the following entry thereon: "This judgment tendered by the plaintiffs, and refused on the ground that the action is not one for a judgment on the debt, and that, if it remains unpaid, the plaintiffs have their remedy by an independent action at law." The plaintiffs excepted. The plaintiffs then moved to so amend the complaint that it would conform to the judgment. His honor refused the amendment, and signed the judgment set out in the record. Said judgment directs the correction of the deed by striking out the words "five hundred dollars" and inserting in lieu thereof "three thousand dollars." The plaintiffs appealed.

The prayer for judgment indicates that the plaintiffs were not entirely clear as to the relief which they desired. They seemed to have conceived themselves entitled to have the deed canceled, and be remitted to their original status. They would, in this view of the case, have been entitled to judgment for such damage as the defendant may have done to the land by cutting and removing the timber, etc.; not to the purchase price. They could not have the land and the price of it. If the defendant had conceded, upon the finding of the jury, that the plaintiffs were entitled to have the deed canceled, he would have been entitled to set up, by way of reducing the plaintiff's damages, such improvements as he had placed upon the land to the extent, not of the cost to him, but of the enhanced value of the land. The defendant, however, does not offer to surrender the land and permit the cancellation of the deed, for the very obvious reason that he

has expended large sums of money in prospecting for minerals and in putting up machinery on the land. He could not, in the light of the verdict of the jury, take the land for his improvements. His honor Judge McNeill for this reason set the verdict aside in regard to the value of the improvements. We think that his honor Judge Allen submitted the proper issue. Upon the coming in of the verdict the plaintiffs were entitled to have the deed corrected.

The only question, therefore, presented upon the plaintiff's appeal is whether the judge should, after making the correction, have proceeded to render judgment for the purchase price as fixed by the jury. He was of opinion that, because the action did not contemplate this result, the plaintiffs were not entitled to such relief. We are of opinion that the conclusion reached in the trial is entirely consistent with the allegations in the complaint; that upon the allegations and the verdict the plaintiffs' equity was for reformation, and not cancellation. It being the purpose of the Code system to avoid a multiplicity of suits and afford complete relief in one action, the courts should be liberal in allowing amendments with this end in view; especially so in respect to the prayer for judgment. It has been uniformly held that judgment should be rendered in accordance with the facts alleged and proved, without regard to the prayer. While we hesitate to question the wisdom of the learned and careful judge who tried this cause in refusing to permit the amendment upon such terms and conditions as upon the whole case he thought proper, we are not able to see from the record before us any good reason why the amendment, if necessary, should not have been allowed, and an end put to the litigation. It has been frequently held by this court that the plaintiff may in one action have relief upon equitable and legal rights. *Ely v. Early*, 94 N. C. 1.

In regard to the share of J. J. Gillis, it appears by the admission of both parties that prior to the execution of the deed in controversy he had executed a mortgage to T. O. Brooks, which was duly recorded; that said Brooks, on the 1st day of October, 1900, sold the land pursuant to the power contained in the mortgage, and it was purchased by A. S. Gillis, to whom he executed a deed, which was recorded on November 25, 1900. In June, 1901, J. J. Gillis received notice from the defendant that he had paid \$500 into the Bank of Virgilina, whereupon he (the said Gillis) collected his part thereof (\$83.33), and signed a receipt in full for his share of the money due on the sale. The plaintiff A. S. Gillis insists that he is entitled to stand in the place of J. J. Gillis and receive the \$500, and that the receipt by him of the \$83.33 does not affect his rights. As the plaintiff A. S. Gillis claims title paramount to the defendant, of course his title is in no manner affected by the action of the plaintiff J. J. Gillis. He does not acquire the right to compel the defendant

to take the J. J. Gillis share at \$500. If, however, the defendant elects to take such share under his contract, he would pay the \$500 to the plaintiff A. S. Gillis. This would seem to be the rights of the parties upon the facts herein stated. The defendant should exercise his election at or before the next term of the superior court of Person county, at which term judgment should be entered in accordance with this opinion.

Error.

Defendant's Appeal.

In the defendant's appeal in this cause we find no error in the trial before Judge McNeill. Upon the trial before Judge Allen the plaintiff R. H. Gillis was introduced as a witness, and testified in regard to the terms of the option and the execution of the contract as set out in the plaintiffs' appeal. He was asked the following question: "At the time when you made this contract, what, in your opinion, was the fair and reasonable value of the minerals on this tract of land of 465 acres, if that was the size of it? Answer. \$3,000. I never would have agreed to anything else." The defendant objected to the question and answer, and, upon his objection being overruled, excepted. He was asked the further question: "At what price had you and the other owners of this property—the minerals, I mean—held the same for some time? Answer. \$3,000." The defendant objected, and, upon his objection being overruled, excepted.

We find no error in his honor's ruling in this respect. The testimony was competent for the purpose of corroborating the plaintiffs' contention that the price agreed to be paid was \$3,000, and not \$500. The defendant tendered in writing to the plaintiffs, before the trial of the case, a proposition to compromise, and in open court tendered the plaintiffs the money in accordance with said proposition. The plaintiffs declined to accept it, and his honor held that it was not a compliance with the rights of the plaintiffs as set forth in the pleadings, to which the defendant excepted. We concur with his honor's ruling in this respect. The plaintiffs were under no obligation to accept the proposition to compromise. They were entitled to stand up on their rights under the contract.

Upon a review of the entire record, we find no error, and the judgment must be affirmed.

(135 N. C. 342)

MINISH v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 3, 1904.)

CARRIERS—TICKETS—MILEAGE BOOKS—DEATH OF OWNER.

1. A mileage book, at the death of the one to whom it is issued, goes to her personal representatives, and cannot be used by her husband to transport her remains.

Appeal from Superior Court, Caldwell County; Shaw, Judge.

Action by W. L. Minish against the Southern Railway Company. From a judgment for plaintiff for nominal damages, both parties appeal. Action dismissed.

Edmund Jones and Lawrence Wakefield, for plaintiff. S. J. Ervin, for defendant.

PER CURIAM. The plaintiff had no contract with the defendant to transport the body of his deceased wife from Washington to Hickory. The mileage book was issued to her, and at her death the unused mileage goes to her personal representatives. In no aspect of the evidence is the plaintiff entitled to maintain the action. It must be dismissed.

Action dismissed.

(135 N. C. 237)

MARKS v. HARRIET COTTON MILLS.

(Supreme Court of North Carolina. May 3, 1904.)

SERVANT'S INJURIES—NEGLIGENCE—EXPOSED COGWHEELS—EVIDENCE—COMPETENCY—MASTER'S DUTY—ASSUMPTION OF RISK.

1. In an action for injuries to a servant whose hand was caught in open cogwheels, testimony that the cogwheels should have been covered was incompetent, as invading the province of the jury.

2. A master is not bound to furnish the best known machinery, implements, and appliances, but only such as are reasonably fit and safe, and as are in general use.

3. In an action for injuries to a servant whose hand was caught in open cogwheels, it was error to permit the jury to consider the testimony of one witness that he had seen one machine with such cogs boxed in.

4. An employé assumes the ordinary perils of his service.

5. The fact that cogwheels in which a servant's hand was caught would have been less dangerous, had they been boxed in, did not show negligence.

Appeal from Superior Court, Durham County; O. H. Allen, Judge.

Action by W. H. Marks against the Harriet Cotton Mills. From a judgment for plaintiff, defendant appeals. Reversed.

Winston & Bryant, for appellant. Guthrie & Guthrie, for appellee.

WALKER, J. The plaintiff brought this action to recover damages for injuries alleged to have been caused by the defendant's negligence. He alleges that the defendant employed him to operate one of the machines in its cotton mill, called a "speeder," and that he was ordered by the boss or foreman to clean the machine while it was running; that the cogwheels of the speeder were not boxed or cased, as they should have been, and that, owing to its condition, it was dangerous to run the machine at a great speed, as was done by the defendant while the plaintiff

¶ 2. See Master and Servant, vol. 24, Cent. Dig. §§ 181, 182, 185, 184.

was cleaning it, all of which was unknown to him, as he was an inexperienced hand, and had not been warned of the danger, or instructed how to avoid it. The excessive speed and the exposed condition of the cogs caused the plaintiff's hand to be caught in the wheels and severely injured.

In order to prove the unsafe condition of the machine, the plaintiff introduced as a witness Ola Woodlief, who was permitted to testify, notwithstanding the defendant's objection, that the cogwheels should have been covered or encased. Similar testimony was permitted to be given by other witnesses. It is only necessary that we should consider the competency of this testimony, as our opinion in regard to it is adverse to the plaintiff, who recovered the judgment below, and the other matters may not be presented at the next trial, if there is one. The defendant's motion to nonsuit, which was denied by the court, and to which ruling exception was taken, presents a question which calls for a most careful consideration. As the facts may be varied if the case is tried again, we refrain from expressing any opinion upon that ruling, lest one or the other of the parties may be thereby prejudiced.

It may be stated as a rule, which is, of course, subject to exceptions, though this case is not within any of them, that a witness can testify only to facts, and it is left to the court and the jury to draw inferences and conclusions and to form opinions from the facts to which the witness testifies. He should not be permitted to express his opinion upon the very question to be determined by the jury under instructions from the court. This case furnishes a striking illustration of the wisdom of the rule. If the witness is allowed to testify that the cogwheels should have been covered, it will be seen that what he says is the full equivalent of an opinion that the defendant was guilty of negligence. It was, in substance, the same as if he had testified that the accident would not have occurred if the cogs had been encased, and that the defendant therefore did not do what, under the circumstances, it should have done. If this is not a substantial declaration by the witness that the defendant was negligent, it is barely one degree removed from it. The witness, in our judgment, was permitted to invade the province of the court and the jury in thus testifying. A witness should state facts, the jury should find the facts, and the court should declare and explain the law. The functions of the three, within their several spheres, are clearly defined, and should always be kept separate and distinct. Whether the speeder was so constructed as that its operation was safe to the defendant's employes was the very question upon which the parties were at issue, and which the jury were impaneled to decide. The witness' opinion upon that question was incompetent, and the plaintiff's objection to it should have been sustained.

Authorities in support of this ruling are abundant. We need cite only a few of them: *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Wolf v. Arthur*, 112 N. C. 691, 16 S. E. 843; *Smith v. Smith*, 117 N. C. 323, 23 S. E. 270; *Summerlin v. Railroad*, 133 N. C. 550, 45 S. E. 898; *Burwell v. Sneed*, 104 N. C. 118, 10 S. E. 152; *Cogdell v. Railroad*, 180 N. C. 313, 41 S. E. 541; *Cogdell v. Railroad*, 132 N. C. 852, 44 S. E. 618; *Harley v. B. C. M. Co.*, 142 N. Y. 31, 86 N. E. 813.

The witness Roberson, who also testified that the machine "should have been boxed," was permitted in addition to say, after objection by the defendant, that "he had seen an intermediate frame with these cogs boxed up." This was also incompetent. The employer does not guaranty the safety of his employes. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements, and appliances, but only such as are reasonably fit and safe, and as are in general use. He meets the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule, which has been recognized as the correct one, and recommended for our guide in all such cases. It measures accurately the duty of the employer, and fixes the limit of his responsibility to his employes. *Harley v. B. C. M. Co.*, supra. This court has said that all machinery is to some extent dangerous, but the fact that it is dangerous does not of itself make the owner liable in damages. It is the negligence of the employer in not providing for his employes safe machinery, and a reasonably safe place in which to work, that renders him liable for any resulting injury to them, and this negligence consists in his failure to adopt and use all approved appliances which are in general use and necessary to the safety of the employes in the performance of their duties; and this rule applies, it is said, even as between carrier and passenger. *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125; *Dorsett v. Mfg. Co.*, 131 N. C. 254, 42 S. E. 612. If the employer is required to adopt every new appliance as soon as it is known and approved, but before it has come into general use, it would devolve upon him the duty, at his peril, of securing at once the latest and best of all appliances, which, as also said by this court, would be too great a burden to impose upon him, even though the safety of the employes would be thereby enhanced. *Witsell v. Railroad*, supra. The rule which calls for the care of the prudent man is in such cases the best and safest one for adop-

tion. It is perfectly just to the employé, and not unfair to his employer, and is but the outgrowth of the elementary principle that the employé, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employé, and he must bear the loss, it being *damnum absque injuria*; but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employées. To the extent that he fails in this plain duty, he must answer in damages to his employé for any injuries the latter may sustain which are proximately caused by his negligence. The testimony of the witness that he "had seen a frame with the cogs boxed up" was admitted in violation of the rule we have just stated, as it was equivalent to saying that the defendant had not adopted the best appliances for safety, though there was no proof that they were in general use. The testimony, as given, was collateral to the issue. It is suggested that the plaintiff could not begin to prove the fact that the boxed machines are in general use unless this kind of testimony is admissible. This reason for admitting the testimony is more apparent than real, and we do not think it is at all sound. A point presented in a case should not be decided as an abstract proposition, but with reference to the facts and actual state of the case. The question and answer were not excluded, but admitted, in this case; and there was no additional evidence offered by the plaintiff tending to show that cogwheels in mills, other than the one mentioned by the witness, are boxed. The plaintiff, perhaps, might have shown that boxes were in general use by proving that a number of mills used them, but this he did not attempt to do. He had the full benefit of the right to begin his proof, and did begin it, but failed to complete it. If the fact that the speeders are boxed in one mill is proof of the general usage to that effect, then the evidence was properly admitted. But can it be successfully contended that it is any evidence of such general usage? There can be but one answer to this question. General usage cannot be established by proof of isolated instances, and certainly not by one instance. It would be unsafe to test the degree of care required of the defendant by proof of what some other person may have done. The latter is not shown to be the ideally prudent man, whose care is the standard for our guidance, and whose example may always be followed. Another reason suggested in support of the admissibility of this evidence would require the employer to guaranty the safety of his employé, as it is said he should box the speeder because there is less danger when the cogs are not exposed.

This is a clear departure, we think, from the rule of responsibility in such cases. If the employer should be required to do everything necessary to free his machine from all danger to his employées, there would be no such thing as the assumption of risk, for there would be no risk to assume. The argument in behalf of the admissibility of the evidence that there is less danger in speeders which are boxed than in those which are not boxed leads to the conclusion that all speeders should be boxed, without regard to the degree of care required of the employer. Again, whether the general use of a certain device for the safety of employées can be proved by the testimony of different witnesses that it is used in a number of mills, as well as by that of one witness who can speak of his personal knowledge in regard to such general use, is quite a different question from the one we have in this case, which is whether it was proper to let the jury hear and consider evidence as to its use in only one mill. If the evidence was competent for the purpose of beginning the plaintiff's proof, when he failed to add to it evidence of a like kind as to other mills, the court should have excluded what had already been admitted, for, in any view, it could only be competent as evidence of one of a series of similar facts, or as a first link in the chain of proof. The error in permitting the witnesses, against the defendant's objection, to testify as above set forth entitles the latter to another trial. It is not necessary that we should consider the other exceptions, as the questions they raise may not be presented if the case should again come before us.

New trial.

DOUGLAS, J. (concurring in result). I concur with the court in the conclusion that, according to our decisions, which I will frankly say have in some instances gone too far, the defendant is entitled to a new trial on account of the admission of the witness' opinion that the cogwheels should be boxed. I do not concur in the opinion of the court, wherein it says that it was error to permit the witness to testify that he "had seen a frame with the cogs boxed up." The witness does not appear to have expressed any opinion as to the best appliance for safety, nor in fact as to any other matter. He merely stated a simple fact which was material to the case. How else could the plaintiff begin to prove that boxed cogs were in general use, except by witnesses who had seen them in other mills? Even experts could not prove that they were in general use unless they knew the fact of their own knowledge. Whether boxes are the best method of protecting cogs may be a question of expert opinion, but whether they are in general use is a fact to which any one can testify. It is not necessary to prove it by any one witness, as it is difficult and frequently impossible to find any one man who has been through a

sufficient number of mills to know the general custom. On the other hand, one witness may testify as to certain mills, and other witnesses as to other mills. It cannot be held that the testimony of a witness is incompetent simply because he does not testify as to a sufficient number of mills, because in that event the first witness would always be incompetent, and so all the witnesses would be excluded in turn. Moreover, the fact of general use is not the exclusive test, nor can a box be called a new and untried device. The true test is the question what a man of ordinary prudence, having due regard for the rights and safety of his fellow men, would do under similar circumstances. Suppose that cogwheels, placed in a position of constant danger to passers-by, could be conveniently covered at small expense and without materially interfering with their efficiency; would it not be the duty of the owner to have them covered? The fact that a witness saw cogwheels boxed in another mill would be admissible as tending to show that they could be boxed, and that they were boxed in other mills of a similar kind. What weight the jury would give to the evidence is another question, and one entirely for them. Whether cogs in a given position can be boxed without interfering with their efficiency may require some experience to determine, but surely it does not require any expert knowledge for a man to know that there is less danger from machinery when it is boxed up so that he cannot possibly get into it, than there is if it is left open so that he may get into it. There is certainly less danger of falling out of a window when the blinds are closed and securely fastened than when they are open. I see no error in the admission of that part of the testimony.

CLARK, C. J., concurs in the concurring opinion.

(135 N. C. 808)

SOUTHERN LOAN & TRUST CO. v.
BENBOW.

(Supreme Court of North Carolina. May 3,
1904.)

EVIDENCE — LETTERS — IDENTIFICATION — COMPETENCY — EXCLUSION — WAIVER OF CONDITIONS — FORCE OF EVIDENCE — QUESTION FOR JURY — FRAUDULENT TRANSFERS — CONSIDERATION — ADEQUACY — APPEAL — QUESTIONS PRESENTED.

1. Where plaintiff introduced in evidence the entire record in supplementary proceedings, it thereby waived its exception to the previous exclusion of parts of such record, objected to as being fragmentary.

2. Letters which witness thought that he had dictated, though he had no recollection of doing so, and which were typewritten, and signed by another, there being nothing to show that, even if witness had dictated them, they were correctly transcribed, or ever seen by him after they were written, were not sufficiently identified to be admissible in evidence.

3. An autograph letter as to a conversation had with defendant, which does not purport to give defendant's exact language, or to contain

the entire conversation, or any substantial part thereof, but simply states, in the writer's own language, as the result of the conversation, that defendant said he wanted to pay certain notes, is not competent evidence.

4. The release by a wife of her right of dower involved in signing mortgages for \$50,000 is a valuable consideration for a note for \$15,000 executed by her husband to her.

5. The probative force of testimony is a question for the consideration of the jury alone.

6. Whether the consideration for a note transferred by a husband to his wife was adequate was a question of fact for the jury.

7. The question whether the consideration for a note transferred by a husband to his wife was so inadequate as to suggest fraud could not be considered on appeal in the face of the verdict of the jury that the note was transferred for a valuable consideration, and not in fraud of creditors.

Clark, C. J., and Montgomery, J., dissent.

On petition for rehearing. Petition allowed.

For former opinion, see 42 S. E. 896.

DOUGLAS, J. This case is now before us on a petition to rehear. After the most careful consideration we are forced to the opinion that the petition should be allowed, and the judgment of the court below affirmed, as we find no substantial error in the record. We do not think it necessary to discuss any exceptions other than those decided in the former opinion. 131 N. C. 415, 42 S. E. 896. The plaintiff offered to read in evidence certain parts of the testimony of D. W. C. Benbow and of the statement of Mrs. Mary E. Benbow given in supplementary proceedings. Upon objection by the defendants this testimony was excluded by the court as being fragmentary. The plaintiff then, reserving his exceptions, introduced in evidence the entire record in the supplementary proceedings. Even if the evidence as originally offered had been competent, and therefore improperly excluded—a question we do not find it necessary to decide—the plaintiff waived his right of exception by introducing the entire record, which, of course, included the part previously offered. If he wished to take advantage of his exception, he should have relied upon it, and not have sought the inconsistent benefits of having his evidence before the jury and the right to a new trial on account of its previous exclusion if it failed of its desired effect. In other words, he should not have the benefit of both its exclusion and admission at the same time. This point has been expressly decided in *Cheek v. Lumber Co.* (at this term) 46 S. E. 488. We see no essential difference between such a case and the effect of introducing testimony after a demurrer to the evidence has been overruled, which is held to be a waiver of the exception. In both cases substantial justice seems to require that a party should either rely on his exception or abandon it. This was the rule in both the state and fed-

eral courts before the passage of the so-called "Hinsdale Act" (Laws 1897, p. 155, c. 100, amended by Laws 1899, p. 263, c. 131), and rests equally upon reason and authority. *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266; *Railway v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694.

Another exception of the plaintiff was to the exclusion of certain letters written by R. B. King to certain of Benbow's creditors. King testified that he had no recollection of writing the letters, nor of anything therein contained, and that the letters did not refresh his memory in the slightest degree. After examining the letters, all that he was willing to say was that one of them was in his handwriting, and the others, typewritten and signed by Mr. Kimball in the name of the firm, were probably dictated by him, as he had personal charge of those matters of litigation. He further testified, in substance, in answer to repeated questions, that he always tried to tell the truth, and that he would not have stated in those letters anything that at the time he did not believe to be true. In no view of the case could any of the letters other than that in King's handwriting be competent against any of the defendants. They are typewritten, and signed by Kimball. King thinks he dictated them, but has no recollection of doing so. Even if that fact were established, there is no evidence that the letters were correctly transcribed, or that they were ever seen by King after they were written. The fact that they were not signed by him would tend to show that they were written and mailed in his absence. If he had read them over, he would probably have signed them. We do not think there was such identification of the papers themselves as is absolutely essential for their introduction under any circumstances.

Mr. King's autograph letter is sufficiently identified as the original paper, but we think that it is otherwise incompetent. It does not profess to give Dr. Benbow's exact language, nor in fact does it repeat the conversation at all. It does not pretend to contain the entire conversation between Mr. King and Dr. Benbow, or any substantial part thereof, but simply states, in the writer's own language, as the result of their conversation, that Dr. Benbow said he wanted to pay certain notes, and to have them sent to Greensboro for that purpose. Mr. King testified that he had a great many conversations with Dr. Benbow, and it is evident that these letters were never intended to contain a record of the numerous conversations, but merely to state such isolated parts thereof or conclusions therefrom as were necessary to the immediate correspondence. This clearly takes the letters out of the rule laid down in 1 Greenleaf, §§ 439a, 439b, even if we were inclined to carry the

principle to the full extent covered by the wording of the section. The author cites but three cases from this state. *Green v. Cawthorn*, 15 N. C. 409; *State v. Lyon*, 89 N. C. 568, and *Bryan v. Moring*, 94 N. C. 687. The first case involved no writing whatever, but merely held that: "Where A. communicated to B. a statement made to him by C., and upon his examination could not recollect its substance, C. is a competent witness to prove it." There each witness testified to his personal recollection. In *Lyon's Case* the witness was permitted to examine an alleged libelous article in a newspaper, not to prove the truth of its contents, but to refresh his recollection as to whether he had seen it. In that case the court says on page 571: "It is not necessary that the mind should be able to recall the distinct facts, when the witness has such assurance of them as enables him to testify. Among the classes into which Mr. Greenleaf distributed this species of evidence is one in which the witness fails to recognize the writing nor does it awaken his memory, yet, knowing the writing to be genuine, his mind is so convinced as to be enabled thereby to swear positively to the fact"—citing 1 Greenl. Ev. § 437. In turning to the section of Greenleaf then relied upon by the court, we find that it is omitted by his progressive editor from the latest edition of the work that bears his name, and relegated to the appendix as being out of date. What Prof. Greenleaf himself said is as follows: "Where the writing in question neither is recognized by the witness as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it, but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively as to the fact." The italics are ours, and we are compelled to say do not seem to us to mirror the condition of the witness' mind upon the letters in question. In *Bryan v. Moring*, the witness, referring to the paper offered in evidence, which was the testimony taken down by him in the ex parte probate of the will before the clerk, testified that: "I was requested by the clerk to take down the testimony, and did so by consent of counsel. I took down the substance of the evidence of J. E. Bryan, and this paper contains everything of importance testified to by him, omitting repetition merely, and is in the main correct. It contains the substance of his evidence accurately." In that case the evidence was taken down for the express purpose of preserving it, and the writer testified that it contained accurately the substance of all that was said. It was admitted as impeaching testimony. In *State v. Pierce*, 91 N. C. 606, the written papers, offered only as impeaching evidence, were the written examinations of the impeached witness before the coroner and committing magistrate, both of whom fully identified the papers. *State v. Jordan*,

110 N. C. 491, 14 S. E. 752, also referred to the written examination of a witness taken down by the committing magistrate, and offered at the trial to impeach the witness. In *Bank v. Fidelity & Deposit Co.*, 128 N. C. 366, 38 S. E. 906, the question is thus stated in the opinion of the court on page 369, 128 N. C., and page 909, 38 S. E.: "The first assignment of error cannot be sustained. The admitted paper was a memorandum of the examination of the defendant Mehegan before a committee of the board of directors of the plaintiff bank, and taken down by the witness Davis, who testified as follows: 'Mehegan was present before the committee. He was examined. His examination was put in writing. I read every sentence to Mehegan as Mr. Fountain propounded the questions. Then I wrote down Mehegan's answer. I read the questions and answers as they were made, and he said that they were correct. The entire paper is in my handwriting. Then read the whole over to Mehegan. He never refused to sign; never was asked to sign it.' Under such circumstances, we think the paper was admissible as part of the testimony of Davis, with whose credibility, of course, its own was involved." This case comes nearer to that at bar than any other of which we are aware, but its bare statement shows its essential points of difference. It contained all of Mehegan's testimony which was reduced to writing for the purpose of preservation; while the witness by whom it was proved clearly remembered the transaction, and testified to its attendant circumstances. Moreover, Mehegan was not only a party to the action, but was the principal on the bond upon which the action was brought, against whom lay the primary right of recovery with the right of exoneration in his codefendant. None of these conditions exist in the case at bar. While Dr. Benbow was, perhaps, a proper party, the only substantial recovery is sought against Charles D. Benbow personally and as executor of his mother. Against him, under the circumstances of this case, we do not think that the admissions of Dr. Benbow would be competent, even if properly shown.

One very serious, if not insurmountable, objection to the admission of any writing of which the witness has no recollection whatever, and which does not at all refresh his memory, is that it deprives the adverse party of all benefit of his legal right of cross-examination. The right to ask questions is worthless without the power to elicit answers. Where the witness remembers nothing, the paper itself becomes the witness, and is protected by its inanimate nature from the utmost skill of the cross-examiner. Cross-examination, while frequently used to discredit a witness, is by no means confined to that purpose. Indeed, its general, as well as most useful, purpose is to bring out the statements and circumstances attending and

qualifying the evidence in chief, the force of which is in this way frequently destroyed without attacking the credibility of the witness. This court has said in *Howie v. Rea*, 75 N. C. 326, that evidence should be "authenticated by the two great tests of truth, an oath, and a cross-examination."

The remaining question is whether there is any evidence of a valuable consideration for the transfer of the Fisher note from Dr. Benbow to his wife. He testifies that he transferred it to her as part payment on his note for \$15,000, then held by her. This involves the question whether there was any valuable consideration for the latter note. Aside from the validity of a gift by one who has no debts, and the meritorious consideration of a promise to repay to a faithful wife the money her father gave her, which is not before us, we think that the release of her right of dower involved in signing the mortgages for \$50,000 was a valuable consideration. Upon a careful reconsideration of the case we think that there is evidence tending to prove that Mrs. Benbow signed the mortgages in consideration of her husband's promise of a home. Aside from her verified answer in the record introduced by the plaintiff, a reasonable construction of her statement, viewed in the light most favorable to her, tends to prove the fact.

As there is no question as to the admissibility of the evidence, all that we can pass on is its probative tendency, its probative force being for the consideration of the jury alone. It is well settled that the inchoate right of dower is a valuable right possessing the elements of property, and that its relinquishment constitutes a valuable consideration. 10 A. & E. Enc. (2d Ed.) 142, 143; 2 Kerr on Real Property, § 914; 2 Scribner on Dower, pp. 7, 8. *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292: "A husband mortgages his land, and, in consideration of his wife's releasing her right of dower to the mortgagee, conveys the equity of redemption to a stranger in fee for the benefit of the wife, but by a deed containing no declaration of the trust, and purporting to be for the consideration of a sum of money paid by the grantee. Held, as against creditors of the husband, that the relinquishment of the right of dower was a valid consideration for the conveyance of the equity of redemption; that parol evidence was admissible to show that it was the true consideration; that, if the transaction was honest, and the right of dower equivalent in value to the equity of redemption, the conveyance was valid." In that case the court says on page 538: "The consideration for this intended settlement on the wife was her right of dower in the estate which the husband was about to mortgage. Without her relinquishment, he could not raise the money wanted for his support and his debts. His days were numbered by intemperance and disease.

Though she had no actual estate in the dower during the life of her husband, yet she had an interest and a right of which she could not be divested but by her consent or crime, or her dying before her husband. It was a valuable interest, which is frequently the subject of contract and bargain. It was an interest which the law recognizes as the subject of conveyance by fine in England and by deed with us. It is more or less valuable according to the relative ages, constitutions, and habits of the husband and wife. It is more than a possibility, and may well be denominated a contingent interest." In *Wheeler v. Kirtland*, 27 N. J. Eq. 534, the court says on page 535: "The character of inchoate dower has been the subject of much contrariety of opinion. It is said not to be an estate. It is not the subject of grant. It cannot be taken upon execution. Equity will not apply it to the satisfaction of the debts of the wife. As dower was a humane provision for the sustenance of the widow and younger children, some limit was imposed on the power to defeat its consummation. Yet, while not technically an estate, it cannot, at this day, be denied that inchoate dower is a valuable interest in land. It is an interest which the courts have repeatedly recognized. Its presence works a breach of the covenants against incumbrances. *Carter v. Denman*, 23 N. J. Law, 260. Its relinquishment is a valuable consideration to support a conveyance by her husband to her against his creditors (*Wright v. Stanard*, 2 Brock. 311 [Fed. Cas. No. 18,094]), or a promissory note given by a purchaser (*Nims v. Bigelow*, 45 N. H. 343)." In *Farwell v. Johnston*, 34 Mich. 342, the court says on page 344: "The objection for want of consideration is without any foundation. It has always been held that a release by a wife of an interest which was within her own option to release or not—as, for example, a right of dower—is a valuable consideration, which will support a post-nuptial settlement, and therefore will suffice for any other purpose. This is elementary law, and was never disputed." In *Gwathmey v. Pearce*, 74 N. C. 398, the entire opinion of this court is as follows: "Where a wife conveys her separate property to secure a debt of her husband's, the relation which she sustains to the transaction is that of surety. *Purvis and Wife v. Carstarphan*, 73 N. C. 575. Here the wife joined her husband in the conveyance of his land in trust to pay his debt; in which land she had, under our dower statute, a vested right to dower, to be allotted after her husband's death; and she joined in the deed for the purpose of binding her dower. After her husband's death, the whole land, her dower included, was sold under the trust deed to pay the debt. This made the wife a creditor of her husband's estate to the amount of the value of her dower in the land. This is the only point in this case,

and it was rightly decided by his honor." In *Gore v. Townsend*, 105 N. C. 228, 11 S. E. 160; 8 L. R. A. 443, this court, in a learned and elaborate opinion by Justice Avery, held that a wife's inchoate right of dower has a present value as property, and that when she incumbers it by joining with her husband in a mortgage to secure his debt she becomes his surety, and as such is entitled to exoneration. It is urged here that Dr. Benbow's note for \$15,000 represented an amount greatly in excess of the value of Mrs. Benbow's right of dower in the lands covered by the mortgages signed by her. This may be true, but we have neither the right nor the means to find such a fact. All that we can say is that there was competent evidence tending to prove a valuable consideration. Whether the consideration was adequate was a question of fact for the determination of the jury. In this connection we can perhaps do no better than to quote the words of Chief Justice Marshall in *Wright v. Stanard*, 2 Brock. 311, 315, Fed. Cas. No. 18,094, as follows: "The first is the difference between the value of the dower which has been relinquished and the property which has been settled in compensation for that dower. The court has already said that this difference, if the conveyance be made with a real intent to pass the property, does not, of itself, vitiate the deed in a court of law. If the value of the dower had been a few dollars or cents less than the value of the property conveyed in satisfaction of it, no person would suppose the deed to be a nullity on that account. And, if a small difference of value would not avoid it, what is the difference that will? Where does the law stop? The difference may be so great as to satisfy the conscience of the jury that the conveyance is intended to cover the property from the just claims of creditors; but as a mere question of law I can find nothing in the books which will justify a court in saying that a deed otherwise unexceptionable is void because the consideration is of less value than the property conveyed." Our attention has not been called to any evidence as to the value of the mortgaged property, and there is no such legal presumption. As a matter of experience, we all know that the loan rarely exceeds two-thirds of the value of the security, and is generally much less. If, in the case at bar, the inequality were so great as to suggest the element of fraud, it should have been presented to the jury in the court below, but cannot be considered here in the face of their verdict. In the absence of substantial error in the trial below, we have come to the conclusion that the petition must be allowed, and the judgment affirmed.

Petition allowed.

MONTGOMERY, J. (dissenting). I dissent in this case from the opinion of the court,

but do not deem it necessary to write anything further than to refer to the opinion of the court written by me in the case as reported in 113 N. C. 418, 42 S. E. 548.

CLARK, C. J., concurs in the dissenting opinion.

(68 S. C. 326)

CREIGHTON v. T. D. CREIGHTON & CO.

(Supreme Court of South Carolina. March 29, 1904.)

ACTION ON ACCOUNT—PLEADING—DEMURRER.

1. Under Code, § 179, providing that a party need not set forth in a pleading the items of an account therein alleged, but shall deliver, on demand, a copy of the account, a demurrer will not lie because the account shows nothing due the plaintiff.

Appeal from Common Pleas Circuit Court of Barnwell County; McDonald, Special Judge.

Action by Irma L. Creighton against T. D. Creighton & Co. From an order overruling demurrer, defendant appeals. Affirmed.

Nathans & Sinkler and J. O. Patterson, for appellant. Davis & Best, for respondents.

GARY, A. J. This is an action on an account for a balance amounting to \$1,633.00, which the plaintiff alleges is due her by the defendant for general merchandise sold and delivered. Upon notice, demanding a copy of the account mentioned in the complaint, the plaintiff served a copy of the account, which showed that she was due the defendant T. R. McGahan a balance amounting to \$225.53. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, for the reason that the itemized statement of account upon which plaintiff brings this action shows that the plaintiff is indebted to the defendant, T. R. McGahan.

The sole assignment of error is that the circuit judge should have sustained the demurrer for the reasons therein stated. Section 179 of the Code contains these provisions: "It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but shall deliver to the adverse party

within ten days after demand therefor, in writing, a copy of the account. * * * The court, or a judge thereof, * * * may in all cases order a bill of particulars of the claim of either party to be furnished." It will be observed, first, that the Code does not make a copy of the account, part of the complaint; and, second, that the court, or a judge thereof, may order a further account when the one delivered is defective. In volume 3, Enc. of Pl. & Pr., pp. 519, 520, the purpose and effect of a bill of particulars is thus stated: "A bill of particulars does not set forth the cause of action or the ground of defense. These constitute the function of the original pleading. The chief office of a bill of particulars is to amplify a pleading, and more minutely specify the claim or defense set up. Another object of the bill of particulars is to prevent surprise on the trial by furnishing the information which a reasonable man would require respecting the matters against which he is called upon to defend himself, and by thus limiting the generality of the pleading its effect is to confine the proof to the particulars specified therein." On pages 535 and 536 of the same volume it is said: "An objection to the sufficiency of a bill of particulars cannot be made on the trial or afterwards. When the bill of particulars is not sufficiently explicit, a motion should be made to the court for a more specific bill, the objection cannot be taken by demurrer." The authorities reflecting the practice prevailing before the adoption of the Code of Procedure are to the effect that the bill of particulars does not form part of the original pleading. In *Davis v. Hunt*, 2 Bailey, 412, the doctrine is thus stated; "The bill of particulars forms no part of the record. * * * If evidence is offered of demands not contained in the bill of particulars, the evidence may be objected to. But when evidence is given which fully sustains the count, it can be no ground for nonsuit that it does not agree with that which is no part of the count." The case of *Vidal v. Clarke*, 2 Rich. Law, 359, decides that the bill of particulars filed with the declaration is no part of the count, and that a variance thereof between the proof and the bill of particulars is not a ground for nonsuit. These authorities conclusively show that his honor the circuit judge was not in error when he overruled the demurrer.

It is the judgment of this court that the judgment of the circuit court be affirmed.

¶ 1. See Pleading, vol. 20, Cent. Dig. § 400.

(68 S. C. 324)

Ex parte POWELL.

(Supreme Court of South Carolina. March 28, 1904.)

MORTGAGE—SATISFACTION—PURCHASE AT TAX SALE.

1. Purchase by a mortgagee at tax sale of one of several tracts conveyed by the mortgage satisfies the debt as to the other tracts conveyed only to the amount of the value of the tract purchased.

Appeal from Common Pleas Circuit Court of Richland County; Hudson, Judge.

Action by G. W. Fetner against T. G. Patrick and others. Petition of Eliza J. Powell. From an order denying the same, she appeals. Affirmed.

Lyles & McMahan and Jno. T. Duncan, for appellant. Weston & Aycock and R. W. Shand, for respondent Patrick.

WOODS, J. J. W. Powell executed to T. G. Patrick a mortgage on two tracts of land, and a chattel mortgage to secure the payment of a bond. One of the tracts was sold by Powell, and the proceeds applied to the debt. After the bond became due, Patrick assigned to Eliza J. Powell, the petitioner herein, the chattel mortgage security, but not the debt, and she assigned to him in exchange her interest in a certain judgment of foreclosure against J. W. Powell, covering land other than that embraced in Patrick's mortgage, in order to secure, among other obligations, the payment of Powell's bond. Patrick purchased at a tax sale the remaining tract covered by his mortgage. Powell contended that the debt was thereby extinguished, but the court, in *Powell v. Patrick*, 64 S. C. 190, 41 S. E. 894, refused to so hold. The same question is now raised on behalf of Eliza J. Powell. The circuit judge held that the debt was not extinguished, but that Patrick should account for the real value of the land purchased at the sale. From this finding Mrs. Powell, the petitioner, appeals.

Little can be added to the clear and conclusive reasoning of the circuit decree. *Trimmer v. Vise*, 17 S. C. 499, 43 Am. Rep. 624, holds that by the purchase by the mortgagee, except under judicial proceedings, of one tract of land where the mortgage covers three

tracts, the debt is extinguished only in the proportion which the true value of the parcel purchased bears to the whole mortgaged property. This case is followed in *Hull v. Young*, 29 S. C. 64, 6 S. E. 938; *Ency. Law*, 1069. *Trimmer v. Vise* is referred to in *Powell v. Patrick*, and, after discussing the doctrine of merger laid down in that case and in *Devereux v. Taft*, 20 S. C. 555, the court goes on to show that "equity will prevent or permit a merger, as will best subserve the purposes of justice and the actual and just intention of the parties." It is true, as a general rule, unless an assignment of a chattel mortgage is accompanied by an assignment of the debt thereby secured, no right passes to the assignee. 7 Cyc. 57. If this rule is applied, then, under the case of *Trimmer v. Vise*, supra, Patrick's rights as owner of the chattel mortgage would prevent extinguishment of the debt. If, on the other hand, as may be inferred from *Powell v. Patrick*, Eliza J. Powell acquired rights under the assignment, then, as stated by the circuit judge, she has no equity to release her from her obligation to Patrick, unless she can place him in the position he occupied before she received from him the chattel mortgage. We think Mrs. Powell did acquire by the assignment the equitable right to enforce the chattel mortgage to the same amount and extent that the securities assigned by her to Patrick should be used by him in the collection of his debt. Mrs. Powell made an exchange of securities with Patrick, and the security assigned by her to him would be no more satisfied by the purchase at tax sale than the chattel mortgage, for which it was exchanged, would have been, had it remained in his hands. Mrs. Powell does not occupy the position of surety, but of one who has voluntarily assumed her present relation to Patrick for full value, and she can have no higher equity against Patrick than J. W. Powell had; and this court held in *Powell v. Patrick*, supra, that the debt and securities of Patrick as against J. W. Powell were not satisfied by the tax sale.

Appellant does not raise the question as to her right to have the respondent account for the proportion which the true value of the parcel purchased bears to the whole mortgaged property, instead of the actual value, and hence that point is not before the court.

The judgment of this court is that the judgment of the circuit court be affirmed.

¶ 1. See *Mortgages*, vol. 26, Cent. Dig. § 226.

(68 S. C. 325)

LOCKWOOD v. LOCKWOOD et al.

(Supreme Court of South Carolina. March 29, 1904.)

ADMINISTRATION—DEBTS DUE PUBLIC—PRIORITIES.

1. Where a county treasurer deposited county funds in an unincorporated bank, the debts are, upon the death of the banker and the insolvency of his estate, debts due the public, within Code 1902, § 2538, and payable in full before other debts.

Appeal from Common Pleas Circuit Court of Beaufort County; Purdey, Judge.

Action by Laura M. Lockwood, executrix of William H. Lockwood, against Willie Hill Lockwood and others. From the decree, certain defendants appeal. Affirmed.

George Galletly, W. S. Tillinghast, and Elliott & Thomas, for appellants. Thos. Talbird, for respondents

GARY, A. J. William H. Lockwood, who for many years had conducted a private unincorporated banking business at Beaufort under the name of the Bank of Beaufort, died testate and insolvent on the 23d day of July, 1902. At the time of his death many persons had claims against him for money deposited in his bank. Among the depositors were H. Q. Adams, county treasurer, and George Gage, clerk and treasurer of the town of Beaufort, who claimed that they were entitled to a preference in the payment of debts, under section 2538, Code Laws, because the sums due them were debts due the public. His honor the circuit judge rendered a decree that they were entitled to such preference. The only question raised by the appellants' exceptions is whether the circuit judge erred in adjudging that these depositors were entitled to such preference. The appellants contend that there is no evidence that the public money was loaned Lockwood—only that certain money was credited to Adams and Gage as treasurers.

Before considering whether this case comes within the provisions of section 2538 of the Code of Laws, we will therefore first determine to whom the money belonged that was deposited by the said treasurers. The circuit judge, in his decree, makes the following finding of fact, to which there was no exception: "There is no contention as to one fact which settles this issue, and that is that H. Q. Adams deposited the money with the deceased as treasurer of Beaufort county, and that George Gage deposited the funds of the town of Beaufort as treasurer of said town. This fact is not disputed. This money did not belong to Mr. Adams or to Mr. Gage. They recognized this, and Mr. Lockwood, the deceased, recognized this, and must, from the nature of things, have known the source from whence

these funds came." From a consent order set out in the record, it appears that H. Q. Adams, county treasurer, has established a claim against the said estate to the amount of \$4,187.39, and that George Gage, treasurer of the town of Beaufort, has established a claim to the amount of \$1,331.77, both of whom claim and set up in their answers priorities as debts due the public. The sums deposited by the treasurers were trust funds, and the case of *Gary v. Bank*, 26 S. O. 538, 2 S. E. 568, 4 Am. St. Rep. 733, shows that they could not have been drawn out of the bank by them as individuals, but only in their official capacity. The county and town of Beaufort were the owners of such funds, and the receipt of them by Lockwood's bank, under the circumstances hereinbefore mentioned, created a liability on his part in favor of the said owners. When he died before repaying said sums, of course, this liability became a debt against his estate.

Having shown that the county and town of Beaufort are the owners of the sum deposited as aforesaid, we will next consider whether the liability to a county or a town for money deposited can be construed as a debt due the public, against the estate of the person with whom the deposit was made. The question whether the liability to a county could be considered as a debt due the public, against the estate of a deceased person, was not settled in this state until the case of *Baxter v. Baxter*, 23 S. C. 114, which decided that a debt due by a surety, at the time of his death, on a county treasurer's bond, for a default of his principal, is a debt due to the public, and as such is entitled to priority of payment out of the assets of the deceased, under section 2538 of the Code of Laws. In the case just mentioned the court says: "The language used in the act is very general and comprehensive—'debts due to the public.' No limitation is either expressed or implied by the terms used in the act, and we are aware of no rule of construction which would justify us in fixing any limit to general terms when the Legislature has not seen fit to do so. Hence, when we find that there is a debt, and that it is due to the public, we are bound to place it in the class which the Legislature has declared shall be entitled to preference. We are less reluctant to reach this conclusion when we see that the court both in the case of the *Commissioners v. Greenwood* [1 Desaus. 450] and *Klinck v. Keckley* [2 Hill, Eq. 250], seemed to assume, without, however, deciding the question, that debts arising from default in accounting for public money did belong to the class protected by the act, and were not disposed to coincide in the limitations placed upon those terms by Judge O'Neill. Again, if the preference given to the state rested upon the ground of prerogative, then there might be good reason for confining the preference to such debts as were due to the state as a sovereign—as, for instance, taxes; but the above

¶ 1. See *Banks and Banking*, vol. 6, Cent. Dig. § 139, 191.

cases show that such is not the ground upon which the preference is based, but that it rests solely upon the terms of the act, and the only question, therefore, is as to the proper construction of the language there used." There is no difference in principle between the case just mentioned and the one under consideration. In the case of *Baxter v. Baxter*, the liability was created by an express agreement, while in the present case it arose from an implied obligation.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(54 W. Va. 665)

STEWART et al. v. LYONS et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

WILLS—CONTEST—DEMURRER TO EVIDENCE—EX-
ECUTION—TESTAMENTARY CAPACITY—UN-
DUE INFLUENCE.

1. In a contest at law over a will, either the proponent or the contestant may demur to the evidence. How the evidence is considered.

2. Evidence of witnesses present at the execution of a will is entitled to peculiar weight, and especially is this the case with the attesting witnesses.

3. It is not necessary that a testator possess high quality or strength of mind, to make a valid will, nor that he then have as strong mind as he formerly had. The mind may be debilitated, the memory enfeebled, the understanding weak, the character may be peculiar and eccentric, and he may even want capacity to transact many of the business affairs of life; still it is sufficient if he understands the nature of the business in which he is engaged when making a will, has a recollection of the property he means to dispose of, the object or objects of his bounty, and how he wishes to dispose of his property.

4. When incapacity of a testator is alleged against a will, the vital question is as to his capacity of mind at the time when the will was made.

5. Undue influence, to avoid a will, must be such as overcomes the free agency of the testator at the time of actual execution of the will.

6. The influence resulting from attachment or love, or mere desire of gratifying the wishes of another, if free agency is not impaired, does not affect a will. The influence must amount to force or coercion destroying free agency. It must not be the influence of affection or attachment. It must not be mere desire of gratifying the wishes of another, as that would be strong ground to support the will. Further, there must be proof that it was obtained by this coercion, by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.

7. The will of a person of competent testamentary mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence.

8. Merely because a testator may be incompetent to safely transact the general business affairs of life does not render him incompetent to make a will.

9. The fact that a man and woman have had or still have unlawful sexual intercourse will not, alone, invalidate the will of one in favor of the other, or afford a presumption of undue

influence. It is only a circumstance to be considered along with other matters.

(Syllabus by the Court.)

Error to Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by Frank Stewart and others against Aaron Lyons and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

B. M. Ambler, J. A. Howard, and R. E. L. Snodgrass, for plaintiffs in error. W. G. Snodgrass, T. P. Jacobs, and E. L. Robinson, for defendants in error.

BRANNON, J. A writing was admitted to probate by the clerk of the county court of Wetzel county as the will of Mary A. Brookover. When this probate came up for confirmation before the county court, Aaron Lyons and others contested such confirmation and denied the validity of the will, and upon trial of the contest the court held the paper not to be such will, and refused to confirm the probate made by the clerk. An appeal was taken by Houston Stewart, the sole devisee and legatee under the will, to the circuit court, and after two trials without decision, by reason of hung juries, a third trial was had before a jury; and the proponent demurred to the evidence of the contestants, and the court, having compelled the contestants, over their objection, to join in the demurrer, gave judgment that the writing was the will of Mary A. Brookover, from which judgment the contestants have sued out a writ of error from this court.

The first question presented for decision is based on the compulsion of the contestants to join in the demurrer to evidence. It is argued that he who bears the burden of proof cannot compel his adversary to join in demurrer to evidence, and that, as the proponent of a will carries the burden of proof, there is error in the ruling of the court compelling the contestants to unite in the demurrer. In West Virginia, the rule is not that a party on whom rests the burden cannot demur. Either party may demur to the evidence unless the case be very clearly against the demurrant, or the court itself has reasonable doubt as to what facts should reasonably be inferred from the evidence. *Hollandsworth v. Stone*, 47 W. Va. 773, 35 S. E. 864; *Bowman v. Dewing*, 50 W. Va. 445, 40 S. E. 576. The evidence on both sides must be incorporated in the demurrer. Then comes the question of the principle of the consideration of that evidence, and here the rule is properly put, in the opinion by Judge Dent in the latter case, that all the evidence on both sides must be considered as if there were a motion to set aside a verdict for the demurree, and that is, discard all evidence of the demurrant conflicting with that of the demurree, or the credit of which is impeached, and all inferences which do not fairly

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arise from his own evidence, and as admitting all that may be fairly and reasonably inferred from the evidence of the demurree. *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Hogg's Plead. & Forms*, 537; *Lewis v. Railroad*, 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816; *Gunn v. Railroad*, 86 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842; *Garrett v. Ramsey*, 28 W. Va. 345. Therefore there is no error in enforcing a joinder in the demurrer.

The next question is the sanity of the testatrix. Mary Lyons was born a poor country girl, without opportunities for education, culture, or refinement. "Chill penury repressed the living rage and froze the genial current of the soul." She worked as a domestic, as a menial, from childhood. When up in years somewhat, after hard years, she accepted the offer of marriage with an aged man, Jennings, who owned a home in the town of New Martinsville, so that she might have a home, or perhaps under promise that it would be given to her at her husband's death, as it was. She was compelled to, and did, support her aged husband and herself at the washtub of the families of New Martinsville. After her husband's death she continued at the washtub or in the kitchens of other people. Some years later she married a very respectable man, Brookover, prominent in his county, who was twice its sheriff, and once a justice, and who owned a home in New Martinsville, and some land near it—a few acres—which he devised to her. Thus she was owner of considerable property, not of great value when she so acquired it, but which later came to be of considerable worth, but not a large estate. She was a dutiful, kindly wife to both husbands. She had only one child, which died when a few weeks old. She had brothers and sisters, the contestants of her will. Her aged mother lived with Mrs. Brookover, and while there secured a pension. The brothers and sisters claimed part of it from the mother, and Mrs. Brookover, proposing to take care of her, denied them their right, and a bitter quarrel arose between her and her brothers and sisters about it, and they became perfectly estranged, not exchanging visits, and Mrs. Brookover forbade them entry to her house. She blamed one brother, also, for furnishing her mother tobacco. The feeling between them for years before her death was intense, as is admitted on both sides. Mrs. Brookover was warm and kindly to friends, but intensely resentful and bitter towards enemies, or those whom she regarded as such. We can say that if, for real or fancied cause, she took up a dislike or prejudice against a person, she never forgave or relented. She was illiterate—just able to read a little print. She was rude, sometimes coarse, often using profane language, especially when excited or angered. Sometimes, as a witness says, she seemed refined, but often otherwise. A wit-

ness says she came in the last years of her life several times a day to his saloon and drank liquor. This does not seem well established, but certain it is that no set drink habit or inebriety is established. No one says she was a drunkard, or ever seen drunk. She was, in the opinion of several witnesses, peculiar and eccentric, but not many features or exemplifications of this are shown. For instance: She owned a little dog, and, when she moved from the house to which it was accustomed, it refused to go with her. She manifested special attachment to it, going back to see it, taking it candy, and on one occasion killing a chicken and giving it the gravy to lick, and covering it up to keep it warm. When her husband Brookover died, she sent to Sistersville to an undertaker, saying she wanted a fine casket for him; refused to take one offered; wanted a silver one, saying she wanted "pap" to be put away nicely, as he had been good to her, and she did not want a wood coffin that would let the water in. She wanted a silver one, the witness thinking she meant an aluminum one. She refused to accept one he offered, and ordered him to get one regardless of cost, and he ordered a heavy steel one, costing \$190, and she was pleased with it. On one occasion she shoved about an acquaintance visiting her house, and kicked him, and he caught her foot and threw her. The witness says he regarded that she did this in joke. Her husband Brookover had a life insurance policy, and upon his death she went to the agent to inquire about it, and learned that Brookover had got the money on it, when she exclaimed: "The damned old son of a bitch! If I had known that, I wouldn't have bought him an iron coffin. I would have bought him a chestnut coffin, so he could go through hell a-crackin'." She was offered a good price for some property, but, suspecting that the purchase was being made for a certain person, she said she would sell, but she would see that person in hell before she would sell to him; she would not sell to "them sons of bitches." She became incensed at this family because in the great flood in the Ohio the water deluged her home, and she went into the house of this family, and she thought that her husband was not treated right while there. The head of this family says she got angry; he did not know why. A witness says that she was governed by prejudice, and "would always have foolish, silly talk. I can't recollect the talk." He then relates the talk just given in relation to selling some property. One of the strongest witnesses against the sanity of the testatrix is Dr. Dinsmore, a doctor, of Pennsylvania, who visited Mrs. Brookover when he practiced in New Martinsville, some eight years before her death. He says she was sick; was averse to his examination; indisposed to answer questions or to exhibit interest in herself; and from this, chiefly, he concluded she was of weak mind. He thought

she would not improve in mind in time. He treated her for not only "mental depravity and constitutional weakness, but for other disabilities of the system," not saying what disabilities. When asked what he meant by "mental depravity," he said: "Weakness of mind—a weak state of mind." When asked if she was a non compos mentis, he declined to say so, saying that might conflict with the answer he had already given. A physician (Curtis), who treated her only once, gave the opinion that she was insane, and thought she would be liable to delusion, but did not know that she had delusion. His acquaintance with her was limited, he said. A witness (Hall) said she had no discriminating judgment. His chief reason was that she brought suit to sell her own property, devised by her husband. There were debts against his estate, some admitted by her, some denied, and she brought a suit to fix debts and sell some of her husband's realty therefor, and Hall, a lawyer, purchased under the decree; a surplus being left from that part sold, which surplus went to her. He said, when she would consult any one about a matter, she used the standing expression, "You wouldn't do it, would you?" He did not think she was able to transact business. But he says he contracted with her for the property at \$3,000. He told about her going to his house to see the dog, and bring it candy and other things to eat. Col. McElldowney says she was a woman of inferior mind, and could be influenced for good or evil. Dr. Underwood said she was "irrational," and "had no capacity to transact business. Her mind at times was unsound." She would generally call her husband "old man," sometimes "old devil." I infer it was jocose conversation. It does not appear that it was in anger. I have given the bulk and substance of the evidence and facts claimed to prove the incompetency. The evidence to sustain the capacity of the testatrix goes to show, in effect, as follows: That she felt it necessary to toil for a living, and did so, working in many families. She rented out her own house at a higher rent, and rented for herself a smaller house for a lower rent, to save money. No waste of money by her is shown. She went to a bank to deposit money coming to her from the sale of some land after paying her husband's debts, so as to have it draw interest. She went to see about her husband's life insurance, to get the benefit of it. The Ohio River Railroad Company trespassed on her land, or denied her a stipulated crossing, and she tore down a fence the company had built, and this cut off one part of her land from another. She made a compromise contract with the attorney of the company. She was active and persistent in claiming the right to her mother's pension, as she was keeping her. She rented her property, paid taxes, cared for her houses, had repairing done, and consulted lawyers about this and that of her

business. The evidence fully shows that she was persistent in caring for property and claiming her rights in it. She was careful to take receipts for money paid. She was scrupulous to close up the funeral expenses of her husband, saying she wanted the matter closed. The will discloses her idea that the property would sell better divided into lots, and evinces a desire that her home lot be not sold for a number of years. In August, 1899, the testatrix was seized with an acute, sudden attack of vomiting and purging, and died in a few hours, aged about 50 years. She went to the house of Hattie Debolt. Hattie Debolt was living in the house of Mrs. Brookover as tenant. Hattie Debolt urged Mrs. Brookover to go to bed, and tendered her a gown; but Mrs. Brookover sent her to her own house to get her own gown, and gave her specific directions to bring her watch, that she might know when to take her medicine, and to get certain letters from her trunk and elsewhere she could find them. She told Hattie Debolt that if she died she did not want certain people to have anything to do about burying her, perhaps referring to undertaking. She also told Hattie Debolt to read the letters, and she would know what to do, if she died. Hattie Debolt says that she knew a Mr. Stewart was going with Mrs. Brookover, and she supposed that Mrs. Brookover meant that he would take care of her after death, and that Mrs. Brookover often said she did not want her relatives about. Mrs. Brookover, when active and in usual health, set about making her will; giving to an attorney who usually attended to her business (Snodgrass) a memorandum of her wishes. He prepared the will, and gave it to her, telling her that he preferred that it should not appear in his writing, as he had resided in the same town (Mannington) where Stewart lived, and it might be charged that he had unduly influenced her to make the will in favor of Stewart, and told her to go to another lawyer (Bowers) and get him to copy it. She did so. Some time later she called on Snodgrass to go to the office of Bowers with her to witness the will. They went, and the will was executed, Snodgrass and Bowers witnessing it, and it was committed by her to the custody of Bowers. This was 13 months before her death. Stewart was not present. It is to be noted that the first draft simply provided for payment of debts and funeral expenses, but, when she had Bowers to redraft it, she provided that "the funeral expenses incurred in purchasing casket and all other things necessary shall be equal to that incurred in the burial of my late husband, A. P. Brookover, Esq." Some time after her last husband's death, Houston Stewart met with Mrs. Brookover, and formed an attachment to her, visited her a number of times, and wrote her many love letters, breathing great love, devotion, and tenderness for her. We have no letters

of hers in reply, but her letters from him were found in her possession—some found by Hattie Debolt and given by her to an attorney against the will, and others found in her house by one of the appraisers and given to the same attorney. Considering the great number of his letters, and the considerable period of time covered by them, and his visitation to her, we are warranted in saying that she reciprocated his affection. Her will says: "The reason I make this kind of disposition of my property is because the devisee, Houston Stewart, has favored me and accommodated me when my relatives did not, and refused to do so."

We hold that the evidence is not sufficient to overthrow this will. Courts must be cautious how they deny to the owners of property the full right of disposition. The law gives to the owner absolute dominion over it, and full—indeed, arbitrary—power of disposition; and this right is, under the law, sacred, next to the right to life and liberty. We may say that the act of Mrs. Brookover in giving her estate—not large—to a stranger in blood, and disinheriting her blood, was wrong, but the law does not regard sentiment in this matter. It can only inquire whether the fact tends to show incompetency. It is the strongest argument against the will, but when we consider the circumstances it loses weight. Remember that the testatrix was a lonely widow, childless, friendless, desolate; her own kindred estranged; bitter feelings between them; she cherishing resentment against them, saying in her last solemn act that they had abandoned her—sent her no helping hand. To whom would she give the little property? To whom more probably, more reasonably, than to Stewart, who loved her, visited her, expressed warm affection for her when others were cold, and who, as she certifies in her will, befriended and accommodated her? It is said there was illicit relation between them. It is not proven. Stewart denies it under oath. But even if there was such relation, what of it? If she was competent, the law gave her absolute power to will him all she had. We cannot now try them for illicit intercourse. They are both now in that city teeming with the countless millions of all past time, and we have no just right to condemn without proof.

"No farther seek his merits to disclose,
Or draw his frailties from their dread abode,
(There they alike in trembling hope repose)
The bosom of his father and his God."

Was Mary Brookover competent in mind to make that will? This is the sole, single question, and all criticism upon testatrix and devisee and their relations, all argument based on the disinheritance of her kindred, are unavailing and abortive in law. So are all arguments or evidence going only to show mere peculiarity or eccentricity of character, disposition, or habits of the testatrix, if they do not overthrow her testamentary capacity.

Who has not peculiarity, personal weakness? How many of us guilty of profanity, rudeness, coarseness, unjustifiable hot blood, at times? This woman saw a hard life from childhood up. She was always a "poor, o'er-labored wight," against whom fair fortune turned its face; and little wonder that she, like many others in like circumstances, was irritable, coarse, and embittered. She had no chance for education. "Put yourself in her place." What if she was unskilled and incompetent to transact business? Most women are. She had little property to experience her in business until late years, and that not of a character to give her much experience, but the little she had she seems to have attended to well. She did not waste, but guarded her property with watchful eye. Witness her care for the bank deposit, the life insurance, the pension money of her mother; the struggle with the railroad company for a crossing; taking receipts for payments; paying taxes; scrutinizing debts presented against her husband's estate; her affectionate solicitude for the fitting burial of her husband from whom she derived her estate, and the reason she gave for that solicitude; her anxiety and care, in the agony of deadly sickness in her dying hours, for those letters, sacred to her, which she did not wish the world to see, and which, notwithstanding her thoughtful care to protect herself and her lover, were wrongfully taken from proper custody and used as weapons against her will, and to cast aspersion on his and her names. Witness the sedate preparation of her will and the change from its first draft, so as to provide as secure a burial, against water entering her casket, as she had sedulously provided for her husband. Is this evidence of insanity? How many shudder at the thought of the invasion of the caskets of loved ones by water, and resort to vaults and other devices, at last wholly unavailing, to shut it out, as if water were not as pure as the devouring worm! The shudder is but human. This woman was not singular and alone in this weakness. Or shall we call it weakness? It seems that she still had sense enough to have emotions tender and human, and, whatever her character, they found a place in her breast. Call to witness for her sanity her care to prepare her will. She knew that without it her kin would get her estate, and that she declared again and again should not be. True, one witness says that some months before her death she said the law should take its course, but many times over she declared the reverse. And she could change her mind. And her will shows she did so, if ever she had intended otherwise. Call to mind her contract with Hall for the sale of some lands. It is not said that she did not get a fair price, or that she got the worse of the bargain. While he says she had no discriminating judgment and talked silly, he gives no good, adequate reason, and his

contract with her goes to the contrary; and it seems he would have taken her deed and paid her \$3,000 if she had not brought suit to convene liens and fix debts, some of which she disputed, against her husband. This suit is no evidence of insanity. The suit was necessary and prudent, yet Hall, on the witness stand, at first gave that suit as evidence of her incapacity. Recall that she directed that the land be not sold in bulk, if sold, but in lots, and that her house in town be not sold for some years. Why? Because property in New Martinsville and its suburbs had already greatly increased, and she expected it would continue to do so, and thus the more benefit her devisee, or else she had pride in having the lots go for the benefit of many. Whatever her motive, this manifests her appreciation of the property, and prudence for the future. She knew her property. The circumstances appealed to for the defeat of the will are frail, and some of them operate the other way. The attack upon the will, at most, amounts to charges of coarseness, profanity, intense prejudice against certain enemies, and chiefly that the testatrix was incompetent to transact business. No mania, no delusions, are shown. No senility, for she was a vigorous, active, restless woman, of energy and positiveness of character. Here I will add a very potent fact. Five of the contestants' witnesses, at least—Robinson, Col. McEldowney, T. S. McEldowney, Hall, and Dr. Underwood—while stating that she was incompetent to transact business, yet, when asked if Mrs. Brookover had sufficient power of mind to know what property she owned, and to know who were her relatives, and to know how she wanted to dispose of her property, and to know what she was doing with her property, and to know that she was willing it to Stewart, all answered that she did. This alone fixes her capacity. Regardless of all other evidence, this establishes the ability of Mrs. Brookover to make the will. In addition we have the evidence of Bowers and Snodgrass, the attesting witnesses, squarely sustaining competency at the very moment of its execution, and that is the most important point of time to be considered. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 430; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 758; *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246. "Evidence of witnesses present at the execution of the will is entitled to peculiar weight, and especially is this the case with attesting witnesses." *Kerr v. Lunsford*, 31 W. Va. 659 (Syl. point 15) 8 S. E. 493, 2 L. R. A. 668. Then we have for the proponent the evidence of Thompson, clerk of the county court, who says he tried to buy property of her, but could not agree on the price, thus attesting her ability to care for herself. He knew her, took a bond of her as executrix of her husband, and who fully attests her soundness of mind. Under the circumstances of this case, the following law vindicates this

will against impeachment for insanity: "It is not necessary that a person should possess the highest quality of mind in order to make a will, nor that he should have the same strength of mind which he may formerly have had. The mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, the character may be eccentric, and he may even want capacity to transact many of the ordinary business affairs of life; but it is sufficient if he understands the nature of the business in which he is engaged, has a recollection of the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them. Where legal capacity is shown, and the testator acts freely, the validity of the will cannot be impeached, however unreasonable, imprudent, or unaccountable it may seem to the jury or to others." *Nicholas v. Kershner*, 20 W. Va. 251; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 430.

Attack is made upon the motives of the attesting witnesses. Bowers is assaulted on two grounds. One that he was paid by Stewart for drafting the will. He was entitled to pay from some quarter. Stewart gave him a note for \$100, payable on condition that the will should be sustained. Bowers swears that Mrs. Brookover owed him for legal services. If so, the estate would be liable in Stewart's hands for its payment if the will should stand; otherwise not. Stewart did no wrong in giving such a note. Bowers did no wrong in taking it. It is charged against Snodgrass that he read the love letters of Stewart to Mrs. Brookover, and answered them, and knew Stewart's designs upon the woman, and was in conspiracy with Stewart. This charge is gratuitous. It is not sustained by evidence, unless by far-fetched inference or suspicion for want of evidence. Snodgrass was the general and confidential attorney of Mrs. Brookover in winding up her husband's estate, and her adviser. She could not read writing or write. She would get some one to do so, and reasonably would call on Snodgrass. We do not see that this impeaches his evidence. Be this even as it may, the evidence for sanity is enough without his evidence, and evidence assailing the will is not sufficient. I refer to this matter, but do not deem it material.

The next charge to overthrow the will is that Stewart procured it by undue influence. The claim is that he wrote her love letters, in effect promising marriage, when he did not intend to do so, and thus induced the will. There is no evidence of any request or importunity by or for Stewart to Mrs. Brookover to make the will. He was absent when it was made. So we cannot say that influence was operative when it was made at the attorney's office. "Undue influence, to avoid a will, must be such as

to overcome the free agency of the testator at the time the instrument was made." *Forney v. Ferrell*, 4 W. Va. 729. The testatrix again and again through years declared that her kin should not have her property, and declared that she intended to will it to Stewart. She gave an attorney direction to draw a will in his favor more than 18 months before death, so that she had ample time for reconsideration and revocation, and so the will reflects sedate design. To whom else would she give her property? What is undue influence that will overthrow a will? The evidence shows affection, attention, and kindness from Stewart to the lonely widow bereft of friendly kin. His letters show this. "A disposition of property induced by gratitude for kindness, affection, and esteem is not the result of undue influence." 27 Am. & Eng. Ency. L. 497. "The influence resulting from attachment, or mere desire of gratifying the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act." *Greer v. Greer*, 9 Grat. 330. In *Parramore v. Taylor*, 11 Grat. 239, and *Simmerman v. Songer*, 29 Grat. 24, the court adopted the following from *Williams on Executors*: "The influence to vitiate a will must amount to force and coercion destroying free agency. It must not be the influence of affection or attachment. It must not be the mere desire of gratifying the wishes of another, for that would be very strong ground in support of a testamentary act. Further, there must be proof that it was obtained by this coercion by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." These principles are found in *Forney v. Farrell*, 4 W. Va. 742. The Supreme Court says that, to set aside a deed or will for undue influence, it must be shown "that the party had no free will, but stood in vincula." "It must amount to force and coercion destroying free agency." *Conley v. Nailor*, 118 U. S. 127, 135, 6 Sup. Ct. 1001, 30 L. Ed. 112. "Even earnest entreaty, importunity, and persuasion may be employed, as well as appeals to remember past kindness or relieve distress. The criterion is, is the influence irresistible? If so, the will is not the instrument of the testator, and cannot stand. If it is not, the influence is not undue, and its existence is immaterial, even though the testator did in fact yield to it." 27 Am. & Eng. Ency. L. 498. These principles were held in *Delaplaine v. Grubb*, 44 W. Va. 612, 80 S. E. 201, 67 Am. St. Rep. 788. In *Beyer v. Le Fevre*, 186 U. S. 114, 22 Sup. Ct. 706, 46 L. Ed. 1080, Justice Brewer, in the court's opinion, said: "One who is familiar with the volume of litigation now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and

very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intention of the testator should not be thwarted without clear reason therefor." Justice Brewer said, as we say in this case, there is no evidence of importunity, even request, by Stewart that Mrs. Brookover should make a will in his favor, no threat, no coercion, nothing to show that it was not her free will, but everything to show that it was. The only ground is those love letters, impliedly promising marriage. If Mrs. Brookover loved Stewart, she had perfect right to give him her property when she no longer needed it herself. But illicit intercourse is hinted at. It is merely hinted by the contestants, but not proven. It is disproven. But suppose it were so. It would not be an undue influence to overthrow the will. "Undue influence, long past, and not shown to be in any way connected with the testamentary act, is not evidence to impeach a will. Where a testator and legatee unlawfully cohabited, and it was alleged that years previous she had falsely accused the testator of seducing her, the facts are not sufficient evidence of undue influence over the mind of a testator in the testamentary act, where it appears the will was properly and formally drawn, and every one but the attorney who drafted it was excluded from the room when the instructions were given." *Wainwright's Appeal*, 89 Pa. 220. In this case Stewart was miles away, and no one present but testatrix and attorneys. A man devised his estate to a woman with whom he had unlawfully cohabited, disregarding his brothers and sisters. It was held that undue influence could not be presumed from such cohabitation, but it must be proven that undue influence was actually exerted. *Porchet v. Porchet*, 82 Ky. 93, 56 Am. Rep. 880. Fraud or undue influence must have some effect upon the testator "in producing the very act of making the will." "A will cannot be invalidated because produced by influences springing from a lawful or unlawful marital relation, unless such influence has been unduly exercised; and, to have the effect of avoiding the will, the influence must place some restraint upon, and prevent the free exercise of, the testator's judgment and motives in making the will." *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620. In *Goodbar v. Lidikey*, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296, the court held that the presumptions in favor of a will attacked for undue influence are increased, rather

than diminished, from the circumstance that a bequest was made to one with whom the testator maintained intimate and confidential relations during life. The court said this is particularly so where the testator has no wife or children, but only brothers and sisters. One may will his property to a paramour, if he chooses, unless courts assume to make wills for others. But there is in this case no evidence of sexual intercourse, only a charge based on suspicion; there is no intimacy shown, only occasional visits. Stewart lived and did business 40 miles away, and traveled over a wide territory, selling tombstones, and was seldom in New Martinsville. But we must not forget that the law puts the heavy burden of proving undue influence upon those who attack the will. *McMechen v. McMechen*, 17 W. Va. 683 (Syl., point 11), 41 Am. Rep. 682.

Exception is made because certain non-expert and expert witnesses were not allowed to answer certain questions as to whether Mrs. Brookover was capable of transacting business. A sufficient answer is that the questions do not show what must have been the answers, nor is it shown what it was proposed to prove by the questions. We cannot say whether there would have been any answer, or what answer, or whether material. "Where an answer to a question is excluded, the exception must show what the party asking the question expected to prove." *Brock v. Bear* (Va.) 42 S. E. 307; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575. But in fact there is no substantial ground of excepting even guessing at answers. The questions contemplated mere answers of opinion. "The mere opinions of witnesses not experts are entitled to little or no regard, unless supported by good reason, founded on facts which warrant them; and, if the reasons and facts on which they are founded are frivolous, the opinions are worth but little or nothing." *Jarret v. Jarret*, 11 W. Va. 584 (Syl., point 10). These witnesses were all allowed to state their facts fully, and it was for the jury to judge what they showed, not for the witnesses to tell the jury what, in their opinion,

should be their conclusion from those facts. The facts were mostly or all light and frivolous. Should a trial be upturned for so light a cause? Dr. Dinsmore knew the woman slightly; had practiced in New Martinsville the latter part of 1891 and nine months in 1892, six years before the will, and then moved to Pennsylvania. He called on Mrs. Brookover once, and, because she was indisposed to be examined and receive treatment, as many people are, he took up the opinion that her mind was not good—a very inadequate reason. He stated facts, and gave opinion as to her mind, and the jury could well form an opinion as to the effect of his evidence as an expert; and simply because he was not allowed to give his opinion—his mere opinion—as to her capacity for business, we are asked to reverse a trial. What though Mrs. Brookover was not accomplished in business? That capacity is not necessary to make a will. Is a man or woman inefficient in business to be denied the right to make a will? If she was capable of recollecting the property she was about to dispose of, the manner of disposing of it, and the object of her bounty, that is enough, though she could not transact general business. *Greer v. Greer*, 9 Grat. 830. That she knew her property well, the will, as well as all the evidence, shows, as it gives one direction as to one piece of real estate, another as to another. And not only three witnesses of the proponent, but also five witnesses of the contestants, with hardly any to the reverse, say distinctly that when she made that will she had ample power and strength of mind to know what property she had, how she was disposing of it, what she wanted to do with it, and the person to whom she was giving it. This being decidedly shown by the evidence, this being the test under all the authorities, and this exclusion of evidence touching only the question of insanity, other evidence becomes practically immaterial and unavailing; and therefore the excluded evidence, even if we dare guess what it would have been, could not—ought not, in justice—have changed the result.

Therefore we affirm the judgment.

(185 N. C. 378)

HILL et al. v. GETTYS et al.

(Supreme Court of North Carolina. May 11, 1904.)

MORTGAGES — FRAUDULENT REPRESENTATION — ACTION TO SET ASIDE — JURY QUESTION — EQUITY — ADEQUATE REMEDY AT LAW.

1. In an action to set aside a mortgage, evidence examined, and held to present a question for the jury as to whether the mortgage was procured by the false and fraudulent representations of the mortgagee that he would take up and cancel other mortgages against the land.

2. Where the execution of a mortgage has been procured by the fraudulent representation of the mortgagee that he would take up and cancel other mortgages existing against the land, in consideration of the execution of a mortgage thereon to himself, equity will grant relief on failure of the mortgagee to discharge the obligations assumed.

3. That plaintiffs, in an action to set aside a mortgage procured by fraudulent representations, have an adequate remedy by way of defense to an action to foreclose the mortgage, will not defeat the plaintiffs' equitable remedy.

Appeal from Superior Court, Rutherford County; Jones, Judge.

Action by J. L. Hill and others against P. E. Gettys and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is a civil action, invoking the equitable power of the court to set aside a mortgage executed by the plaintiffs to the defendant C. C. Gettys, for that the same was without any consideration, and the execution thereof was procured by the false and fraudulent representations of the mortgagee. The defendant, at the close of the plaintiffs' testimony, moved the court for a judgment of nonsuit, and upon the refusal to grant the motion the defendant introduced testimony, and at the close of the entire evidence renewed his motion, which was again refused. The defendant excepted. His honor submitted the following issues to the jury: "(1) Did the defendant C. C. Gettys procure the execution of the mortgage or trust deed in controversy upon the false and fraudulent representation that he would pay off and discharge the Coxe and Gallert mortgages, or either of them, and did he fail to do so? (2) Was the mortgage or trust deed executed without consideration?" The jury responded to both issues in the affirmative, and the court, upon the verdict, rendered judgment directing the cancellation of the mortgage. The defendant appealed.

Eaves & Rucker, for appellants. McBrayer & Justice, for appellees.

CONNOR, J. The only assignment of error in the record is the refusal of his honor to dismiss the action as upon nonsuit at the conclusion of the evidence. The testimony on behalf of the plaintiffs tended to show that W. S. Hill, Sr., the husband of the feme plaintiff, was indebted to Frank Coxe in the sum of about \$85, to S. Gallert in the sum of about \$55, and to the defendant P. E. Gettys in the sum of \$360, subject to certain credits;

that said debt was tainted with usury; that the several debts were secured by mortgage on the land of W. S. Hill, Sr., who was insane; that Coxe and Gallert held mortgages of prior date to that of the defendant; that the defendant went to the house of the plaintiffs and falsely represented to them that Coxe was about to foreclose his mortgage; that if the plaintiff, the wife of said W. S. Hill, Sr., and her children, would execute to him a mortgage on the land of said Mary H. Hill for the sum of \$150, he, Gettys, would take up the Coxe and Gallert mortgages and cancel the same, applying the difference between the aggregate amount thereof to the credit of his mortgage; that upon said promise or representation the plaintiffs executed the mortgage in controversy; that thereafter the defendant purchased the Coxe and Gallert mortgages, but failed and refused to cancel the same or deliver them to the plaintiffs; that no other consideration than the said representation passed to the plaintiffs for the execution of said mortgage; that W. S. Hill, Sr., died shortly thereafter, whereupon the defendant qualified as his administrator, and immediately filed a petition for the sale of his land, setting up the two said mortgages as debts against his intestate's estate. The defendant introduced testimony tending to contradict the contention of the plaintiffs, and to show that the purpose of the mortgage executed by the plaintiffs was to secure a credit on the debt of said W. S. Hill, Sr., to the defendant. He admitted that he bought the Coxe and Gallert mortgages, but denied that he did so with the proceeds of the mortgage in controversy.

A court of equity will not cancel a bond or mortgage simply because it is made without consideration. The party will be left to make his defense, in so far as it may be available, when an action is brought to enforce or foreclose the mortgage. Nor will a court of equity cancel a bond or mortgage because the obligee or mortgagee fails or refuses to perform or discharge some promise or agreement made at the time of its execution. Where, however, as the jury have found in this case, the execution of the bond or mortgage has been procured by the false and fraudulent representation that the obligee or mortgagee would discharge the obligation assumed, there is no reason why a court of equity should not grant relief. A false and fraudulent representation or promise we understand to be one made with the intention in the mind of the promisor not to perform the promise. This is the misrepresentation of a subsisting fact, false within the knowledge of the party making it, and calculated to deceive. Speaking of an actionable fraud, Lord Bowen, in *Edington v. Fitzminnia*, 29 L. R. Chan. Div. 459, says: "There must be a misrepresentation of a subsisting fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is difficult to prove what the

state of a man's mind at a particular time is, but, if it can be ascertained, it is as much a fact as anything else. A misstatement as to the state of a man's mind is therefore a misstatement of a fact." "The general rule in regard to promises is that they are without the domain of the law unless they create a contract, a breach of which gives to the injured party simply a right of action for damages, and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it, and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made. A promise is a solemn affirmation of intention as a present fact." 1 Bigelow on Fraud, 484. The author is discussing, of course, civil remedies. "When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense." *Goodwin v. Horne*, 60 N. H. 485. "The intent is always a question for the jury, and, to determine whether the intent was fraudulent, the jury have necessarily to look to the circumstances connected with the transaction, or those immediately preceding or following it." *Des Farges v. Pugh*, 98 N. C. 81, 58 Am. Rep. 446.

We think that, for the purpose of disposing of the motion for nonsuit, there was evidence proper to be submitted to the jury. They have found that the promise was false and fraudulent. In the absence of any exception to his honor's charge, we must assume that he explained to them the distinction between the failure to perform a promise honestly made and one made with the purpose not to perform, which is a fraud upon the party relying upon it, as an inducement for his action. And as a mortgagee is a trustee, as held in *Bobbitt v. Blackwell*, 120 N. C. 253, 26 S. E. 817, and cases therein cited, a court of equity will compel him to faithfully execute his trust or surrender the trust property. In this case the only purpose of the mortgage, as well as its sole consideration, was to take up the Coxe and Gallert mortgages. When the purpose failed, either through the inability or bad faith of the trustee, the trust was at an end, and we see no reason why the trustee should not be compelled to reconvey. Surely he should not be permitted to take advantage of his own wrong, and convert to his own use property to which he held only the legal title, and for which he had paid nothing.

To the suggestion that the plaintiffs have an adequate remedy by way of defense to an action to foreclose the mortgage, it is sufficient to say that equity will always relieve

against a mortgage, which is a conveyance of the legal title with a clause of defeasance. If this were not true, the act of 1893 (page 37, c. 6), a wise and most salutary statute, gives a remedy to remove a cloud from title created by the mortgage.

The judgment must be affirmed.

(134 N. C. 743)

STATE v. GOULDEN.

(Supreme Court of North Carolina. April 26, 1904.)

BIGAMY — EVIDENCE — KNOWLEDGE OF EXISTENCE OF FIRST SPOUSE — BURDEN OF PROOF.

1. In a prosecution for bigamy, evidence that defendant had said about three weeks before the second marriage that he wished he could hear that his first wife was dead, so that he could be a free man, is competent to prove the first marriage.

2. In a prosecution for bigamy, in which defendant had testified that he drove his first wife away, his reasons for so doing were inadmissible.

3. Under Code, § 983, declaring that a second marriage during the life of the former husband or wife is bigamy, and providing that nothing therein contained shall extend to any person marrying a second time whose spouse shall have been continually absent for the space of seven years, and shall not have been known by such person to have been living within that time, the burden is on defendant in a prosecution for bigamy to show that he did not know that his first wife, from whom he had separated, was living during the seven years prior to his second marriage.

4. Under the statute, absence of a wife, resulting from having been driven away by the husband, is not such absence as to excuse him from inquiry even after the lapse of seven years.

Douglas, J., dissenting.

Appeal from Superior Court, Rockingham County; McNeill, Judge.

Julius Goulden, alias Uriah Goulden, was convicted of bigamy, and appeals. Affirmed.

O. O. McMichael, for appellant. The Attorney General, for the State.

CLARK, O. J. The defendant was indicted under Code, § 983, for bigamy. The admissions of the defendant were competent to prove the first marriage. *State v. Wylde*, 110 N. C. 500, 15 S. E. 5; *State v. Melton*, 120 N. C. 591, 26 S. E. 933; 2 McLain, Cr. Law, § 1083, and cases cited in note 6; 2 Bish. Stat. Cr. (2d Ed.) § 610. It was therefore not error to admit evidence that when the defendant, about three weeks before the second marriage, stated his intention to marry, and was charged with the existence of his first wife, he had replied, "I wish I could hear she was dead, so I could be a free man." The defendant stated that he drove his wife off. It was not error to refuse to permit him to give his reasons for so doing, for it was not matter pertinent to the issue.

The court charged the jury: "The burden is on the defendant to show that he did not know that his first wife was living for the

¶ 1. See *Bigamy*, vol. 6, Cent. Dig. §§ 43, 51.

seven years prior to his second marriage." In this there was no error. The Code (section 988), after prescribing that a second marriage during the lifetime of the former husband or wife is bigamy, and fixing the punishment therefor, contains the following proviso: "Provided that nothing herein contained shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time, nor shall extend to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage, nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." The burden is on the state to prove beyond a reasonable doubt both marriages, and that at the date of the second marriage the husband or wife of the defendant by the first marriage was still living. This completes the offense, but the proviso exempts the defendant, notwithstanding, from conviction and punishment, if either one of three things peculiarly within his knowledge, are shown; i. e. (1) that such former wife or husband had been continually absent for seven years at the date of the second marriage, and shall not have been known by the defendant to have been living within that time; or (2) that the defendant had been lawfully divorced at the time of the second marriage; or (3) that the first marriage has been declared void by any court of competent jurisdiction. These are matters of defense to withdraw the defendant from liability notwithstanding proof that bigamy has been actually committed by a second marriage during the lifetime of the first husband or wife. These matters being set out in the proviso, withdrawing the defendant from liability, by our uniform decisions they are not required to be negated in the indictment, and, of course, the state is not required to prove what it is not called on to allege.

In *State v. Norman*, 13 N. C. 222, construing the act of 1790, now substantially the above section 988 of the Code (save that the punishment is not death, as was then the case), Henderson, C. J., says that the proviso therein "withdraws the case from the operation of the act," and the burden was upon the defendant to show the divorce, which in that case was the part of the proviso relied on. This ruling that the state is not called on to negative in the indictment matter of defense set out in a proviso when it withdraws a case from the operation of the body of the section has been cited and approved. *State v. Davis*, 109 N. C. 784, 14 S. E. 55; *State v. Melton*, 120 N. C. 596, 26 S. E. 933; *State v. Call*, 121 N. C. 649, 28 S. E. 517; *State v. Newcomb*, 126 N. C. 1106, 36 S. E. 147—in which last case the authorities are reviewed. The burden is on the defend-

ant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living. The authorities for this are abundant. *State v. Barrow*, 31 La. Ann. 691; *State v. Lyons*, 3 La. Ann. 154; *Stanglein v. State*, 17 Ohio St. 453; *State v. Abbe*, 29 Vt. 69, 67 Am. Dec. 754; *Fleming v. People*, 27 N. Y. 329; *State v. Williams*, 20 Iowa, 98; 2 Wharton, Cr. Law (10th Ed.) §§ 1704, 1705; 2 McClain, Cr. Law, § 1080. The state could rarely prove that a defendant was not ignorant that his wife was living, while he can as a witness in his own behalf testify that he was.

Speaking of another (the second) ground of defense allowed in the proviso, Lord Denman, C. J., said in *Murray v. Reg.*, 7 Q. B. 706, that it would be as reasonable to require the prosecution to deny that the statute had been repealed as to negative a divorce; one being as much a matter of defense as the other. The matters set out in the proviso are, as above stated, matters peculiarly within the knowledge of the defendant, and none more so than whether he was ignorant of his wife's existence at all times within seven years before the second marriage. "In such cases * * * the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant as matter of defense." Wharton, Cr. Law, § 614; 1 Greenleaf, Ev. § 79. In *Rex v. Jarvis*, 1 East, 643, Lord Mansfield said: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defense by the party accused; but where exceptions are in the enacting part of the law it must appear in the charge that the defendant does not fall within any of them." All the authorities concur that neither the belief of the defendant, however honest, that the first spouse is dead, nor ignorance of his or her being alive for less than seven years, is a defense. *Reg. v. Cullen*, 9 C. & P. 681; *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468; *Com. v. Mash*, 7 Metc. (Mass.) 472. In 2 Wharton, Cr. Law (10th Ed.) § 1705, it is well said: "'Men readily believe what they wish to be true,' is a maxim of the old jurists. To sustain a second marriage, and to vacate a first, because one of the parties believed the other to be dead, would make the existence of the marital relation determinable, not by certain extrinsic facts, easily capable of forensic ascertainment and proof, but by the subjective condition of individuals." In this case the evidence is that the first wife had lived within 20 or 30 miles of the defendant ever since he testified that he drove her off, and, though his testimony was that he had not heard of her for 24 years, except that he heard a year before his second marriage that she was dead, he showed no effort to verify that fact, and the state offered evidence tending to

show that the defendant knew she was alive within seven years of the bigamous marriage. Indeed, he having driven her off, such involuntary departure, being absence procured by the defendant himself, is not such "absence" as would have excused the defendant from inquiry even after the lapse of seven years. *Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43.

No error.

DOUGLAS, J. (dissenting). I am inclined to agree with the line of authorities holding that, where it has been shown that the wife has been absent from her husband for over seven years, the burden of proving that he knew she was alive at the time of the second marriage rests upon the state; otherwise the defendant would be required to prove a negative, which he could do only by going upon the stand and submitting to cross-examination. He would be forced to become a witness in his own case, with all its possible consequences. On the other hand, the state could prove the fact affirmatively by any evidence, direct or circumstantial, that the jury might believe; as, for instance, that the defendant had been seen with his wife within the seven years, or that she had been seen in the neighborhood, or that some one had told him she was alive, or that her whereabouts were generally known in the community. Any one of these facts would tend to prove his guilty knowledge. To require a defendant to prove a divorce is essentially a different matter, and, indeed, is the converse of the former. A divorce is an affirmative fact, peculiarly within the knowledge of the defendant, and which can be easily and conclusively proved by a mere transcript of the record, without requiring the defendant to become a witness or involve himself in any dangerous consequences. "*Cessante ratione legis, cessat et ipsa lex.*"

(135 N. C. 106)

JUNGE et al. v. MacKNIGHT.

(Supreme Court of North Carolina. April 19, 1904.)

DEFAULT JUDGMENT—OPENING FOR IRREGULARITY.

1. Code, § 385, provides that judgment by default final may be had at the return term, on failure of defendant to answer, proof of service of summons being made, on a verified complaint alleging a contract to pay a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Section 386 provides that in all other actions, except those mentioned in section 385, when defendant shall fail to answer, and on a like proof judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term. *Held*, that judgment by default final may be rendered at the return term only in the case provided in section 385, unless elsewhere provided for, and that, there being no provision for such judgment at such time in an action to remove cloud

on title, rendition of it at such time is an irregularity, for which it should be set aside.

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, Moore County; O. H. Allen, Judge.

Action by W. P. Junge and another against Harry P. MacKnight. The court refused to set aside a default judgment, and defendant appeals. Reversed.

H. P. MacKnight, in pro. per. U. L. Spence and W. J. Adams, for appellees.

MONTGOMERY, J. The plaintiff filed his complaint at the May term, 1903, of the superior court of Moore county, and alleged therein that he was the owner in fee and in the possession of a certain lot of land, described in the complaint, and that the defendant, through an alleged deed of the sheriff of the county, made under an execution, had cast a cloud upon the plaintiff's title. The prayer for judgment was that the deed from the sheriff to the defendant be declared void and canceled. The defendant having filed no answer, a judgment by default final was entered up against him. In that judgment it was decreed that the title to the property was in plaintiff, that the deed from the defendant to the sheriff was of no effect and void, and that it be delivered up and canceled. At the next term of the superior court the defendant, after having given the plaintiff proper notice, made a motion in writing to set aside the judgment by default final, on the ground that it was irregular, and because the summons was not served on the defendant 10 days before the first day of the term of the court at which the judgment was entered. His honor refused the motion, on the ground that the facts as he found them showed that the summons was served on the defendant 10 days before the beginning of the term of the court.

We are of the opinion that the judgment should have been set aside for irregularity. Judgments by default final can be rendered in this state only in the cases mentioned in section 385 of the Code, and this case does not fall under that section. In section 386 of the Code it is provided that in all other actions, except those mentioned in 385, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be had at the next succeeding term. In the same section (386) it is further provided that, except when a reference may be ordered to state a long account, the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law. The clear meaning of section 386 of the Code is that in all actions, except those embraced in section 385 of the Code, a plaintiff cannot recover a judgment by default final upon the failure of the defendant to answer until he has proved all the material allegations of his complaint.

In Georgia there are special exceptions, as with us, in which judgment by default final may be had, and we find numerous cases in the courts of that state in which it is held that a plaintiff cannot take a judgment by default, upon the failure of the defendant to file an answer, until he has proved all the material allegations of his complaint; and in *Sanner v. Sayne*, 78 Ga. 468, 3 S. E. 651, the court said: "The defendant, while in default, may resist passively whatever is brought to attack him, but cannot make a counter attack. Though not allowed to return the fire, he is not obliged to run, but may stand until he is shot down. Exceptions to the general rule are made by statute, but this case is within the relief itself." And in regard to the plaintiff the court said: "Whether, on matters of fact, he is before the jury or before the judge, can make no difference in his burden. He must produce enough evidence to manifest the truth of every material allegation. There is a trial to that extent, though there be no issue in the record. There must be an examination of evidence and a determination of such facts as the declaration necessarily involves. The law itself, by requiring evidence, puts the truth of these facts in issue, and keeps up the issue until the facts are established." If this action had been for the recovery of, or for the possession of, the land, the defendant having failed to answer and to file the undertaking required by section 237 of the Code, judgment by default final might have been rendered against him, under the provisions of section 390 of the Code. *Jones v. Best*, 121 N. C. 154, 28 S. E. 187. The last-mentioned section of the Code furnishes the only additional exception to the rule laid down in section 385.

Reversed.

CLARK, C. J. (concurring). Code, § 385, allows a judgment by default final at the return term, "on failure of the defendant to answer," upon a verified complaint alleging an express or implied contract to pay a "sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." And section 386 provides: "In all other actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof [as to service of summons, etc.], judgment by default and inquiry shall be had at the return term, and inquiry shall be executed at the next succeeding term." This language is too explicit to admit of two constructions. When the action is one sounding in damages, and there is judgment by default and inquiry, the inquiry must be made at the next term by a jury. In most other cases, especially in proceedings formerly cognizable in equity, the judgment by default and inquiry at the return term upon failure to answer authorizes a judgment final pro confesso at the next term by the court, on inspection of the record

without further proof, if the complaint is verified. The statute has authorized a final judgment at the return term only in the instances stated in section 385. The general rule (section 208) is that the decision of a cause is to be had not before the second term, and the exception made as to final judgment at the return term when no answer is filed is restricted to the plain cases mentioned in section 385, probably for the reason that it could not be known till the court was on the point of adjourning that no answer would be filed, and in all cases but a plain action for a definite money demand on a verified complaint the court would not ordinarily have opportunity to consider the effect of a judgment pro confesso, or it may be that it was intended, except as to such plain actions, to give a defendant who had been inadvertent, or badly advised, opportunity at the next term to ask leave, upon cause shown, then to file answer before final judgment passes against him.

In 1 Black on Judgments (2d Ed.) § 28, it is said: "An order that a bill be taken pro confesso is interlocutory (as in our Code, § 386), and intended to prepare the case for final decree. Its effect is similar to that of a default in an action at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration. The defendant has lost his standing in court, and is not entitled to notice of its further proceedings; but the matters set forth in the bill do not pass in rem judicatam until the final decree"—which by our Code (section 386) is at the next term, though in most cases, except those sounding in damages, judgment passes at that term, as is above stated, without further proof, if the complaint was duly verified. See, also, 5 Enc. Pl. & Pr. 989; 6 Enc. Pl. & Pr. 90, 104. In *Rouillac v. Miller*, 90 N. C. 176, Smith, C. J., notes as an innovation that final judgments "are now allowed" at the return term upon a verified complaint for a money demand, certain in its nature, and italicizes the class of cases in which summary judgment at the first term is committed. That final judgment is authorized only in cases falling under section 385 is again noted in *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840, *Battle v. Baird*, 118 N. C. 863, 24 S. E. 668, *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18, and *McLeod v. Nimocks*, 122 N. C. 437, 29 S. E. 577.

It may be noted here that by chapter 626, p. 863, Laws 1901, judgment at the return term is further authorized in actions "upon a bill, note, bill of exchange, liquidated and settled account, or for divorce," where the summons shall be served and the complaint filed in the clerk's office "at least 30 days before the term," whereupon the action shall stand for trial at the return term. Except in such cases, section 385 still presents the only instance in which the law authorizes a final judgment at the return term, except when

judgment is taken in ejectment under Code, § 237, for failure to file a defense bond. *Jones v. Best*, 121 N. C. 154, 28 S. E. 187.

CONNOR, J. (dissenting). I regret that I cannot concur in the opinion of the court in this case. His honor having found as a fact that a summons was served upon the defendant ten days before the first day of the term, and the plaintiff having filed and verified the complaint within the first three days, the defendant was in default, in that he filed no answer during the term, nor obtained an extension of time therefor. This presents the question as to the status of the case at the last moment of the term. The several sections of the Code must be read together, and so construed as to bring about a harmonious and orderly system of procedure. The plaintiff complied strictly with section 233 of the Code by setting forth in the complaint a concise statement of the facts constituting his cause of action. The defendant within the time fixed should have filed a demurrer or an answer. If a demurrer, he should have set forth his grounds thereof; if an answer, it should have contained a general or specific denial of each material allegation of the complaint controverted by him, or of any knowledge or information thereof sufficient to form a belief, and, in addition thereto, if he so desired, any new matter by way of avoidance or counterclaim. Upon his failure to do either, within the time prescribed, it is expressly provided that "every material allegation of the complaint not controverted by the answer * * * shall for the purpose of action be taken as true." Section 268 of the Code. In this condition of the record the inquiry arises as to what is the next step to be taken. Section 385 provides that, "where complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay," etc., "upon proof of personal service," etc., "and upon the complaint being verified, judgment shall be entered at the return term for the amount mentioned in the complaint," etc., "and where the defendant, by his answer in such an action, shall not deny the plaintiff's claim, but shall set up a counterclaim," etc. Section 386 provides that "in all actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account be necessary to execute properly the inquiry, the court, at the return term, may order the account," etc.; "in all other cases, the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law." It is manifest that this section of the Code relates to causes of action for the recovery of money, either by way of damages for breach

of contract or action sounding in tort. It will be observed that this action is neither, but may be assimilated, under the practice prevailing prior to the adoption of the Code, to a bill in equity to quiet and remove cloud from title. The action is brought under chapter 6, p. 37, of the Laws of 1893, entitled "An act to determine conflicting claims to real property," and the complaint states a cause of action coming within the terms of this act. In the condition of the pleadings at the last moment of the return term of the court, there was nothing to be tried by a jury, nothing in respect to which inquiry was to be made. As the record then stood, no issues could be formulated, because an issue arises "upon a material allegation in the complaint controverted by the answer." Section 393.

This leads us to inquire as to the effect of a failure to answer. We find, by referring to the practice prevailing prior to the adoption of the Code, that "on the expiration of the time for pleading, a rule to plead having been given, and a plea demanded, when necessary, the plaintiff's attorney should search for a plea, if not delivered to him, with the clerk of the papers, who receives special pleas in the king's bench, and with the clerk of the judgments, who keeps the general issue book at the king's bench office, or at the prothonotary's office in the common pleas; and, if no plea be delivered or found at either of those offices, the plaintiff's attorney may sign judgment as for want of a plea. A judgment by default is interlocutory or final. When the action sounds in damages, as in assumpsit, covenant, trover, trespass, etc., the judgment is only interlocutory, 'that the plaintiff ought to recover his damages,' leaving the amount of them to be afterwards ascertained. In debt, the judgment is commonly final," etc. *Tidd's Practice*, p. 563. It will be observed that in almost, if not every, form of action at common law, except debt, damages were demanded as a part of the recovery, either for the purpose of ascertaining the value of the recovery, or, as in detinue, trover, and replevin, etc., for the value of the property and damages for the detention. It is therefore probable that in every judgment by default, except in debt, the judgment was by default and inquiry. This may not be strictly accurate, but is sufficiently so for the purpose of this discussion. In courts of equity, where no answer was filed to the bill, it was the privilege of the plaintiff to have a decree pro confesso. "The proceeding which is termed taking a bill pro confesso is the method adopted by the court for rendering its process effectual, where the defendant fails to appear and answer, by treating the defendant's contumacy as an admission of the complainant's case, and by making an order that the facts of the bill shall be considered as true, and decreeing against the defendant according to the equity arising

upon the case stated by the complainant." Beach on Modern Eq. Prac. § 191.

The mode of procedure in taking the bill pro confesso is prescribed by rules of courts. It is only necessary to inquire, for the purpose of this discussion, as to the effect of the decree pro confesso upon the right of the plaintiff to proceed to final decree. If the allegations in the bill are distinct and positive, they may be taken as true without proof. "The defendants are concluded by that decree, so far, at least, as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants, unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree pro confesso regards the statements of the bill as confessed." *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105. This court has held, in accordance with the rules of practice prevailing in courts of law and equity, that "all facts averred in the complaint, and not controverted by the defendant, must be taken as true for the purposes of the action." *Oates v. Gray*, 66 N. C. 442; *Dick, J.*, saying: "The object of the Code was to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity, and uniformity which are essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration; and the defendant must controvert the allegations of the complaint, or they will be taken as true for the purposes of this action." The Constitution has not abolished the principles of equity. Indeed, it could not. On the contrary, it fully recognizes them, and they must be applied as far as may be under the existing statutory method of procedure, but, when that is silent and inadequate, by the method and practice of the late court of equity in this state. *Morisey v. Swinson*, 104 N. C. 555, 562, 10 S. E. 754. It has been further held that by a failure to deny the allegations in the answer the fact is admitted, and the effect of the admission is as available to the plaintiff as if found by the jury (*Bonham v. Craig*, 80 N. C. 224), or, as is said in *Cook v. Guirkin*, 119 N. C. 13, 25 S. E. 715, has the same force and effect as a finding of the jury.

After a default the defendant may not be heard to deny any facts set forth in the complaint; but he may be heard in respect to the judgment or decree tendered by the plaintiff upon his complaint. The plaintiff may have, upon the failure to answer the com-

plaint, such judgment as upon the facts stated he is entitled to, and the defendant may be heard to object to the form of the judgment tendered. The failure to answer does not admit that he is entitled to the relief demanded, but that he is entitled to such relief as the law gives him upon the facts alleged. This court, in *McLeod v. Nimocks*, 122 N. C. 437, 29 S. E. 577, says: "The defendant does not complain of that part of the judgment which institutes an inquiry as to the damages which the plaintiff may have sustained by reason of the matters set out in the complaint, but he insists that the judgment by default final, for the conversion of the cotton and embezzlement of the proceeds, is such a judgment as could not have been rendered under section 386 of the Code. We think his contention not well founded. The action sounded in damages, and was for a tort. The tortious conduct of the defendant was set forth in the complaint as the basis for demanding the damages. The judgment by default and inquiry, the defendant having said nothing in answer to the plaintiff's complaint, was conclusive that the plaintiff had a cause of action against the defendant of the nature declared in the complaint, and would have been entitled to nominal damages without any proof. That cause of action was admitted by the defendant's failure to answer." Here no damages were demanded, and there was nothing to submit to the jury; the facts alleged in the complaint having been admitted by the failure to answer. We therefore think that, upon failure to answer, the plaintiff was entitled to such relief in accordance with the facts stated in the complaint, and that by failure to answer the defendant could not call upon the plaintiff to make proofs of these facts. It would be a strange result if the new Code of Procedure, the purpose of which is to simplify and expedite remedial justice, should work out this result. That the plaintiff may take judgment in an action of this kind for want of an answer is shown by section 2, c. 6, p. 37, of the Laws of 1893—"that if a defendant in such action shall disclaim in such answer any interest in the estate or property or suffer judgment to be taken against him in such answer, plaintiff could not recover cost."

An examination of the complaint and judgment develops the fact that in this respect the judgment is erroneous, in that it taxes the defendant with the cost. The judgment is strictly in conformity to the relief to which the plaintiff is entitled upon the facts set forth in his complaint. The plaintiff alleges that one Lasker was on the 14th day of October, 1899, the owner of the land in controversy; that on said day he executed a mortgage containing power of sale, which was duly recorded October 23, 1899 (a certified copy of the mortgage is attached to the complaint); that said mortgage was given to secure a note of \$25,000,

due on October 14, 1902, with interest from date, payment quarterly, and that upon default in payment of interest the power of sale should be executed; that on April 8, 1901, the mortgagee, pursuant to the power of sale, there having been default in the payment of interest, sold the land, after advertisement, etc., and that plaintiff purchased, paid the purchase money, and took deed therefor (a certified copy of the deed is attached to the complaint); that after the execution and registration of the mortgage certain judgments were recovered and docketed against said Lasker; that the defendant had execution issued on said judgment, and after the sale under the mortgage, August 11, 1902, had the land sold, and purchased at said execution sale, and took deed from the sheriff therefor (a certified copy of the deed is attached to the complaint); that at the time of issuing said execution the judgment debtor was dead; that the plaintiff claims title to said land under said sheriff's deed, etc.; that said deed is a cloud upon plaintiff's title. These facts being admitted by the failure to answer, there can be no possible doubt of plaintiff's right to the relief demanded, under chapter 6, p. 37, Laws 1893. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635; *Rumbo v. Mfg. Co.*, 129 N. C. 9, 39 S. E. 581; *Bispham, Eq. § 474*; *Beach, Modern Eq. 556, 558*. The question is important to the courts and to the profession. I am quite sure, from an experience on the superior court bench and at the bar, that in all actions for the recovery of property, when no damages are claimed, or when it is not necessary to assess the value of the property, as well as in actions for relief formerly sought in courts of equity, fixing rights of property, etc., it is, and has been for many years, the custom to take judgment by default final, in accordance with the facts stated in the verified complaint. The law, as held by the court in this case, will render many judgments taken in accordance with the course and practice of the court irregular, and, I cannot but think, seriously delay and embarrass the administration of remedial justice. By simply standing mute the defendant can, in actions of this character, and others in which no damages, or an uncertain amount, is demanded, put the plaintiff to the expense and annoyance of proving the allegations of his complaint. I must confess, with all deference, that I would be at a loss to know what issue should be submitted to the jury in this case. There is not a material allegation of the complaint controverted. Should an issue be submitted upon each allegation, as if denied, or the general issues, I think great confusion must ensue from the construction put upon the several sections of the Code.

There is another view of this case upon which I think the judgment of his honor should be affirmed. Conceding that the judgment is irregular in the respect pointed out by the court, it is held by this court that such a judgment will not be set aside unless the defendant set forth facts showing *prima facie* a valid defense, and the validity of the defense is for the court, and not with the party. *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696. The defendant based his motion to set this judgment aside upon the ground that the summons was not served on him 10 days before the first day of the term. After a war of affidavits, which I have examined, his honor, it seems to me, could not have done otherwise than refuse the motion. In the case on appeal it is stated that the defendant did not at any time request the court to find any of the facts set forth in the affidavit, except as to the date of the summons. He attached to his original affidavit an answer which he proposed to file. An examination of it shows that, although he denies as of his own knowledge the existence of documents, papers, and records of which it is difficult to understand how he could be ignorant, he does not really and seriously—he does not really, taking his entire answer—set up any substantial defense to the action. He swears to many legal conclusions, such as that the mortgage and deed of the plaintiff are void, for that, he says in his brief, there is no allegation that they were stamped, and it does not so appear from the copies taken from the registry. I cannot think that from any point of view the plaintiff should be put to further test or trouble in this case. This court has frequently held that an irregular judgment may be set aside at any time. The safety of titles to property dependent upon the validity of such judgment was secured by the principle announced in *Jeffries v. Aaron*, *supra*, which seems to be overruled by the decision in this case. I cannot but think that the doctrine now announced will endanger many titles, as in suits for foreclosure of mortgages and many other actions affecting title to land. The case of *Jeffries v. Aaron* cannot be distinguished from the one before us. It is “a motion to set aside a judgment by default final upon an open account.” *Faircloth, C. J.*, says: “The motion is not put upon the ground of mistake, surprise, or excusable neglect.” This court reversed the court below, setting aside the judgment. See, also, *Stancill v. Gay*, 92 N. C. 455; *Peoples v. Norwood*, 94 N. C. 167.

I cannot think that from any point of view the plaintiff should be put to further test or trouble in this case.

WALKER, J., concurs in the dissenting opinion.

(126 N. C. 371)

CITY OF WINSTON et al. v. BEESON et al.

(Supreme Court of North Carolina. May 2, 1904.)

MUNICIPAL CORPORATIONS—LICENSE TAXES—
SUBJECTS—TRADING STAMPS—"GIFT
ENTERPRISE."

1. Code, § 3800, provides that cities and towns may levy taxes for municipal purposes on all persons, privileges, and subjects within the corporate limits liable to taxation for state and county purposes. Revenue Act 1903, pp. 337, 348, c. 247, §§ 51, 76, imposes a license tax of \$50 on any person or establishment offering or engaged in selling trading stamps. Winston City Charter, § 65, subsec. 11, provides that each distiller of fruits or grains, compounder of spirituous liquors, and each gift enterprise or lottery, together with each railroad company having a depot or office in the town, shall pay a license tax not exceeding \$50 a year; and section 66, subsec. 13, declares that the board of aldermen shall have power to impose a license tax on any business carried on in a city, not enumerated, not exceeding \$10 a year. *Held* that, since the city was limited by its charter in the imposition of license taxes, it was not entitled to impose a license tax of \$50 on dealers in trading stamps therein, either under Code, § 3800, or Revenue Act 1903, pp. 337, 348, c. 247, §§ 51, 76.

2. Manufacturers and dealers in trading stamps sold to merchants; to be given to cash customers, and absolutely redeemable in goods offered by the trading stamp concern, without restrictions, except as to the number redeemable at any one time, were not engaged in a "gift enterprise," within Winston City Charter, § 65, subsec. 11, authorizing the city to levy a license tax on each gift enterprise or lottery, not exceeding \$50 per year.

Appeal from Superior Court, Forsyth County; W. R. Allen, Judge.

E. E. Beeson and another were charged with selling trading stamps without having first obtained a license, and from a judgment finding them not guilty the state and the city of Winston appeal. *Affirmed*.

The defendant the Sperry & Hutchinson Company was tried in the superior court upon appeal from the mayor of Winston, who fined it \$20, for issuing and selling to merchants what are known as "trading stamps," without obtaining a license so to do, contrary to the provisions of an ordinance of that city forbidding the sale of such stamps to merchants or manufacturers, or the use of the same by the latter, without having paid the license tax of \$50 imposed by the ordinance for the privilege; and the defendant Beeson was tried for issuing and selling trading stamps as manager and agent of his codefendant, in violation of the said ordinance passed under the authority given in the charter of the city of Winston (section 65, subsec. 11), which is as follows: "Each distiller of fruits or grains, each distiller or compounder of spirituous liquors, each gift enterprise or lottery, each railroad company having a depot or office in town, a license tax of not exceeding \$50 a year." It is not claimed by the state that any other special authority has been given by the Legislature, in the charter of Winston, to impose a

license tax of \$50 upon the defendants, except that contained in the above extract from the charter. Subsection 13 of section 66 of the charter provides "that the board of aldermen shall have the power to impose a license tax on any business carried on in the city of Winston not before enumerated herein, not to exceed ten dollars a year." Priv. Acts 1891, p. 1362, c. 307, as amended by Priv. Acts 1899, p. 206, c. 103. No special reference is made in the verdict to the charter of the city as contained in the two chapters of the acts of 1891 and 1899, above referred to, but it was admitted that the present charter is the one to be found in those two chapters; and counsel referred to the charter in the argument, and especially to the provisions of it which relate to taxation. We will therefore consider it as a part of the case. It may be that, as a section of the charter was put in evidence, we should consider the other sections without any agreement; but, however that may be, we hold that, under the circumstances, the charter as a whole is now before us.

The jury returned a special verdict as follows: "That the Sperry & Hutchinson Company is a corporation organized under the laws of the state of New Jersey, and the defendant Ernest E. Beeson is the local agent and manager thereof, located in the city of Winston, North Carolina. That the said defendant Beeson, for and on behalf of his company, located a business in the city of Winston in the following manner: That he first applied to the proper officers, and paid the license fees prescribed by the revenue act for trading stamp companies, and duly received his license for doing business in the said county and state, and then applied to the city of Winston, asking for a license, and offering to pay \$10, as prescribed by the ordinances of the city for advertising businesses, whereupon the city, through its officers, declined to grant said license for less than \$50. Thereupon the defendants began business in the city of Winston. That said Beeson approached a good many merchants in various businesses in the city of Winston, and entered into contracts with them to use what was known as a 'trading stamp.' That he did on the 30th day of October, 1903, enter into a contract with W. B. Hudson, which contract is hereto attached and made a part of this record, and marked 'Exhibit No. 1.' That, in carrying out said contract with said Hudson and with others, the defendants advertised in the newspapers the business of the said parties with whom it had contracted for one week, had books called 'directories' printed, and circulated throughout the town in the various homes and business establishments in the city of Winston, which books contain the names of the various merchants with whom the defendant company had contracted, and containing an explanation of the business, and having blank leaves diagramed for the pur-

pose of pasting thereon stamps, which said book is made a part of this record, marked 'Exhibit No. 2.' That the defendant company, in pursuance of this contract marked 'Exhibit No. 1,' promises and agrees to advertise the business of the parties with whom it contracts in various forms and ways, and to induce persons to go to the store of the said parties with whom it contracts, and there buy goods and make demand upon the merchants for trading stamps. That the defendants sold to the said W. B. Hudson, and proposes to sell to all others, certain trading stamps, and delivered to the said Hudson one pad of trading stamps, containing 990 trading stamps, which are small stamps, about the size of a postage stamp, containing certain numbers, and the name of the Sperry & Hutchinson Company, which stamps are exact in form as those which will be found pasted on the first blank leaf of Exhibit No. 2. That these stamps are sold to the merchants for about one-half cent each, and it contracts that, on demand of customers, the merchants will give, for every ten cents worth of goods which he sells for cash to said customers, one of said stamps. That the customer gathers said stamps in this way, and when he obtains, either through his own purchases, or through the purchases of others, stamps to the number of 990, which are pasted in a book in form as hereto attached, marked 'Exhibit No. 2,' he then goes to the storehouse of the Sperry & Hutchinson Company, which is established in the city of Winston, and managed by defendant Beeson, and there selects an article of merchandise. That said articles of merchandise consist of furniture, tableware, and other articles of virtue, which are marked as worth one book, worth two books, etc., meaning that 990 stamps aggregated and put in a book constitute one book, and entitles the holder thereof to get any article of his own selection in said store, which is valued and labeled for one book, and so on. That the Sperry & Hutchinson Company purchase their goods and merchandise in large quantities, and the managers of the various stores make requisition to the general house for goods as they are needed in the various establishments. That the said merchandise of the Sperry & Hutchinson Company are such articles as are usually found in stores of general merchandise, and those labeled 'One book' are approximately worth \$4.50, those labeled 'Two books,' \$9.00, etc., and will compare favorably in price with the retail prices of such articles in any other establishment in the city of Winston. That the defendant, in circulating the directory, which is marked 'Exhibit No. 2,' in order to induce persons to trade with the merchants using the trading stamps, pastes on the first blank page of said directory ten stamps, which is given by defendant company, without consideration, to the persons having the directory. That

these and all other stamps issued by merchants are redeemable by the Sperry & Hutchinson Company at its store in Winston, or at any of its various stores throughout this state or the United States, as above stated. That the defendant company has done business in the city of Raleigh for six months, and at this time $14\frac{1}{16}$ of the stamps issued by the merchants have been presented to and redeemed by the defendant company. That no percentage is found of the number of lapsed stamps, or stamps which are not finally redeemed. That in North Carolina there are at this time storehouses of defendant company located and doing business, among others, in the cities of Raleigh, Greensboro, Durham, and High Point. That there is no time limit to the redemption of said stamps. That they are transferable by those who have them, and are bound, under the contract, to be redeemed, whenever presented in the number above set forth, to any of the various houses of the Sperry & Hutchinson Company. That the contracts of defendant company made in the city of Winston with others, as above set forth, are for a period of one year, except that the contract which defendant made with E. W. O'Hanlon was as follows: That it differs from the contract marked 'Exhibit No. 1,' in that the words, 'parties of the first and second parts mutually agree that this agreement shall be and remain in force for one year from the date of the opening of the store aforesaid of the party of the first part,' were stricken out of the contract, and it was agreed that the contract should continue at the option of either of the parties to said contract, and that the said defendants would not enter into a similar contract with any other drug store in Winston during the continuance of the contract with the said E. W. O'Hanlon. That the defendant Beeson delivered stamps to W. B. Hudson, a grocery merchant in the city of Winston, and the said Hudson delivered said stamps to one of his customers, according to the terms of the contract as above set forth. Defendant only redeems stamps when presented in a full book, consisting of 990 stamps. The portion of the charter of Winston and the ordinance under which defendant was arrested appear in this record as a part of this verdict. And the jurors say that they find the foregoing facts, and, if upon said facts, the defendant is guilty in law, they find him guilty, and, if upon the foregoing facts, the defendant is not guilty, in law, they find him not guilty."

Watson, Buxton & Watson and the Attorney General, for appellants. Glenn, Manly & Hendren and W. B. Crisp, for appellee.

WALKER, J. (after stating the case). It is provided by section 3500 of the Code that cities and towns may levy taxes for municipal purposes on all persons, privileges,

and subjects within the corporate limits which are liable to taxation for state and county purposes. By the revenue act of 1903, pp. 337, 348, c. 247, §§ 51, 76, a license tax of \$20 is imposed "on any gift enterprise or any person or establishment offering any article for sale and proposing to present a purchaser with a gift or prize as an inducement to purchase," and a license tax of \$50 in each county where the business is conducted is imposed "upon every person, firm or corporation, who issues or sells to merchants or manufacturers any trading stamps or other devices to be redeemed by the person issuing or selling the same." The city of Winston could therefore have required the defendant corporation to pay a license tax of \$50, under section 3800 of the Code and section 76 of the revenue act, if it were not for the clause in its charter by which the tax on all subjects not otherwise specifically provided for is limited to \$10. It is not provided in section 3800 that cities and towns may lay taxes to the same amount as the state and counties can impose, but upon the same privileges and subjects as are taxed for state and county purposes. The amount of the tax is left to be determined by the charter of the particular city or town, and, if there is no restriction in the charter, then by ordinance; but, whenever such a limitation upon the city or town to tax is inserted in its charter, the power to tax by ordinance or otherwise must be exercised within the limit thus fixed by the law. Municipal corporations can levy no taxes except such as are authorized by their charters, or, where the charters are silent, such as are otherwise authorized by law. *Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114; *State v. Bean*, 91 N. C. 554; *Latta v. Williams*, 87 N. C. 126. All these cases relate to license or privilege taxes. As to taxes on property, see *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. 845, 7 L. E. A. 539. By these considerations and authorities we are brought to the conclusion that the city of Winston had no authority to lay a privilege or license tax upon the defendant company exceeding in amount \$10, which is the maximum allowed by its charter, unless it has acquired the power to exact the payment of a higher tax by virtue of the provision of section 65, subsec. 11, which authorizes it to impose on "each gift enterprise a license tax not exceeding \$50 for each year."

If the business as conducted by the defendant corporation in the city of Winston is a "gift enterprise," the tax was lawfully imposed; but, if it is not such an enterprise, the defendants were justified in refusing to pay the tax, and the judgment below was right. In this contention between the parties, after a careful examination of the authorities and a consideration of the question involved, we are with the defendants, as we think it must be conceded that, unless the city had the power under the provision of the

charter last mentioned, it was without power to pass the ordinance under which this prosecution was instituted before the mayor, and we must hold that it had no such power under that provision.

In passing upon the question whether the business of the defendant company falls within the meaning of the term "gift enterprise," we must not confine ourselves solely to any definition of those words which is intended to convey to our minds the meaning they have acquired by mere popular use, nor should we give to those words simply a literal interpretation. We must go deeper than that, and ascertain what was the real purpose and intention of the Legislature in using them, or, in other words, what is their legal meaning and import. We would fall short of a full and proper investigation of the question if we should be content with saying that the company's business is in a general sense an "enterprise" at which "gifts" are used as an inducement to attract purchasers to the stores of its customers or patrons, and therefore it must be "a gift enterprise." This would be "sticking in the bark." The words had a well-known and definite meaning in the law when the statutes we have mentioned were passed, and, by a well-settled rule of statutory construction, they must have that meaning in any interpretation we may give to those statutes. The law lexicographers define a "gift enterprise" as a scheme for the division and distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. *Black's Law Dictionary*, p. 539; *Bouvier's Law Dict.* vol. 1, p. 884; *Anderson's Law Dic.* p. 488. In *Lohman v. State*, 81 Ind. 17, it was said, in approving the definition just given, that the words "gift enterprise," as thus understood, had attained such notoriety that the courts would take judicial notice of what is meant when they appear in legislative enactments. It has been said in some of the books and by several of the courts that while the word "lottery" is not a technical term of the law, and to dispose of property of any kind by lottery is not an offense which has a recognized and established legal definition, and that the meaning of the word must be determined by reference to its popular sense and the mischief intended to be redressed by the statutes, yet, when thus construed, it indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. The word "lottery" has been variously defined as a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or other articles, a distribution of prizes won by lot or chance, a kind of game of hazard, wherein several lots of goods or merchandise are deposited in prizes for the benefit of the fortunate, or a sort of gaming contract, by which, for a valuable consideration, one may, by favor of the lot,

obtain a prize of a value superior to the amount or value of that which he risks. *State v. Mumford*, 73 Mo. 650, 39 Am. Rep. 532; *State v. Clarke*, 33 N. H. 334, 68 Am. Dec. 723. Tested by any one of these approved definitions, a lottery always involves the element of chance, fortune, or hazard. It is gaming, pure and simple.

This being established, let us see if it assists us in arriving at the meaning of the words "gift enterprise" as used in the charter of Winston. The rule of construction is that associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found, and the meaning of the terms which are associated with it. This idea is expressed in the maxim *nosctur a sociis*. *Black's Interpretation of Laws*, 135; *Sutherland, Stat. Cons.* § 262. We find not only in the charter under consideration, but in other statutes of the state relating to revenue, that the words "gift enterprise" are used in close and intimate association with the word "lottery." In the revenue act passed at the same session as the charter of Winston, it was provided (*Acts 1891, p. 293, c. 323, § 15*) that a tax should be laid on every gift enterprise, or on any person or establishment offering any article for sale, and proposing to present purchasers with any gift or prize as an inducement to purchase, and on any lottery, whether known as a "beneficial association," "gift concert," or otherwise, provided that the section should not be construed as giving license or as relieving such persons or establishments from any penalties incurred by a violation of the law. This provision has been retained, we believe, in every revenue act passed since that year. It would seem plain, from the connection in which the words are used, and also by the very use of the words themselves, that the Legislature intended to tax only those enterprises, schemes, and offers of bargains which involve substantially the same sort of gambling upon chances as in any other kind of lottery, and which appealed to the disposition or propensity for engaging in hazards and chances with the hope that luck and good fortune may give a good return for a small outlay. The provision refers to gifts or prizes, the precise nature of which are not known at the time, and to cases in which the element of uncertainty is always present. It is restricted, therefore, to the kind of enterprises which appeal to the gambling instinct. The Legislature has not looked upon the business of the defendant company as a gift enterprise, for in the revenue acts of 1901 (*Acts 1901, p. 137, c. 9*) and 1902 it was not taxed as such, but was excluded from that class (section 51), and placed in a class by itself (section 76), and so taxed as to indicate that it was considered a perfectly legitimate and proper business. There is no saving in section 76 concerning criminal prosecution, as there is in section

51. A statute of similar import to the provision in this charter was held in *Commonwealth v. Emerson*, 165 Mass. 146, 42 N. E. 559, to embrace such a scheme or offer of bargains into which chance entered as one of its elements, and by which persons are induced to buy what they do not want in the hope or expectation or upon the hazard of getting something else as a gratuity, which it might turn out they did want, but the exact character of which they do not at the time know. It would be strange indeed that the Legislature should link two such terms together in many statutes, without intending that they should have a kindred meaning, but intending, on the contrary, that they should be diversely construed. We prefer to conclude that the purpose was not to impose a tax upon a perfectly innocent and harmless business, and to place it in the same class and category with lotteries, which have fallen under the ban of an enlightened public sentiment and under the condemnation of the law, but to tax such "enterprises" as partake of the nature of lotteries, and hold out temptations and allurements to the unwary and credulous, or to those who are willing always to take chances on results, in the hope of getting a great deal for a very little.

Having reached the conclusion that the words "gift enterprise," as used in the charter, refer only to such a one as includes the element of chance, we must next inquire whether the business of the defendant company comes within the meaning of those words as thus construed. From the definitions we have already given of a lottery or scheme for the disposition or distribution of prizes or property by chance, it appears that three things must concur in order to constitute it: (1) There must be the purchase of a right; (2) the right must be a contingent one to receive something greater than that which is purchased; and (3) the contingent right must depend upon a lot or chance. We have not been able to discover any one of these elements in the plan devised by the defendant company for the conduct of its business. The right to have the stamps redeemed depends upon no contingency, chance, or lot whatsoever. The person receiving the stamps upon the purchase of goods is not in any degree deprived of his choice or will. Indeed, by the contract he is given full and free exercise of his choice and will. The right of selection among the articles kept by the stamp company in its store is expressly given, and the stamp collector may choose the best or the most valuable, or such a one as may be most useful to him or pleasing to his taste, as he may be minded. The articles are all publicly exhibited, and, before the purchases are made or the stamps collected, any person proposing to buy and to receive the stamps from the merchant has free access to the store, where he may see and examine the goods from which his selection may be made. There is therefore no uncertainty as to the

nature, character, or value of the premium, if we may so call it, with which the stamps will be redeemed. The fact that the stamps are redeemed at a place other than the one where they are issued certainly does not introduce into the scheme any element of chance. We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase; and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not, in law, vary the case, or change the real and substantial character of the transaction. The plan, as outlined in the verdict, seems to be one for advertising the merchant's business and his wares, and enabling him to sell his goods for cash instead of on time. This, it must be conceded, is an advantage to him. It is also a benefit to the customer, who practically receives a discount, and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his means. The stamp company is undoubtedly benefited, also, by the sale of its goods, and anything it may gain by the failure to present stamps for redemption. But where is there anything in the transaction, from first to last, that bears any likeness or resemblance to a lottery or an enterprise of chance? What declared policy of the state or law forbids it? It was suggested that the gain to the stamp company by the failure to present stamps at the store for redemption in goods involved an element of chance. If this is so, the government and the banks are engaged in a prohibited business, for both benefit by the loss of bills and currency which they put in circulation. The same may be said of railroad companies who issue tickets which may not be used, and never come back to them for redemption. Can it be correctly said that this is the result of chance? Many other similar instances might be mentioned, but it has never been supposed that the business in which such gains are made was for that reason unlawful. Nor does the fact that the defendant's business is novel make it unlawful or subject it to taxation.

We turn now to the books, and find that the decisions of the courts of other states are in perfect accord with the view we take of this matter. The Court of Appeals of Virginia has recently considered the same question in *Young v. Commonwealth* (Va.) 45 S. E. 827, in which the court says: "We find nothing in the contract between Sperry & Hutchinson and the defendant, nor the transactions with customers in pursuance of such contract, that is not a legitimate exercise of one's right to prosecute his own business in his own way. As has already been said, it appears to be simply one of many devices fallen upon in these days of sharp competition between tradespeople to attract customers, or to induce those who

have bought once to buy again, and in this respect is as innocent as any other form of advertising." Substantially the same is said in *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916. "It appears," says the court, "to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any form of advertising." In *State v. Shugart* (Ala.) 35 South. 23, the business of the defendant is thus described: "The scheme, if such it may be termed, was only a mode of advertising by those merchants who entered into it. The articles of property given away by the company, of which the appellee was the manager, was not by lot or chance, nor by way of distribution of prizes among share or ticket holders in any chance scheme. We are quite clear that there was nothing in the transaction offensive to the statute against lotteries and gift enterprises." In *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818, will be found an able and elaborate discussion of the question, and an unanswerable argument sustaining the defendant's contention that there is no element of chance in its enterprise, if it may be so called. In that case the court says: "In other words, the act recognizes the right of a person to give away an article of merchandise in connection with, and as an inducement to, the making of a sale of some other article, but provides, in effect, that the giving of such article must be done by him directly, and not through a third person. We fail to see that there is any substantial difference in principle between the two methods, or that either bears any resemblance to a lottery. The element of chance, which is the basal principle in every scheme in the nature of a lottery, is wholly wanting." See, also, *People v. Dycker*, 72 App. Div. (N. Y.) 308, 76 N. Y. Supp. 111; *Com. v. Emerson*, 165 Mass. 148, 42 N. E. 559; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *Long v. State*, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268. Several cases have been decided the same way in the lower courts of some of the other states. They involved the very question we have under consideration, but, as they have not been reviewed by the courts of last resort, we will not make further reference to them.

Since this opinion was prepared, we have read the case of *Lansburgh & Sperry v. Dist. of Columbia*, 11 App. D. C. 512, which has been called to our attention. We do not think anything said in that case, which was necessary to its decision, conflicts with what we have herein decided. The only point in that case was whether the business of the defendants came within the meaning of a "gift enterprise," as defined by the statute of the District. This will appear from the following passage in the opinion of the court: "Without the necessity of declaring that the

acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of 'gift enterprise.'"

The defendant's counsel also contended that the ordinance is not a legitimate exercise of the police power, is discriminating, prohibitory and unreasonable, and is unconstitutional and void. We need not consider this sweeping attack upon the validity of the ordinance, though it is supported by a very learned and able argument, for we have concluded that the business of the defendant, as described in the special verdict, does not come within the meaning of the term "gift enterprise," as used in the charter. The city of Winston, being limited in the power to pass ordinances by its charter and the general law, was without the necessary authority to pass the ordinance upon which this prosecution is based.

The court properly adjudged, upon the special verdict, that the defendants are not guilty. Affirmed.

(134 N. C. 457)

HUGHES et al. v. CLARK et al.

(Supreme Court of North Carolina. March 22, 1904.)

Concurring opinion. For opinion, see 46 S. E. 956.

DOUGLAS, J. (concurring in result only). I am compelled to concur in the judgment of the court, since, however erroneous the opinion of the court may be, it would be manifestly inequitable to compel the defendant to specific performance of a contract for the purchase of land, the use of which this court will not permit him to enjoy. I do not think that the case of *Collins v. Land Co.*, 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720, has any application to the case at bar; but, in any event, my views have been so fully expressed in my dissenting opinion in that case that it is needless to repeat them here.

As to the other question in the case, the solution seems very simple. The plaintiff owns the 10 feet in controversy in fee simple, subject only to whatever rights of easement the public or adjacent proprietors may have therein. When the easement ceases to exist, by abandonment or otherwise, the owner retains the fee, and recovers the unrestricted use of his property. I freely admit that the town cannot entirely close up the street, or sell or give any part of it to any one, but I am not aware of any law by which a private donor or donee can compel

the town to accept a street of any specified width. If the town keeps open a street of suitable width, I see no reason why it cannot refuse to accept or subsequently abandon such part as may be neither necessary nor convenient for public use. This is simply an abandonment of the public easement pro tanto, and in no sense a gift, concession, or conveyance to any one. We all know that a well-paved street of 40 feet would be much more useful than 50 feet of mudholes, and that it would cost proportionately more to pave a wider street than one of less width. It is common knowledge that the city of Washington, in spite of the national aid it constantly receives, found it impossible to bear the expense of paving its residence streets at their original width, and permitted a certain number of feet to be inclosed by the adjacent owners. As there the fee never was in the adjacent owners, they acquired only such permissive use as the city might give them. In the case at bar the fee was already in the plaintiff, and the abandonment of the public use simply relieved that much of his land of the burden of the pre-existing easement.

(135 N. C. 382)

ROBINSON et al. v. CITY OF GOLDSBORO et al.

(Supreme Court of North Carolina. May 11, 1904.)

CITIES—ISSUE OF BONDS FOR WATERWORKS—NECESSITY OF ELECTION.

1. Under Priv. Laws 1901, p. 944, c. 397, providing that the aldermen of a city may issue bonds for waterworks, provided that before they are issued the proposition shall be submitted to the voters at an election, such submission to the voters is a prerequisite to the power to issue the bonds.

Appeal from Superior Court, Wayne County; W. R. Allen, Judge.

Action by J. J. Robinson and others against the city of Goldsboro and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

The city of Goldsboro was incorporated by chapter 397, p. 944, Priv. Laws 1901. Among other corporate powers conferred by the charter, the city was authorized to establish a system of sewerage, waterworks, electric lights, etc., and for that purpose to purchase the system of waterworks and electric lights then in operation in said city. The board of aldermen, for the purpose of providing the means with which to establish or purchase and maintain the said system of waterworks, etc., and for certain other purposes set forth in the charter, were authorized to issue bonds of said city "as and when the board of aldermen may determine * * * from time to time to an amount not exceeding in the aggregate the sum of two hundred thousand dollars and to issue said bonds for any of said purposes, or for two or more, or for all." By section 65 of the

charter, it is provided that, before any of the bonds provided for shall be issued, the proposition shall be submitted to the qualified voters at an election. The time and manner of holding the election are provided for. Pursuant to the provisions of the charter, an election was held, and an issue of bonds voted, for the specified purposes, to an amount fixed at said election. An issue of bonds to the amount of \$2,500 for the purpose of purchasing the electric light plant was approved, and bonds issued in accordance therewith. The total amount of bonds voted and issued was \$110,000. On April 14, 1904, the board of aldermen adopted a resolution, reciting in the preamble thereof the purchase of the electric light plant; that said plant was inadequate to supply the city with light; the public necessity for an increase of its capacity, with additional machinery, fixtures, etc.; the inability of the city to furnish adequate light without contracting a debt for the purpose of enlarging and increasing the capacity of the plant, etc. The plaintiff, in behalf of himself and all other taxpayers of such city, seeks to enjoin the board of aldermen from issuing such bonds, for that the proposition has not been submitted to the voters of the city. The court below granted the injunction, and the defendants appealed.

A. C. Davis, for appellants. F. A. Daniels, for appellees.

CONNOR, J. The defendants rely upon the decision of this court in *Fawcett v. Mt. Airy*, 134 N. C. —, 45 S. E. 1029, to sustain their resolution to issue the bonds without the approval of the voters of the city. It is there held that in the absence of any restrictive provision in the charter, or by special or general legislation, the power may be conferred upon municipal corporations to contract debts and issue bonds for necessary expenses, and that furnishing light and water is a necessary expense. The facts set forth in the pleadings in this case, however, bring it directly within the principle announced in *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948. The charter expressly provides that bonds for the purpose set out may be issued to the amount of \$200,000 when the proposition has been submitted to and approved by the voters. The principle upon which that case is based is thus stated—quoting *Dillon on Municipal Corporations*, § 449: "Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation." The power to issue bonds for the purpose of establishing an electric light plant—and we think this language includes making adequate provision for lighting the

city—is expressly conferred subject to the approval of the qualified voters of said city. Certainly, until this power is exhausted, it excludes any other. It would be an idle thing for the General Assembly to prescribe the method by which and the terms upon which a municipal corporation could issue bonds, if, in disregard of such provisions, it could proceed to do so. It is clearly within the power of the General Assembly to restrict, which, of course, includes the power to prescribe, the terms upon which it may be exercised. Const. art. 8, § 4.

The judgment must be affirmed.

DOUGLAS, J. (concurring in result). In concurring in the result of the opinion of the court, it is perhaps needless to say that, in view of the uniform decisions of this court and my fixed convictions of constitutional obligation, I would have dissented in *Fawcett v. Mt. Airy* had I been present when the opinion was filed. My views have been so recently expressed in my concurring opinion in *Wadsworth v. Concord*, 133 N. C. 601, 45 S. E. 948, that it is useless to repeat them now.

(135 N. C. 385)

JOHNSON v. GRAND FOUNTAIN OF UNITED ORDER OF TRUE RE- FORMERS.

(Supreme Court of North Carolina. May 11, 1904.)

RECORDARI—DISMISSAL—APPEAL—BENEFICIARY ASSOCIATIONS—CHANGING CONSTITU- TION—APPEARANCE.

1. A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case, and have it dismissed.

2. A beneficiary association may not change its constitution, after its contract with a member, to his detriment, except by consent, the burden of showing which is on it.

3. The refusal of the superior court to dismiss a recordari granted as a substitute for an appeal from a justice, while not appealable, being excepted to, is reviewable on an appeal from the court's action in setting aside a verdict and granting a new trial on the ground of an error of law.

4. Any lack of service on defendant is cured by its coming into court, without any special appearance, asking for a recordari, and trying the cause on its merits.

Appeal from Superior Court, Forsyth County; McNeill, Judge.

Action by Nelson Johnson, administrator, against the Grand Fountain of the United Order of True Reformers. From an order setting aside the verdict and granting a new trial, plaintiff appeals. Reversed.

Louis M. Swind and J. S. Fitts, for appellant. J. S. Lanier, for appellee.

CLARK, C. J. Judgment was rendered before a justice of the peace 30th September, 1902. The defendant took no appeal, but at December term, 1902, on application to the

superior court, obtained an order for a recordari and supersedeas. The defendant failed to give bond or to have the case docketed either at that term or at the next succeeding term of the superior court, which was held in February, 1903. At the March term the plaintiff moved to docket and dismiss. This was refused, and the plaintiff excepted. At the September term, 1903, the recordari and supersedeas not having been yet docketed, the plaintiff again moved to docket and dismiss. This was refused, and the defendant was allowed to docket the recordari and supersedeas at that term, and the plaintiff again excepted. A trial by jury was had, with verdict against the defendant, which the court set aside on the ground that he had misdirected the jury to allow sick benefits, whereas, subsequent to the contract, the general order had changed its constitution so as to provide that sick benefits should not be paid by the defendant, but by the subordinate lodges, and the plaintiff excepted.

There was error in both particulars. The recordari was granted as a substitute for an appeal, and, not having been docketed, the plaintiff had a right to docket the case and have it dismissed at March term, 1903, and also at September term. *Clark's Code* (3d Ed.) p. 731; *Brown v. Plott*, 129 N. C. 272, 40 S. E. 45; *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78; *Ballard v. Gay*, 108 N. C. 544, 13 S. E. 207; *Boing v. Railroad*, 88 N. C. 62.

As to the second ground, the defendant could not change its constitution, subsequent to the contract, to the detriment of the other party, except by mutual consent. *Bragaw v. Supreme Lodge*, 128 N. C. 356, 38 S. E. 905, 54 L. R. A. 602. And this was not shown. It was error against the plaintiff to put the burden upon him to show that there was no consent to the change. The opposite was held to be the law. *Hill v. Life Ass'n*, 128 N. C. 463, 39 S. E. 56; *Strauss v. Life Ass'n*, 128 N. C. 465, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Simmons v. Life Ass'n*, 128 N. C. 469, 39 S. E. 966; *Bragaw v. Supreme Lodge*, 128 N. C., at page 357, 38 S. E. 905, 54 L. R. A. 602.

The judge having set aside the verdict and granted a new trial for a supposed error of law, an appeal lies to review him. *Bryan v. Heck*, 67 N. C. 322; *Gay v. Nash*, 84 N. C. 335; *Thomas v. Myers*, 87 N. C. 31; *Wood v. Railroad*, 131 N. C. 48, 42 S. E. 462. The refusal to dismiss not being a final judgment, no appeal then lay, and the plaintiff properly noted an exception, which brings the ruling up for review on this appeal. *Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, and other cases cited in *Clark's Code* (3d Ed.) p. 738.

The defendant's exception to the jurisdiction, taken in this court, that the defendant is a foreign corporation, and not domesticated here, and hence cannot be sued here, is without merit. The summons was served

on its agent. *Jester v. Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447. Even if there had been originally lack of service, the defendant waived objection by coming into court, asking for a recordari, and trying the cause upon its merits. *Clark v. Mfg. Co.*, 110 N. C. 111, 14 S. E. 518. It would have been otherwise if the defendant had entered a special appearance, and, that being overruled, had excepted and gone to trial. *State v. Johnson*, 109 N. C. 852, 13 S. E. 843.

The order setting aside the verdict and judgment is reversed. This renders it unnecessary to direct the dismissal of the recordari. Reversed.

(125 N. C. 373.)

WOMACK v. GROSS et al.

(Supreme Court of North Carolina. May 11, 1904.)

DEPOSITIONS—COMMISSION—OMISSION OF COMMISSIONER'S NAME—FAILURE TO OBJECT IN TIME—PROOF OF GROUNDS FOR ADMISSION—NECESSITY—APPEAL—INSUFFICIENCY OF RECORD—WAIVER.

1. Code, § 1361, provides that at any time before trial or hearing a party may move to reject a deposition for irregularity in taking it. Section 1360 provides that a deposition shall not be quashed for irregularity after the trial begins, where it has been on file long enough to permit earlier objection. A deposition was taken November 2d, and trial had January 25th. The commission under which it was taken omitted the commissioner's name. The opposite party appeared at the taking, cross-examined the witness, and made no objection till after trial was begun. Held a waiver of the defect.

2. Where a deposition is rejected in limine as invalid, it is not incumbent on the party offering it to give evidence of grounds for its admission under Code, § 1358, specifying the instances in which depositions properly taken may be read at the trial.

3. Appellee's agreement that a rejected deposition need not be sent up to the Supreme Court on appeal "because not material to the decision," admits that the rejected evidence was material, so that the failure to send up the deposition will not prevent a reversal for error in its rejection.

Appeal from Superior Court, Rutherford County; E. B. Jones, Judge.

Action by Q. L. Womack against J. C. Gross and others. Judgment for plaintiff, and defendants appeal. Reversed.

Eaves & Rucker, for appellants. McBrayer & Justice, for appellee.

CLARK, C. J. On objection by the plaintiff the court refused to permit the deposition of Susan Gross to be read in evidence on the ground that the name of the commissioner was not inserted in the commission. The defendant excepted. The commission was properly signed, sealed, and issued, and the plaintiff accepted service of the notice, which stated the time and place at which the deposition would be taken, and the name of

¶ 1. See Depositions, vol. 16, Cent. Dig. §§ 309, 316, 338.

the commissioner. Before said commissioner the plaintiff appeared without exception, and cross-examined the witness. The deposition was taken November 21, 1903, and the trial took place January 25, 1904. There was no exception to the deposition till after the trial began. The Code, § 1361, provides how and when an objection on account of irregularity may be made. Section 1360 provides that no deposition shall be quashed for irregularity after a trial begins, where the deposition has been filed sufficiently long before the trial to permit objection to be made sooner. The irregularity in failing to fill in the name of the commissioner to whom the commission was issued, and who duly took and returned the deposition, was waived by the plaintiff appearing before him by counsel without exception, and cross-examining the witness, and by not making any exception till after the trial was begun. *Willeford v. Bailey*, 132 N. C. 403, 43 S. E. 928 (where the commissioner was not named in the notice); *Davison v. Land Co.*, 118 N. C. 369, 24 S. E. 14 (where the commission was neither signed nor sealed); *Carroll v. Hodges*, 98 N. C. 419, 4 S. E. 199; *Woodley v. Hassell*, 94 N. C. 159; *Barnhardt v. Smith*, 86 N. C. 480; *Kerchner v. Reilly*, 72 N. C. 173. The deposition having been rejected in limine for the reason given, it was not incumbent upon the defendant to put in evidence grounds, under section 1358, for its admission, for that would have been a vain thing to do after the deposition had been already rejected as invalid. It is also true that, when evidence is rejected, the party offering it should state its purport, or send it up if written (as a deposition), that the court may see that it was competent and relevant, and that its rejection was injurious, and not merely harmless error. *Straus v. Beardsley*, 79 N. C. 59. But the agreement of the appellee that the deposition should not be sent up "because not material to the decision" is an admission that failure to send it up should not be prejudicial to the appellant, and, in effect, that the rejected evidence was material, if wrongly rejected.

For the error in rejecting the deposition, there must be a new trial.

DOUGLAS, J. (concurring). I concur in the opinion of the court upon the ground therein stated that "there was no exception to the deposition till after the trial began." I am very much influenced in this view by the reasoning of the court in *Shutte v. Thompson*, 15 Wall. (82 U. S.) 151, 21 L. Ed. 123, where the deposition was taken before an officer not authorized by law. The court said, on page 159: "It is to be observed that the objections made are all formal, rather than substantial. Still they are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect. But it is obvious that all the provisions made in the statute re-

specting notice to the adverse party, the oath of the witness, the reasons for making the deposition, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was, and if by his waiver he has misled his antagonist; if he refrained from making objections known to him at a time when they might have been removed, and until after the possibility of such removal had ceased—he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent, but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." In the case at bar it appears that the deposition was taken on the 21st day of November, and that the trial took place on the 25th day of the following January. This apparently gave the plaintiff ample opportunity to examine the deposition and object to any irregularity of form or substance. I do not mean to say that a failure to object in proper time would validate a blank commission. Merely formal irregularities may be cured, and substantial rights may be waived, but it is impossible to validate that which has no legal existence. The plaintiff's conduct does not have the legal effect of creating a commissioner, but is construed by the court, in the furtherance of substantial justice, into a consent to the taking of the deposition under the circumstances under which it was taken. By withholding all objection when he knew the facts, or by reasonable diligence might have known them, until it was too late to remedy defects which might otherwise have been remedied, he is deemed to have acquiesced. A void commission is essentially different from a defect in notice. The only object in the latter is to give the opposite party a reasonable opportunity of attending. If he actually attends, and proceeds with the examination, the object of the notice is attained. This is not so with other irregularities, which he generally has no means of knowing until after he does attend. Hence his attendance is not necessarily a waiver as to them; but even then he should assert his right of objection in good faith and in due time. This seems to be the essential principle aimed at by sections 1360 and 1361 of the Code.

(135 N. C. 423)

SETZER & RUSSELL v. DEAL.

(Supreme Court of North Carolina. May 17, 1904.)

BILLS AND NOTES—BONA FIDE PURCHASERS—FACTS PUTTING ON INQUIRY.

1. Knowledge on the part of a bona fide purchaser of a note of the assignor's crookedness in business matters does not defeat the purchaser's title, or charge him with the duty of making inquiry about the note.

2. The fact that the firm in which the assignor of a note was a partner had its place of business next door to the purchaser's place of business was irrelevant on the question of the purchaser's character as a bona fide holder of the note.

Appeal from Superior Court, Catawba County; Shaw, Judge.

Action by Setzer & Russell against A. A. Deal. From a judgment for defendant, plaintiffs appeal. Reversed.

E. B. Cline, for appellants. Self & Whitener and T. M. Hufham, for appellee.

PER CURIAM. All the evidence was to the effect that the defendant executed two notes to the Deering Harvester Company—one in the sum of \$50, and the other in the sum of \$55—for an Ideal binder sold by that company to him; that those notes were destroyed in the presence of the defendant by Yoder, and that thereupon the defendant executed the note sued upon in this action. Yoder claimed to be one of the firm of the Hickory Implement Company, and testified that he indorsed the same to the plaintiffs for value. The defendant attempted to prove that Yoder and the plaintiffs conspired to cheat the Deering Harvester Company by destroying the evidence of the indebtedness of the defendant to that company, and in taking the note of the defendant for the amount. There is abundant evidence in the case going to show that Yoder practiced a fraud upon the Deering Harvester Company in the transaction, but we can see from the evidence only one suspicious circumstance tending to prove the complicity of the plaintiffs in the matter, viz., that, according to the defendant's testimony, after the plaintiffs alleged they bought the note sued upon, the defendant called upon the plaintiffs, and asked them if they had bought the note from Yoder, and, if so; what they paid for it, and they declined to answer the questions. That was, as we have said, after the alleged purchase of the note. The defendant, with the purpose to show that the plaintiffs were in possession of such facts as should have put them on inquiry as to the title of Yoder to the notes sued on, asked Setzer, one of the plaintiffs, if he did not know at the time of the transfer of the notes that there were charges against Yoder of crookedness in business transactions. And the witness was further asked for the same purpose if he tried to find out

anything else about the note, and, further, if he knew the Hickory Implement Company did business next door to the plaintiffs. The witness was compelled to answer that he had heard there were some charges against Yoder; that he did not make inquiry about the note or the plaintiffs' title to it; and that he did know that the Hickory Implement Company conducted business next door to the plaintiffs. We are of the opinion that the evidence was incompetent. The defendant had executed the note. It was not due when it was transferred, and the plaintiffs had testified that they had given \$100 for it, and knew nothing, nor had heard anything, to its dishonor; and the defendant had introduced no evidence in contradiction. The purchase of the notes seems to have been made for value, in good faith, and in due course of business. Any knowledge on the part of the purchaser of the assignor's crookedness in business matters could not be allowed to defeat the rule of law which gave to a purchaser of a note for value, in good faith, and in regular course of business, the title to the property. It would be almost impossible for the business of banking to be carried on if it was incumbent that bank officers, whenever negotiable paper was offered for discount or sale, inquire into whether any of the parties to be charged were crooked in their business methods.

We cannot see what connection the fact that the Hickory Implement Company did business next door to the plaintiffs could have to do with the matter. Neither in fact nor in law did it have any connection with the matter. We see nothing in the evidence, as we have said, which put the plaintiffs upon notice to look into or find out anything about Yoder's right to the note. "What circumstances will amount to actual or constructive notice of any defect or infirmity in the title to the note, so as to let it in as a bar or defense against a holder for value, has been a matter of much discussion, and of no small diversity of judicial opinion. It is agreed on all sides that express notice is not indispensable, but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder upon inquiry." Story, *From. Notes*, § 197. The same principle of law was held in *Lottin v. Hill*, 131 N. C. 105, 42 S. E. 549.

New trial.

(135 N. C. 429)

FOY v. CITY OF WINSTON.

(Supreme Court of North Carolina. May 17, 1904.)

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—HITCHING TIMBERS.

1. Since under the system of procedure in force in North Carolina there is no general verdict, but the jury is required to respond to issues, a request to charge that "plaintiff cannot recover" is properly refused.

¶ 1. See *Bills and Notes*, vol. 7, Cent. Dig. § 825.

2. Where, in an action for injuries, there was no conflict in the evidence, and from the facts only one inference could be drawn, the question of negligence was for the court, and should not have been submitted to the jury.

3. Plaintiff, a blind man, unattended, attempted to cross a street between regular crossings, and ran against a strip of timber 2 inches square and about 10 feet long, nailed lengthwise along the street across two electric light poles set in the outer edge of the sidewalk, about 4½ or 5 feet above the ground. The strip had been in that place for about six years, and was used for hitching animals, and did not obstruct any one passing along the sidewalk or along the street. *Held*, that the presence of such strip under such circumstances did not constitute negligence on the part of the city.

Appeal from Superior Court, Forsyth County; Hoke, Judge.

Action by Pleasant Foy against the city of Winston. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Watson, Buxton & Watson, for appellant. Lindsay Patterson, for appellee.

OLARK, C. J. The plaintiff, a blind man, and unattended, attempted to cross the street, not at a regular crossing. There was a row of electric light poles on the outer edge of the sidewalk, and to two of such poles, which were about 5 feet apart, was nailed a strip about 2 inches square and about 10 feet long, which projected beyond one pole about 3 feet and some 6 or 8 inches beyond the other pole. This strip was nailed 4½ feet or 5 feet above the ground, and had been there some six years, and was used for a hitching post, being on the edge of the sidewalk around the courthouse square. The strip did not obstruct any one passing along the sidewalk or along the street. The plaintiff, coming down the walk from the courthouse, instead of turning to the left or right and going to the corner of the square where the street crossings are, attempted to go diagonally across the street at that point, and, not discovering by the use of his stick that there was any strip nailed from one post to the other, ran against it, and was hurt. Why he should have run against it with such impetus as to be seriously hurt (if he was) does not appear. "The defendant asked the court to hold as a matter of law that the plaintiff could not recover, and to so charge the jury. The court declined to so hold or charge, but left the question to the jury to decide on the entire testimony whether there was negligence on the part of the defendant in causing the injury. The defendant excepted." There was no error in refusing to charge that "the plaintiff cannot recover." This instruction is not applicable to our present system, under which there is no general verdict, but the jury respond to issues. *Vanderbilt v. Brown*, 128 N. C. 501, 39 S. E. 36; *Bradley v. Railroad*, 126 N. C. 740, 36 S. E. 181; *Willis v. Railroad*, 122 N. C. 909, 29 S. E. 941; and several other cases there cited. But the judge erred in "leaving the question to the jury to decide on the entire testimony whether there was negligence on the part of the defendant in causing the injury." There was no conflict in the evidence, and when the facts are known, and only one inference can be drawn from them, negligence is a question of law for the court. We do not see where in the defendant was negligent. The strip nail-

ed to two electric light poles standing along the outer edge of the sidewalk around the courthouse square did not impede travel along the sidewalk or along the street, nor interfere with those passing from one side of the street to the other at the regular and usual crossing places. The strip, used as a hitching rack, was a convenience to those coming to the courthouse on business otherwise than on foot, to have some place to hitch their horses, and it was no inconvenience to any one else. Those living in the country, or too far from the courthouse to walk, are entitled to some consideration for their convenience as to hitching their animals. The strip had been there, used for this purpose, and without complaint, so far as shown, for about six years. There was no negligence of the defendant shown, and it was the plaintiff's own fault that, blind and unattended, he attempted to cross the street at other than one of the regular crossings provided for the public. In an action by this same plaintiff against the defendant for a different injury (126 N. C. 381, 35 S. E. 609) it was held that it was not negligence per se for him to pass along the public sidewalk without a guide, provided he used ordinary care; adding that "ordinary care on the part of a blind man means a higher degree of care than would be required of a person in possession of all his senses." We did not mean to be understood as giving the plaintiff permission to leave the sidewalk and public crossings provided for pedestrians, and to plunge across the streets at any point he chose. Besides, instead of using a "higher degree of care than would be required of a person in possession of all his senses," he used less, since no one in possession of his eyes with ordinary care would have run against the horse rack. We are, however, not resting the decision upon the contributory negligence of the plaintiff, but upon the ground that no negligence has been shown on the part of the defendant.

Error.

DOUGLAS, J. (concurring in result). The opinion of the court says: "When the facts are known, and only one inference can be drawn from them, negligence is a question of law for the court." I know there are precedents tending in that direction; but it seems to me, on the better and greater weight of authority, that the rule is too broadly stated, even if intrinsically correct. Under the rule of "the prudent man," which seems now to be meeting with practically universal acceptance, negligence, especially in its proximate relation to the injury, is a mixed question of law and fact for the determination of the jury. The court can in proper cases direct the plaintiff to be consulted, on the ground that there is no evidence tending to prove negligence; but any intimation that the court can weigh the evidence and harmonize conflicting inferences, and then say that negligence has or has not been proved, either on the part of the plaintiff or the defendant, is a proposition too dangerous in its tendencies to admit of my approval.

(125 N. C. 400)

WESTBROOKS et al. v. WILSON et al.
(Supreme Court of North Carolina. May 11, 1904.)

WILLS—UNDUE INFLUENCE—INSTRUCTIONS.

1. On an issue of *devisavit vel non*, the court, after correctly defining mental capacity requisite to make a will, and stating the test thereof, and what constituted undue influence, charged that the caveators contended that, if testator had sufficient mind to know the consequences

of his act, yet his mind was weak, and he was surrounded by the beneficiaries of the will, whose influence, domination, and control over him were such as to put him in fear and coerce his conduct, and by these means his will was perverted from its free action, or thrust aside entirely, and the will of the beneficiaries substituted; that the caveators must show by the greater weight of evidence that these influences existed, and the beneficiaries were successful in procuring the making of the will as it was made; and that if the jury found that testator lived an adulterous life with his mistress (mother of the beneficiaries), recognizing her illegitimate children by him, and abandoning his legitimate ones, these facts would not, alone, show undue influence and coercion, but might be considered in passing thereon. *Held* that, in view of the whole charge, error in instructing that, if the jury found the will was "influenced" by the beneficiaries, they would find for the caveators, was not ground for reversal.

Appeal from Superior Court, Rutherford County; E. B. Jones, Judge.

Proceedings by Lottie Wilson and others for the probate of a will, in which J. F. Westbrooks and others appear as caveators. Judgment for the caveators, and the propounders appeal. *Affirmed*.

This was an issue *devisavit vel non*, the caveators being the children and only heirs at law of the alleged testator. The propounders were the children of one Lottie Wilson, to whom the larger portion of the estate was given in the alleged will. The caveators alleged and introduced evidence tending to prove that their father, at the date of his will, was 82 years of age; that by reason of dissipation, sickness, and old age, his mental and physical powers were so much impaired that he was incapable of making a valid will or other disposition of his property; that, if not legally incapable of doing so, he was the victim of fraud and undue influence exerted over him by Lottie Wilson, with whom he lived in an illicit relationship, and of her two sons, who were bastards, living in the same house; that the said Lottie Wilson, an unchaste, immoral woman, wielded an almost irresistible influence over him; that, by reason of his age, condition of health, and an accident sustained by being thrown from a mule, he was easily influenced by said Lottie Wilson, who had absolute control over him; the two sons of said Lottie were named as executors to the alleged will; that he was coerced and compelled to sign it by threats and other undue influence of the said parties. The propounders, admitting the age and infirm condition of the alleged testator, denied that he was incapable of executing the will, or that any undue influence or coercion was exerted over him. The usual issue was submitted to the jury, to which they responded in the negative, and from the judgment rendered thereon the propounders appealed.

Eaves & Rucker, for appellants. McBrayer & Justice, for appellees.

CONNOR, J. The only exception and assignment of error in the record is directed to

the eighth special instruction given in response to the prayer of the caveators, to wit: "The burden is upon the caveators to establish fraud or undue influence, and, in passing upon this question, it is your duty to take into consideration the relation of the alleged testator to the devisees; his age and state of health at the time; the circumstances surrounding him, and the manner of disposition of such property; and if, from all the circumstances surrounding the execution of the said paper writing, you shall find that the said paper writing was influenced by the beneficiaries, or any of them, then you will answer the issue, 'No.'" The criticism of this instruction is to the use of the word "influenced," in the concluding sentence, in the absence of any qualifying word. The propounders say that thereby the jury were instructed to return a verdict in condemnation of the will if they found that the alleged testator was in any way or to any extent influenced to execute it by the propounders. The exception is well taken, and must be sustained, unless, as contended by the caveators, the error is rendered harmless by what is said in other portions of the charge. That a person may, by proper influences, be induced to make a valid disposition of his property, is well settled. As if such influences be addressed to his sense of justice, his affection, or his relation to other persons, there can be no possible valid objection, either in law or morals. The kind and degree of influence which the law denounces as undue, and therefore vitiating, are such as overrule and control, dominate and direct, the mind and will of the person operated upon. *Wright v. Howe*, 52 N. C. 412. It is a fraudulent influence which controls the mind of the testator so as to induce him to make a will which he would not have otherwise made. *Marshall v. Fliinn*, 49 N. C. 199.

The caveators make no contention in regard to the law, but direct attention to the entire charge of his honor, and say that, when read as a whole instruction, it is impossible for the jury to have been misled by the failure at this point to use the word "undue," or some other appropriate term. It is settled that if a charge is contradictory, in presenting material aspects of the law, a new trial will be awarded. This must be so, because this court cannot know to what extent the jury is misled or confused. *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217. It is equally well settled that when, reading the entire charge, it is manifest that the jury could not, in any reasonable view, have misunderstood the real matter in controversy, or the law bearing thereon, a new trial will not be awarded. To the criticism made of the charge in *Lewis v. Sloan*, 68 N. C. 557, this court said: "But upon a consideration of the instructions as a whole, we think they called the attention of the jury, as fairly as could be expected, under the circumstances, to the material questions upon which they

were to pass." The same rule is announced and followed in *Dills v. Hampton*, 92 N. C. 565, and *State v. Keen*, 95 N. C. 646.

His honor's charge was very full and clear. There is no possible criticism to be made of it—certainly not by the propounders—except in the particular pointed out. He gave the jury a full and clear statement of the contentions of the parties and of the testimony. He also stated correctly the definition and test of mental capacity requisite to make a will, and of what constituted such undue influence as would invalidate a will. He further said that "the caveators contend that if you should find that at all times the testator had sufficient mind to apprehend, understand, and know the consequences of his act in making the will and disposing of his property, yet the evidence shows that the testator's mind was very weak and feeble; that his disease was such as to weaken his mind; that, being weak in body and mind, he was surrounded by the beneficiaries of the will; and that their influence, domination, and control over him were such as to put him in fear, to coerce and influence and force his conduct in writing the will as it was made; and by these means the will of the testator was perverted from its free action, or thrust aside entirely, and the will of the beneficiaries substituted for the will of the testator. The caveators must show to you, by the greater weight of evidence, that these infectious influences existed, and that they (the beneficiaries) were successful in procuring the making of the will as it was made. If you find as a fact from the evidence that the testator lived an adulterous life, cut loose and abandoned his children begotten in lawful wedlock, and lived entirely or a greater part of the time with Lottie Wilson, his mistress, treating her as his lawful wife, and recognizing the children begotten by her as his offspring, these facts and circumstances alone would not be sufficient to show fraud, undue influence, and coercion in making the will; but you may consider them, along with other facts and circumstances, in passing upon the question of fraud, undue influence, and coercion, which is alleged by the caveators to have existed at the time of the execution of the will. If you find there was no fraud, undue influence, coercion, or threats which procured the execution of the will, and that the testator had mental capacity to make the will on the 24th of February, 1903, it would be your duty to answer the issue 'Yes.'" We think that, in view of this clear and explicit instruction in regard to the kind and degree of influence which would invalidate the will, the jury could not have understood his honor to say or to mean that any other test should be applied to the will, or that they should disregard all that he had theretofore said to them upon that point. The language of Mr. Justice Montgomery in *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810, is directly in point: "If the charge, on

the whole, was not full and clear on the point to which the exception is directed, we would have no hesitancy in ordering a new trial for the reason set out in the exception. But upon reading the whole charge, it is perfectly clear that on this point the jury could not have been misled. The language used by the judge, when taken in connection with the balance of the charge, was so manifestly an inadvertence that it could have produced no harm."

After a careful examination of the entire record, we find no reversible error. While it is not our province to pass upon the verdict, we think that it is amply supported by the evidence sent up to this court. We are not sure that his honor should not have told the jury that if they found the facts in regard to the age, mental and physical condition, habits, etc., of the testator, coupled with his relations with Lottie Wilson and her sons, to be as contended by the caveators, the burden of proof would have been on them to rebut the presumption of undue influence. Wills made by men under such conditions and surroundings should be sustained only when it clearly appears that they are the offspring of a sound and disposing mind, free from the baleful influence of those who have obtained control of the maker. There is no error.

DOUGLAS, J. (dubitante). I fear we are too much influenced in this case by its intrinsic equities, and that, in our desire to prevent injustice, we are ignoring those settled principles of law which experience has shown to be essential to the permanent administration of justice itself. It is always dangerous to stretch general principles too far to cover particular cases. A late eminent statesman, who was regarded as somewhat inflexible in his opinions, said that he was afraid to stretch a principle or a blanket too much at the edges, as he might split it down the middle. This case goes beyond *Crenshaw's Case*, 120 N. C. 270, 26 S. E. 810, because there the error and correcting portion of the charge were in a consecutive paragraph. I fear it comes within the rule laid down in *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730, and *Id.*, 132 N. C. 99, 43 S. E. 585.

(135 N. C. 348)

WILSON et al. v. GREEN et al.

(Supreme Court of North Carolina. May 11, 1904.)

LAW AND EQUITY—DISTINCTIONS—ABOLITION—ADEQUATE REMEDY AT LAW—INJUNCTION—TAXATION—ASSESSMENTS—REVIEW.

1. Notwithstanding the abolition of the distinction between actions at law and suits in equity, the distinction between legal and equitable principles has been retained, so that a court of equity will not assume jurisdiction where there is an adequate and complete remedy at law.

2. Acts 1903, p. 355, c. 251, providing for

¶ 2. See Taxation, vol. 45, Cent. Dig. § 1223.

the appointment of discreet freeholders in each township to list property for taxation, which assessments are required to be returned to the county commissioners; creating a board of equalization, which is required to hear complaints, and revise the tax lists and assessments, with power to alter the same, to equalize the burden of taxation, and providing that the assessment so equalized shall be made subject to review by the state tax commissioners—creates a plain, complete, and adequate remedy for the review of tax assessments, and precludes a taxpayer from resorting to equity to restrain the collection of a tax on the ground that his property has been fraudulently assessed.

Appeal from Superior Court, Wake County; W. R. Allen, Judge.

Action by F. H. Wilson and others against A. H. Green and others to restrain the collection of a tax assessment. From a judgment dissolving a temporary injunction, plaintiffs appeal. Affirmed.

This action was brought by the plaintiffs, in behalf of themselves and all other taxpayers of Raleigh township and the city of Raleigh who will come in and make themselves plaintiffs, to declare null and void the valuation and assessment of real property in said township and city for taxation as shown by the lists of the assessors made in the year 1903 for the years 1903-1904, and further to enjoin the board of commissioners of the county of Wake and the city of Raleigh from levying any tax based upon the said assessment, and the sheriff of Wake county from collecting any tax levied upon the valuation of real property for taxation in the township and city. The pleadings in the case and the evidence, which is in the form of affidavits, exhibits, and depositions, are very voluminous, but it will not serve any useful purpose for us to state at length their contents. A substantial statement of the grounds upon which the plaintiffs base their right to relief will be sufficient to present the point in the case. The plaintiffs allege that the commissioners appointed three list takers and assessors for Raleigh township at the meeting of the board in April, 1903, but that they were not "discreet freeholders in said township," as the law requires they should be, in that they had no such knowledge or experience in respect to the value of real property in said township as would render them competent to value the same for taxation, and that they were not freeholders in the township. It is further alleged that the board did not act together in fixing the value of property, but in many instances the valuation was made by one member, and in some cases by two members of the board, and merely acquiesced in by the said member or members, who took no part in the valuation, without having had any view of the property. Plaintiffs further allege that the board of list takers and assessors, and the board of equalization, to whom they made their return, instead of to the board of commissioners, as required by law, acted partially, arbitrarily, fraudulently, and oppres-

sively in the discharge of their respective duties, and that plaintiffs and other taxpayers had no fair or reasonable opportunity to be heard in their own behalf concerning the valuation of their property, though they had requested the board of equalization to grant them a hearing, and that, by reason of the unlawful and wrongful conduct of the two boards, the real property in the said township was not fairly and uniformly assessed as required by the law, but grossly excessive, unequal, and discriminating valuations were placed thereon, and that the property of the plaintiffs and of those of the other taxpayers of the township who are similarly situated will not be "taxed by a uniform rule" and according to its value. Other grave and serious charges are made against the boards, but it is not necessary that they should be set out. The defendants, in their answer, which is full and explicit, deny all of the material allegations of the complaint, and aver that the board of list takers and assessors and the board of equalization acted fairly, impartially, and justly in the performance of their duties. They set forth with much detail the manner in which the property was valued, and how the assessments were afterwards adjusted and equalized. They allege that the assessment in force prior to the month of June, 1903, was far below the true value of the property, and that the increase in valuation was made only when it was found that property had been undervalued. They further aver that every taxpayer had a fair opportunity to be heard before the board of equalization, and, when any complaint of excessive valuation was made, it received full consideration from the board. They admit that O. D. Arthur, a member of the board of list takers and assessors, is not a freeholder in Wake county, but owns real property in the county of Carteret. The case came on to be heard before Judge W. R. Allen upon motion of the plaintiff for an injunction to the hearing, a restraining order having been previously granted by Judge Peebles, when an order was entered refusing the motion, and the plaintiffs excepted and appealed.

Busbee & Busbee, Battle & Mordecai, and Peele & Maynard, for appellants. Armistead Jones & Son, W. L. Watson, B. M. Gatling, and Argo & Shaffer, for appellees.

WALKER, J. (after stating the case). While, under our present procedure, we have but one form of action, the difference between actions at law and suits in equity having been abolished, yet the distinction between legal and equitable principles has been fully retained, and equity has no jurisdiction when there is an adequate, complete, and certain remedy at law; and it is equally well settled as a rule of the court of equity, which still obtains, that there will be no interference by injunction when there is a

sufficient remedy at law. This simple and elementary doctrine is applicable to all cases when the complaining party can have adequate relief by the prosecution of his legal remedy in the courts, or when relief can be obtained by resorting to those methods of procedure pointed out by the statute, in cases where a body or tribunal, whether, strictly speaking, a court, or not, is invested with power and authority to hear and determine the matter, and to administer such relief as the nature of the case may require. This principle is especially applicable to controversies arising out of the exercise of the taxing power. If parties will act seasonably, and present their complaints, verified by proper proofs, to the officers of the law clothed with the necessary authority to act in the premises and to redress their grievances, they will find that the remedy afforded by the statute is adequate for the correction of all the errors and injustice liable to be committed by those who are appointed by law to assess property for taxation, in the performance of their official duties. By the act to provide for the assessment of property and the collection of taxes (Acts 1903, p. 355, c. 251), commonly called the "Machinery Act," the board of commissioners of each county is required to appoint three discreet freeholders in each township, to be known as the board of list takers and assessors, who shall list and assess the real and personal property in their respective townships for taxation (section 12), and make a complete return of their assessments, embracing an abstract of the taxable property, to the board of commissioners of the county (section 17). It is further provided that the commissioners and the chairman of the board of list takers and assessors for each township (including wards of cities and towns) shall constitute a board of equalization for the county, and shall meet on the second Monday in July and examine the returns of the list takers and assessors, and equalize the valuation of property liable to taxation, so that each tract of land or lot and each piece or article of personal property shall be entered on the tax list at its true value in money, by raising the valuation when, after investigation, they find that it is too low, and by reducing it when they find that it is too high. This board, it seems, is given ample power and authority to adjust all valuations to a uniform standard, so that the burden of taxation, as it should do, may rest equally upon all persons whose property has been assessed. Power is also conferred upon the board of commissioners of the county, by section 68 of the act, to revise the tax lists and valuations returned to them by the list takers and assessors; and they are authorized to continue in session from day to day, as long as may be necessary to make a complete and thorough revision of the lists and valuations. They are required to hear all persons objecting to the valuation of their property,

or to the amount of the tax charged against them, and they may summon and examine witnesses, including the list takers and assessors, and correct the lists of the assessors as may be right and just, "so that the valuation of similar property throughout the county shall be as nearly uniform as possible." They have the right, upon a like examination and investigation, to raise the valuation of any property that they may decide has been undervalued. In addition to these provisions for securing a fair and just assessment of property, the Legislature has created a board of state tax commissioners, with the power, to use the language of the statute, "to exercise a general supervision over the tax-listers and assessing officers of this state, and to take such measures as will secure the enforcement of the provisions of this act, to the end that all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed at their true value in money," and "to receive complaints as to property liable to taxation that has not been assessed, or has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if found to exist." The board is required to meet regularly on the first Tuesday of March, June, July, August, September, and October of each year, and to adjourn the regular meeting from time to time when necessary for the proper transaction of business and the full performance of the duties of the board; and special meetings may be had at any time and at any place in the state, if deemed advisable. They have the power, under the act, to hear complaints and correct individual assessments, or they can, if they see fit, make a revision of the entire assessment.

It would seem that these provisions of the law are comprehensive enough to afford ample protection to the taxpayer against any excessive valuation, discrimination, or abuse of power by the taxing officers. A thorough and complete system of procedure is established, by virtue of which the taxpayer can be heard upon all questions concerning the valuation of his property for taxation, and be restored to any and all rights he may have lost by any irregular or fraudulent action of the assessors. The board of county commissioners and the board of state tax commissioners, if not the board of equalization, are not only authorized to adjust and equalize the aggregate valuation of property as fixed by the board of list takers and assessors, but they have the power to act as an original assessing body, and review the lists and make an assessment *de novo*. Section 9. It is important that the true extent and scope of the powers of these revising tribunals should be clearly understood and stated, because, if they are possessed of the authority which, as we think, was intended to be conferred upon them, the plaintiffs have failed to avail

themselves of the complete and adequate remedy which is thus afforded by the statute for the redress of their alleged grievances. The remedy is not only certain, but is simple, speedy, and efficacious; and, by every rule of procedure and practice, it must be pursued and exhausted before the complainants can have recourse to the courts for equitable relief, and certainly before the court will extend its aid in preventing or retarding the collection of the public revenues. No rule which does not impose this duty upon the party who seeks injunctive relief against the collection of a tax could be enforced without the most disastrous consequences to the state. The revenues derived from taxation are continually needed for the support and maintenance of government, and the almost fatal results which would follow the issuing of an injunction directed against an entire tax levy should give pause to any court called upon to act in so grave a crisis. We may safely say that it should never be done, except upon the clearest necessity, and when required for the protection of the admitted natural or constitutional rights of the citizen, and even then in such a way as to produce the least harm to the public interests. The controlling principle in such cases is thus stated by the text-writers: "A court of equity will not by injunction pass upon the action of assessors and boards of review. Courts cannot convert themselves into assessors of property for purposes of taxation, and reassess in every case where the assessor has erred in his judgment as to the value of property. In nearly all the states—probably in all of them—provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions." 2 Beach on Inj. § 1204. And if the complainant does "not state that he applied to the board to correct the assessment, nor give a reason for not doing so, nor that he could not obtain relief in that way, if entitled to it," the action of the assessors cannot be called in question by an injunction. *Id.* § 1205. "The fundamental principle applicable to such cases is that a court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly. Where, therefore, a particular manner is provided by law, or a particular tribunal designated for the settlement and decision of all errors or inequalities in behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief, and seek in equity to enjoin the

collection of the tax. And this upon the ground that where one has a complete and ample remedy at law, and slumbers upon his rights, he is estopped from invoking the aid of equity." 1 High on Inj. (3d Ed.) § 493. "If the taxpayer may have adequate relief for excessive taxation by an appeal or application to a board of review or equalization, but neglects to avail himself of such remedy, he will be denied relief by injunction." *Id.* § 493. "If the bill fails to negative the remedy at law, and presents no reasons for not pursuing that remedy, it is demurrable." *Id.* § 491. The doctrine as thus stated by the text-writers has been approved by the courts. *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Hughes v. Kline*, 30 Pa. 227; *Meade v. Haines*, 81 Mich. 261, 45 N. W. 836; *Keigwin v. Commissioners*, 115 Ill. 347, 5 N. E. 575; *Railroad v. Brooklyn*, 123 N. Y. 375, 25 N. E. 476; *Stewart v. Maple*, 70 Pa. 221; *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336; *Bourne v. Boston*, 2 Gray, 494; *Macklot v. Davenport*, 17 Iowa, 379; *Merrill v. Gorham*, 6 Cal. 41; *Meyer v. Rosenblatt*, 78 Mo. 495; *Chapel v. Franklin County*, 58 Neb. 544, 78 N. W. 1062; *Commissioners v. Mining Co.*, 61 Md. 545.

We find a succinct statement of the principle in 21 Am. & Eng. Enc. of Pl. & Pr. p. 436, as follows: "The statutory remedies thus provided to a party to have objections heard, and errors, such as overvaluation and other matters within the jurisdiction of the particular officers and boards, corrected, are exclusive, at least in the first instance. Courts will not inquire into objections which should have been made in this manner, especially in the absence of an attempt to pursue the ordinary remedy." Numerous and pertinent cases decided in the different states are collected in a note to this passage in support of what is therein stated as the law upon the subject. This court, in *Hilliard v. Asheville*, 118 N. C. 852, 24 S. E. 738, which related to a local assessment, adopted and applied the same principle. The present Chief Justice, speaking for the court, says: "At any rate, the act itself prescribed a special method by which the validity and regularity of such assessment can be contested, and the plaintiffs, having that remedy, cannot proceed by injunction. * * * The act being constitutional, whether any particular lot is overassessed or improperly assessed is a matter which must be litigated in the manner and by the proceeding provided for that purpose by the act itself." In *Covington v. Rockingham*, 93 N. C. 139, it was sought to enjoin the collection of a tax upon the ground of overassessment and irregularities, and the court said: "If the tax list, as made up, contained errors, as it may have done, especially as most of the taxpayers failed to render a proper list of their taxable property, as they were notified to do and ought to have done, they were nevertheless not without remedy. They, or any one or more of them, including

the plaintiffs, might have applied to the commissioners to readjust and correct any errors in the taxes charged against them, respectively. They had the power to correct errors. The settlement of the tax list is always more or less a summary proceeding, and ought to be subject to correction upon proper application; and the Legislature, having an eye to this necessity, has wisely provided by statute (Code, § 3823) the largest reasonable opportunity for correcting errors in it, even after it has passed into the hands of the collecting officer. This statute expressly embraces municipal corporations, such as the defendant, as well as counties. It does not however, appear that the plaintiffs sought such relief. If they had done so, any errors might have been corrected."

We conclude, therefore, that the plaintiffs have an adequate remedy for the correction of any inequalities in the assessments, and for the full redress of all the other grievances of which they complain.

We do not deem it necessary or profitable to discuss at length the other questions presented in the argument before us. The defendants have questioned the validity of that provision of the statute requiring the assessors to be freeholders, upon the ground that they are officers, and, by article 1, § 22, of the Constitution, no property qualification can affect the right to hold office. Even if the requirement is valid, the plaintiffs cannot attack the legality of the organization or formation of the board of assessors in this collateral proceeding by showing that the assessors were not freeholders. They should have applied to the board of commissioners to correct their mistake in appointing them, if there was any mistake, or at least have instituted some direct proceeding to test their qualification. *Keigwin v. Commissioners*, supra; *McDonald v. Teague*, 119 N. C. 604, 28 S. E. 158. They had this remedy in addition to the right of applying to the reviewing board for a revision and correction of the assessments. While it is not necessary to decide the question, it may well be doubted if, under section 30, c. 558, p. 795, of the Acts of 1901, an injunction will lie to restrain the collection of a tax because the valuation of property has been excessive or unequal. The party aggrieved seems to be afforded a plain legal remedy by that section, in such a case.

The plaintiffs admit that the assessments for the years immediately prior to June, 1903, were fair, equal, and uniform. If this be so, it would appear reasonable that the plaintiffs should be required to comply with the ordinary requirement or condition precedent to bringing an action to restrain the collection of a tax, by paying or at least tendering what is justly due, which could have been approximately ascertained. In this respect the case is not unlike *Covington v. Rockingham*, supra. 2 *Cooley on Taxation* (3d Ed.) p. 1425; *State Railroad Tax*

Cases, 92 U. S. 575, 23 L. Ed. 663. Judge Cooley says: "Where an injunction has been applied for to restrain the collection of a tax partly legal and partly not, the court has made the payment of the legal tax a condition precedent; and it has been strongly intimated, in a case where it was alleged the assessment had by fraud been made too high, that the payment of what the party conceded would be his just proportion ought to be required before an injunction should issue in order that the proceeding may be as little as possible injurious to the public interests." *Cooley on Taxation*, supra. It is but the familiar application of the universal rule that he who seeks equity at the hands of the court must first do equity. In respect to this requirement, it has been said, in a case not unlike this in principle, that the plaintiffs resist the rule by which the value of their property was ascertained, and then resist the tax. But surely they must pay the tax by some rule. Should they pay nothing, and escape wholly because they have been assessed too high? These questions answer themselves. Before they seek the aid of the court to be relieved of the excessive tax, they should pay what is due, and do that justice which is necessary to enable the court to hear them. It is not sufficient to say in their complaint that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the complaint. Surely something is due, and the state is not to be thus tied up as to that about which there is no contest by lumping it with that which is really contested. This is equity, and is in accordance with the first principles of equity jurisdiction. *State Railroad Tax Cases*, supra. "Where the officers intrusted by law with the duty of making an assessment have fraudulently assessed property above its real value for the purpose of relieving resident taxpayers from their due proportion of the taxes, and have not exercised their judgment upon the valuation, but have arbitrarily made an excessive assessment, while it would seem to be proper to enjoin a sale of land for the excess in such assessments, the injunction should not extend to the entire tax, and should only be allowed upon payment of the proportion which is justly due." 1 *High*, supra (3d Ed.) § 500; *Merrill v. Humphrey*, 24 Mich. 170. This was said in a case where it appeared there was no review or other method of relief provided by statute.

While we must deny to the plaintiffs the relief they seek in their complaint, they have made serious charges against those intrusted with the administration of this important branch of the law. It is true, the charges are denied, but it yet remains to be said that the law should be so justly administered as to avoid even the appearance of wrong. The state has no right to require of the taxpayer any more than his just proportion of the

public burden in the way of taxation, and any exaction which exceeds this limit, and compels him to make a larger contribution than of right he should be called upon to make, is, of course, unjust and unlawful; and the revising tribunals who are invested with the necessary power and jurisdiction should see to it that he is protected against any wrongful exaction arising out of the abuse of power or the misconduct of subordinate officers. A fair assessment of property at its true value, with the lowest possible rate, is the true rule of taxation, for it is just to all, and distributes the burdens uniformly. These remarks are general, and not intended as any intimation of opinion that the allegations of the complaint are true, for that matter is not now before us.

So far as it appears from the pleadings and findings, the plaintiffs cannot prosecute this action with success. It must therefore be certified that there is no error in the ruling of the court refusing to continue the injunction to the hearing. No error.

(135 N. C. 314)

**HINTON v. MUTUAL RESERVE FUND
LIFE ASS'N.**

(Supreme Court of North Carolina. May 3,
1904.)

**LIFE INSURANCE—INSURABLE INTEREST—FRAUD
—EVIDENCE—VARYING TERMS OF WRITTEN
CONTRACT.**

1. Where there are no ties of blood or marriage between insured in a life policy and the beneficiary, there must, in order to constitute an insurable interest, be some contract between the two, the fulfillment of which would be prevented by death.

2. Where it was agreed at the time application for a life policy was made that a person having no insurable interest in the life of insured should pay all the premiums and receive the proceeds of the policy, it was void.

3. A life policy payable to the estate of insured was secured under an agreement between insured and a person having no insurable interest in her life that this person would pay all premiums and take the proceeds of the policy. The policy was assigned to him, and he brought an action thereon as the administrator of assured, but in fact to secure the proceeds pursuant to the original agreement. *Held*, that he could not recover.

4. In an action on a life policy, evidence that the policy was procured pursuant to an agreement that plaintiff, though having no insurable interest in the life of insured, should pay the premiums and take the proceeds, and that plaintiff, though suing as administrator of the assured's estate, was in fact seeking a recovery so as to carry out the terms of the original agreement, was not objectionable as varying the terms of a written contract.

Appeal from Superior Court, Pasquotank County; M. H. Justice, Judge.

Action by John L. Hinton, as administrator of the estate of Mary F. Brothers, deceased, against the Mutual Reserve Fund Life Association. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Hinsdale & Son, for appellant.
Pruden & Pruden and Shepherd & Shepherd,
for appellee.

CONNOR, J. The plaintiff alleges that on November 8, 1897, the defendant corporation issued its policy to Mary F. Brothers for the sum of \$2,000, payable to her executors or administrators, and that she paid the premiums on it as they fell due; that on the — day of July, 1900, the said Mary died intestate, and the plaintiff was duly appointed her administrator; that proper proofs of death were duly forwarded to and accepted by the defendant, and demand made for the payment of the amount of said policy and refused. The defendant, answering, admitted issuing the policy, denied that Mary F. Brothers paid the premiums, admitted the death, and denied that proper proofs of death were forwarded to and accepted by the defendant. The defendant also alleged that certain statements made by the insured in regard to her health were false; that such statements were by the terms of the policy made a part of the consideration upon which it was issued, etc. For a further defense the defendant alleged that, on and before the date of the policy, Mary F. Brothers was the wife of Joseph S. Brothers; that said Joseph purchased from C. L. Hinton, a son of the plaintiff, a tract of land, which he represented to contain 150 acres, for which the said Joseph promised to pay \$2,000; that said C. L. Hinton executed a deed to the said Joseph, and at the same time, and as a part of the transaction, the said Joseph executed his note to C. L. Hinton for \$2,000, and a mortgage on said land to secure its payment; that the plaintiff was the real owner of the land, and that C. L. Hinton acted for his benefit in the sale thereof; that on November 2, 1897, he transferred said note to the plaintiff; that the tract of land contained only 107 acres, and was not worth more than \$500, as was well known to both parties to said contract; that before November 2, 1897, it was agreed between said Joseph and the plaintiff that said Joseph should insure his life for the sum of \$2,000 to secure the said indebtedness; that in consequence of said agreement the said Joseph made application for such insurance, but the application was rejected by the company to which it was addressed; that thereafter, and before the 2d day of November, the plaintiff requested the said Mary F. Brothers to insure her life to secure the said indebtedness; that pursuant to such request she made application to the defendant for a certificate of membership; that, upon the faith of the representations made in the application, a certificate was issued, payable to the estate of Mary F. Brothers; that the plaintiff, having no insurable interest in the life of said Mary, and well knowing that the defendant would not issue a certificate to said Mary, payable to him as beneficiary, wrongfully and unlawfully en-

tered into an agreement with the said Mary and the said Joseph, before or at the date of the application for said certificate, by which it was agreed that the said policy should, on its face, be made payable to the estate of the said Mary, but that the plaintiff should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the plaintiff in full of the indebtedness of said Joseph, and he would cancel the said mortgage, etc.; that at the time of or before making such application the said Mary promised and agreed to assign said policy to the plaintiff; that pursuant to said agreement the plaintiff paid the admission fee, and all dues and assessments levied upon said policy; that in pursuance of said agreement the said Mary on the — day of December, 1897, executed an assignment of said certificate or policy to the plaintiff, a copy of said assignment being attached to the answer; that the husband of the said Mary did not sign or consent in writing to the execution of said agreement, and no notice of the assignment was given to the defendant until after the death of the said Mary F. Brothers; that upon the death of said Mary the plaintiff notified the defendant that he was the holder of said policy by assignment, made proof of claim as such, and requested payment of the amount thereof; the defendant refused to pay the amount to the plaintiff, or to recognize him as assignee, whereupon the plaintiff demanded payment to him as administrator; that, while this action is prosecuted by the plaintiff as administrator, the purpose is to secure the payment thereof for his sole benefit, personally, in pursuance of the said agreement; that the plaintiff had no insurable interest in the life of Mary F. Brothers; and that the agreement between the plaintiff, Joseph S., and Mary F. was a fraud upon the defendant, and, the policy was a wager, and in consequence thereof void.

It is provided in the policy that no assignment or change of beneficiary shall be valid without the consent of the company; that the assignee must have an insurable interest. The plaintiff filed no reply to the new matter set up in the answer. The defendant made a motion, before answering, to set aside the service of summons on the Insurance Commissioner. This was refused, and the defendant excepted. This question has been settled adversely to the defendant, and the exception cannot be sustained. *Moore v. Life Ass'n*, 129 N. C. 31, 39 S. E. 637.

When the cause was called for trial, the defendant tendered a series of issues directed to the several matters set up in the answer by way of defense to the action. The plaintiff objected, and the court declined to submit either of the defendant's issues, to which exception was noted. The court thereupon submitted the following issues:

"(1) Is defendant company indebted to the plaintiff as alleged in the complaint? (2) If so, in what sum? (3) Did Mary F. Brothers obtain the policy of insurance by fraudulent representation?" The defendant excepted. It was admitted that the said Mary was dead, and the plaintiff was her administrator. The plaintiff introduced the policy and so much of the answer as admitted the receipt of proofs of loss, and rested. The defendant introduced Joseph S. Brothers, and proposed to prove by him each and every allegation in the answer, as a further defense, as above set forth. The questions propounded to the witness are set forth in full in the case on appeal, and cover each and every one of said allegations. To this testimony the plaintiff objected. The objections were all sustained, and the defendant excepted. There were other exceptions to the exclusion of testimony in regard to the physical condition of the insured, and it may be that they will not arise upon another trial.

Without entering into a discussion of the several exceptions bearing upon this phase of the case, we think there was evidence proper to be submitted to the jury, under proper instructions, upon the third or some appropriate issue directed to the questions raised by the defense in regard to the condition of the health of the insured at the time the policy was issued, and the representations made by her in the application.

The defendant also offered to prove that Mary F. Brothers was a woman of no property with which to pay life insurance premiums or assessments, and no capacity or ability to earn any money for that purpose. This testimony, upon objection, was excluded, and the defendant excepted. The defendant offered to read the assignment in evidence. Upon the plaintiff's objection, it was excluded, and the defendant excepted. There was evidence tending to show that Mary F. Brothers worked in the field, did washing, picked cotton, and performed other like labor. She died a few months after giving birth to twins. She was illiterate and unable to sign her name.

The plaintiff's contention is that the entire testimony, if admitted, failed to show any defense to the action. If he is correct in this, of course, such testimony was immaterial, and its rejection harmless. The proposed testimony was clearly relevant to the issue, and the witness competent to testify to such facts as were within his knowledge.

It would seem very clear that if the testimony offered by the defendant is true, as we must, for the purpose of disposing of this appeal, take it to be, a fraud was practiced upon the insurance company. It is expressly alleged, and in support of the allegation was proposed to be shown, "that John L. Hinton had no insurable interest in the life of Mary F. Brothers, and, well knowing that the defendant would not issue a certificate of membership on the life of said

Mary F. Brothers, payable to him, as beneficiary, entered into an agreement with the said Mary F. Brothers and the said Joseph S. Brothers, her husband, before or at the date of the application for the certificate of membership or policy of insurance, by which it was agreed that the said policy should on its face be made payable to the estate of the said Mary F. Brothers, but that said John L. Hinton should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the said John L. Hinton, who, upon receipt of the amount thereof from the defendant, should receive the same in full payment of the indebtedness of said Joseph S. Brothers to him, and that he should thereupon cancel and discharge the said mortgage upon the said tract of land.

* * * In the light of the further testimony proposed to be introduced that the real value of the land sold was but \$500, and that the plaintiff paid the premiums and assessments, and within a month after the policy was issued the said Mary assigned it to the plaintiff, and that none of these facts were known to the defendant, although there was a plain provision in the policy that no assignment should be valid until notice given to the company, the defendant was entitled to have an issue submitted to the jury, inquiring as to the truth of the allegations; and, in our opinion, the proposed testimony was material and competent to be heard and considered by them upon such issue.

The defendant further says that the policy was what is known in the books as a wager upon the life of Mary F. Brothers, and therefore void as against public policy. Whatever conflict there may be—and it must be conceded that there is very much—as to what constitutes an insurable interest in the life of a person, this court has adopted a well-defined principle which meets our approval.

Burwell, J., in *Trinity College v. Insurance Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291, after naming several cases, says: "These instances and others that might be mentioned seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life of the insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contract between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated by some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract; and, under its rules, made and enforced

in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object they have in view." *Merrimon, J.*, in *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409, says: "As the insured had no insurable interest in the life of the cestui que vie, the contract was simply a wager." In that case the premiums were paid by the beneficiary. In *Albert v. Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693, the policy was taken out by the insured, and premiums paid by her. This court sustained the policy. We have no disposition to question that case. The writer, if the question was an open one in this state, would feel constrained to follow the authorities holding the contrary view. The decision is sustained by the authorities cited. The testimony proposed in this case was that the agreement was made before or at the time of the application, and that the plaintiff was to pay the entrance fee and all further assessments; he not then having, or expecting to have, any insurable interest in the life of the insured. This is a very different case from one where the insured has taken out a valid policy, paying the premium thereon, and, either as a gift to some friend, or as collateral security to a debt, assigns the policy with the knowledge of the company. The plaintiff was to be paid his debt from the proceeds of the policy, he paying all of the premiums and awaiting her death to reap the profits of his bargain. In *Ruse v. Insurance Co.*, 23 N. Y. 516, *Selden, J.*, says: "A policy obtained by a party who has no interest in the subject of insurance is a mere wager policy. Wagers in general (that is, innocent wagers) are at common law valid, but wagers involving immorality or crime, or in conflict with any public policy, are void. To which of these classes, then, does the wagering policy belong. * * * Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about the event insured against." The learned justice traces the history of the law and its development in England, resulting in the passage of the act of Parliament declaring all such policies void, saying: "My conclusion, therefore, is that the statute of 14 George III avoiding wager policies upon lives was simply declaratory of the common law, and that all such policies would be void independently of that act." *Burbage v. Windley*, supra.

While there are conflicting decisions in this country, a careful examination of them brings us to the conclusion that the foregoing is the sound view of the subject. "Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation." *Insurance Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Price v. Knights of Honor*, 68 Tex. 366, 4 S. W. 633;

Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251. Mr. Justice Field, in *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. Ed. 924, says: "Such policies create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy." May on *Ins.* (4th Ed.) 44, 45.

The plaintiff, however, says that, conceding this to be the law, the insured had an insurable interest in her own life; the policy was valid when issued; the assignment, being invalid, did not affect the integrity of the policy; that the right to maintain this action by the administrator of the insured is not affected by the void assignment. It is held in many cases, and we have no disposition to question the principle, that every person has an insurable interest in his own life, and may insure his life for the benefit of his executors, administrators, or assigns; that such policy, being valid, may be assigned to one having an insurable interest. We do not question the validity of assignments of life insurance policies to a creditor, or the right of the creditor to receive the amount of his debt, together with such sums as he has paid on account of assessments or premiums, or an assignment to one having any other insurable interest. That a creditor has an insurable interest in the life of his debtor is well settled. When the assignment of a policy is made in good faith to secure a subsisting debt, or a present loan, or a debt then contracted, the courts have sustained such assignment, certainly to the extent of such indebtedness and premiums paid out to keep the policy alive. *Cammack v. Lewis*, 82 U. S. 643, 21 L. Ed. 244; *Ins. Co. v. Schaefer* and *Warnock v. Davis*, supra; May on Insurance, 80 et seq. The defense made and the testimony proposed to be introduced go very far beyond the principle upon which these cases rest. The allegation here is that, at and before the application was made, there was an agreement between the plaintiff, the husband, and the insured that the policy, although, in truth and in fact, it was to be for the benefit of the plaintiff, who knew that he had no insurable interest in the life of the wife, and knew that the company would not issue the policy payable to him, should be made payable to the estate of the wife, and immediately assigned to the plaintiff, who was to pay the admission fee and all of the premiums.

In *Keystone M. B. Ass'n v. Norris*, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572, application was made by the assured for, and a policy issued on, her life, payable to her son-in-law, Norris. Pursuant to an agreement made before the application, Norris assigned the policy to one Spangler, having no insurable interest in the life of the insured, who paid all of the assessments. Notice of the assignment was given to the company. Spangler was the medical examiner of the company, and it was for that reason the policy was not

made payable to him. Suit was brought upon the death of the assured by Norris to the use of Spangler. The court said: "If now we admit that Norris had such an interest in the assured as would have warranted him in taking a policy on her life, yet that fact cannot help out the plaintiff's case, since the policy was not founded on that interest, neither was it for the benefit of Norris, but for the benefit of one who had no interest in the insured's life." The principle upon which the testimony offered by the defendant is made material is thus stated by the Supreme Court of Texas in *Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893, quoting from Bishop on Life Insurance: "The question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederate together to procure a policy for the plaintiff's benefit, when he is not, and does not expect to be, a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void. There are respectable authorities which hold that the assignment of the policy, without regard to any pre-existing agreement, to one having no insurable interest, is a fraud upon the company, against public policy, and therefore avoids the policy." This view is strongly stated by Horton, C. J., in *Insurance Co. v. Crum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537. To the suggestion that the attempted assignment was void, he says: "The law does not tolerate attempted frauds any more than it does those that are committed. * * * If the beneficiaries can now recover, they are doubly benefited by the questionable transaction in which they were engaged."

The Supreme Court of Pennsylvania, in *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570, expresses itself in very vigorous terms regarding wagering life insurance contracts in every form: "The very foundation of the doctrine is that no one shall have a beneficial interest of any kind in a life policy, who is not presumed to be interested in the preservation of the life insured. * * * The beneficiary is directly interested in the death of the insured. Moreover, if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. Nor can we see that, did the defendant's case depend upon an assignment directly from Moose to himself, how it could be bettered in the least." The opinion concludes with these words: "So fraught with dishonesty and disaster, and so dangerous even, to human life, has this insurance gambling become, that its toleration in a court of justice ought not for one moment to be thought of." Mr. May, in the last edition of his work on Insurance, comes to the same conclusion: "And although innocent wagers were once sustained, the courts will not now waste their time in discussing the question whether what is sub-

stantially a wager ought or ought not to be held good upon any grounds. Under the influence of a healthy public sentiment, they have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject matter." May on Insurance, 74. It is said, however, that the suit is by the plaintiff as administrator, and the recovery will be for the benefit of the estate of Mary F. Brothers. The record shows that the defendant offered to show that, while the action is prosecuted in the name of the plaintiff as administrator, the purpose thereof is to secure the payment of the policy for the sole benefit of the said John L. Hinton personally, in pursuance of the agreement set forth in the answer. This was excluded. If this were proved, it would be a singular result if by this means the plaintiff can reap the profits of a contract denounced by the law as contrary to public policy. If the agreement alleged to have been made by the parties to the transaction is shown by competent evidence, and found by the verdict of a jury, it would be a reproach to the law if the two living parties can use its process to gather the fruits of their illegal agreement after the death of the one who was the ignorant and passive instrument of the scheme to make profit by her death. The testimony was competent. It is said, however, that to permit the testimony to be introduced violates the rule excluding parol evidence to contradict a written instrument. The proposed testimony in no manner contradicted the terms of the policy. It was offered to prove an agreement collateral to the policy. As his honor excluded the entire testimony offered by the defendant, as immaterial, and as the case was argued before us upon that view, we cannot indicate otherwise than by the general principles announced what portions of it are competent.

The extent of our decision is that the defendant is entitled, if it can, to show that the application was made and the policy obtained under the circumstances and for the purposes alleged, and that the defendant had no notice of the agreement or of the assignment of the policy.

For the refusal to submit the issues tendered by the defendant, or such others in lieu thereof as the court may think proper, and to receive testimony material and tending to prove the affirmative of the issues, there must be a new trial.

WALKER, J. I concur in the result of this appeal, upon the ground first stated by the Court in its opinion, namely, that the defendant is entitled to a new trial because of the erroneous ruling of the presiding judge upon the question as to the condition of the health of the insured at the time she applied for the policy and the same was issued to her, and as to the representations made in the application. This error extends to all the

issues, as a false, fraudulent, and material representation in regard to the state of the insured's health, if found by the jury, will vitiate the policy.

(125 N. C. 338)

KISTLER et al. v. WEAVER et al.

(Supreme Court of North Carolina. May 11, 1904.)

INJUNCTION—REMOVAL OF PERSONAL PROPERTY—ADEQUATE REMEDY AT LAW—STATUTES.

1. Acts 1885, p. 664, c. 401, provides that, in an application for an injunction to enjoin a trespass on land, it shall not be necessary to allege insolvency of the defendant, when the trespass is continuous in its nature, or is the cutting or destruction of timber or trees. Acts 1901, p. 900, c. 663, provides that when there is a bona fide contention as to the title to the land, or trees thereon, no order shall be entered permitting either party to cut the trees, except by consent, until the title shall be determined, and that if the claim of one of the parties is not asserted in good faith, and based on evidence establishing a prima facie title, then, on motion of the other party, if he shall satisfy the court of the bona fides of his claim, and produce evidence showing a prima facie title, he may be allowed by order to cut the trees on giving bond as required by law. *Held*, that neither of these acts has any application to an order requiring defendants to desist from removing lumber unless they first give bond to secure any damages plaintiffs may sustain by the removal.

2. Injunction will not lie where the plaintiffs have an adequate remedy at law.

3. Injunction will not lie to prevent the removal of personal property in the absence of allegation by the plaintiff that the defendants are insolvent.

4. Injunction will not lie when the title to personal property is the sole question involved.

Appeal from Superior Court, McDowell County; Shaw, Judge.

Action by Wilson Kistler and others against A. D. Weaver and others. From a decree for plaintiffs, defendants appeal. Reversed.

J. W. Pless and Zebulon Weaver, for appellants. Avery & Ervin, for appellees.

WALKER, J. This action was brought to recover possession of a tract of land, and damages for a trespass committed thereon, in cutting timber, and removing from the land the cut timber and the lumber into which some of the timber had been sawed. Plaintiffs allege in their complaint that they are the owners of the land, and entitled to the possession thereof, and that the defendants are in the unlawful possession of the same, and are unlawfully and wrongfully cutting and removing timber therefrom, and also removing the lumber into which some of the timber has been sawed. There is no allegation of the insolvency of the defendants. Defendants, in their answer, denied the trespass, and also denied the title of plaintiffs to the land and timber and trees, and especially denied their right to an injunction against removing the lumber. Plaintiffs moved in the court below for an injunction re-

straining the defendants from cutting or sawing any timber trees on the land, and further restraining them from removing any lumber sawed from any timber trees which had been cut on the land. The court granted the injunction, providing, however, that, if the defendants gave bond, payable to the plaintiffs, with good and sufficient sureties, in the sum of \$600, conditioned to secure all such damages as the plaintiffs may recover in the action, they could remove any and all lumber sawed and manufactured from trees cut on the said premises, and, if said bond is filed, the injunction should not apply to the removal of the lumber. To so much of the order of the court as restrained them from removing the lumber without giving bond as set forth in the order, the defendants excepted and appealed.

A court of equity will not enjoin an ordinary trespass, such as entering upon land and working turpentine trees, or cutting and making staves thereon, unless irreparable injury is threatened; that is, one for which there can be no sufficient recompense in money. It is therefore held that in such cases an averment of the defendant's insolvency is necessary, for, if he is not insolvent, and the plaintiff can recover an equivalent in money for the loss sustained by the trespass, the damage cannot in any proper sense be called irreparable. *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *Sharpe v. Loane*, 124 N. C. 1, 32 S. E. 318; *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19. By statute (Acts 1885, p. 664, c. 401) it is provided "that in an application for an injunction to enjoin a trespass on land it shall not be necessary to allege the insolvency of the defendant, when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees." This act, as construed, does not deprive the court of the discretion to require a bond to be given by the defendant to secure plaintiffs' damages, or to appoint a receiver, instead of issuing an injunction. *Ousby v. Neal*, 99 N. C. 146, 5 S. E. 901; *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701. By the Acts of 1901, p. 900, c. 666, it is provided that when there is a bona fide contention as to the title of the land, or the timber trees thereon, no order shall be entered permitting either party to cut the trees, except by consent, until the title shall be determined, and that, if the claim of one of the parties is not asserted in good faith, and based upon evidence establishing a prima facie title, then, upon the motion of the other party, if he shall satisfy the court of the bona fides of his claim, and produce evidence showing a prima facie title, he may be allowed by order to cut the timber trees upon giving bond as required by law. The plaintiffs, in their brief, or citation of authorities, rely upon these acts and the cases in which they have been construed, but we do not perceive how they can have any bearing upon the particular question pre-

sented in this appeal. There was not only no exception to the order of the court so far as it enjoined the defendants from cutting the trees, but the defendants conceded the correctness of the order in that respect, as the plaintiffs had made out a prima facie case. The only exception is to that part of the order requiring the defendants to desist from removing the lumber unless they first give a bond to secure any damages plaintiffs may sustain by the removal. The acts relate to the cutting of timber; and the order of the court, to the removal of lumber, so far, at least, as exception has been taken to it. Even if the plaintiffs could show a good title to the lumber, it would seem that they could not have the defendants enjoined from removing it, because they would have a plain and adequate remedy at law by action, with the ancillary proceeding in claim and delivery, to recover it, or they could recover the value of the lumber in an action for the conversion of it, if they can show that they are the owners of it—a question which is not now before us for decision. The courts will not permit a party to resort to the extraordinary remedy of injunction where there is a simple and ordinary remedy at law for the recovery of the property itself, and especially will such relief be denied when the plaintiff who applies for it is in no danger of suffering any loss by reason of the insolvency of the defendant. An injunction will not issue when the title to personal property is the sole question involved. The question of title cannot be tried in that way. *Baxter v. Baxter*, 77 N. C. 118.

We were not informed upon what principle the ruling of the court in this case proceeded, but, in any view that we have been able to take of the matter, the decision appears to us to be erroneous. The exception of the defendants is sustained. Error.

(135 N. C. 406)

FIDELITY BLDG., LOAN & INVESTMENT ASS'N v. LASH et al.

(Supreme Court of North Carolina. May 11, 1904.)

MORTGAGES — JUDGMENT LIENS — PRIORITY — HOMESTEAD — FORECLOSURE — PARTIES.

1. After the docketing of judgments against one of two tenants in common of a town lot, they both united in a mortgage on a strip 50 feet wide through the center of the lot. Thereafter there was a partition allotting a strip 70 feet wide on one side of the lot to the judgment debtor, a similar strip on the other side to the other co-tenant, and leaving the mortgaged strip undivided. Prior to this partition the judgment debtor had mortgaged his undivided interest in part of the strip which was afterwards allotted to him, and had also mortgaged to a different party his undivided interest in the entire lot. Thereafter execution issued on one of the judgments, and, a homestead having been allotted to the judgment debtor in the 70-foot strip set apart to him, his undivided interest in the 50-foot strip was sold. Thereafter the interest of the other co-tenant in the 50-foot strip was sold under the mortgage, and the mortgagee de-

clared to be entitled to a lien on the homestead to the extent of the value of the judgment debtor's interest in the 50-foot strip. *Held*, that the homestead should have been sold under the mortgage, subject to the lien of the judgments.

2. At a sale under the mortgage covering the judgment debtor's undivided interest in a part of the land afterward allotted to him, the purchaser took the property subject to the lien of the judgments.

3. Though after the death of the judgment debtor the homestead might have been sold under the judgment lien, yet it was proper, all persons interested having been made parties to the proceeding by the mortgagee of the 50-foot strip, to move for a decree of sale in that case.

4. The administrator and heirs of the judgment debtor should have been made parties.

Appeal from Superior Court, Forsyth County; McNeill, Judge.

Suit by the Fidelity Building, Loan & Investment Company against Frank Lash and others, for the foreclosure of a mortgage. From an order denying the petition of A. F. Messick, as administrator of Frank Lash, defendant, deceased, and certain judgment creditors, for the sale of certain property, said petitioners appeal. Reversed.

Watson, Buxton & Watson and L. M. Swink, for appellants. J. S. Grogan, for appellee.

CLARK, C. J. On 11th December, 1891, Frank Lash and Emma Alston were tenants in common of a lot of land in Winston, 200 feet wide by 100 feet deep, subject to the life estate therein of Amanda Lash. On that day a judgment before a justice of the peace was docketed against Frank Lash in favor of Vaughan & Popper for \$50.41 and costs, and three others in favor of Gilmer & Mahler, aggregating \$496.68 and costs. In December, 1892, Frank and Emma and the life tenant gave a mortgage for \$400, for money borrowed, to the plaintiff, upon a strip 50 feet wide running through the center of said lot. The life tenant having died in December, 1894, immediately thereafter there was a partition made; the strip about 70 feet wide on the east side of said lot being allotted to Frank Lash, and the strip about 70 feet wide on the west side being allotted to Emma Alston, and the strip 50 feet wide in the center, which had been mortgaged to the plaintiff, being left undivided. In the meantime Frank Lash, in March, 1893, had mortgaged his undivided interest in part of said 70-foot strip, afterwards allotted to him, to one Tyson, to secure \$125, and in May, 1894, had mortgaged his undivided interest in the entire lot (200x100) to one Brown to secure \$500. In January, 1895, execution issued against Frank Lash on the Vaughan & Popper judgment. The homestead was allotted to him in the 70-foot strip, and his undivided interest in the 50-foot strip was sold, under execution issued upon that judgment, for \$75, and applied upon the Vaughan & Popper judgment. Thus Frank Lash's interest in the lot was reduced to the 70-strip on the east side of said lot upon which his homestead had

been allotted, and against which there was outstanding the lien of the judgments in favor of Gilmer & Mahler, \$496.68 and costs, docketed 11th December, 1891, the mortgage (\$125) to Tyson, March, 1893, and the \$500 mortgage to Brown, May, 1894. The plaintiff began this suit February, 1894, making the above judgment and mortgage creditors and Emma Alston codefendants with Frank Lash, asking a sale of Emma Alston's interest in the 50-foot strip under the mortgage, and that the various liens be adjusted and their rights settled. Proceedings were had which resulted in a sale of Emma Alston's undivided interest in the 50-foot strip, and application of the proceeds to the plaintiff's mortgage, and a judgment, 2d July, 1898, decreeing that the three judgments of Gilmer & Mahler were the first lien upon the homestead tract of Frank Lash; that, by reason of the sale under execution of the 50-foot strip mortgaged to the plaintiff, the plaintiff, "under the doctrine of marshaling," was entitled to a lien upon the homestead of Frank Lash to the value of Frank Lash's interest in said 50-foot strip, not exceeding \$75, balance due on the plaintiff's mortgage, subject to prior lien of judgment creditors, and that the mortgages of Tyson and Brown were also liens; that none of these liens could be enforced till the termination of the homestead estate; and that Brown and Tyson could have a receiver for the rents and profits, to apply upon their several mortgages, which has been done ever since.

Upon motion, on notice issued 6th December, 1899, it was ordered that the part of the homestead covered by the Tyson mortgage, made in March, 1893, should be sold subject to liens of judgment creditors. Upon the coming in of the report, the sale was confirmed, and the defendants excepted. The receiver remained in possession. In July, 1903, Frank Lash, the homesteader, died insolvent, and leaving neither widow nor child. A. F. Messick qualified as administrator, and at September term, 1903, he joined with the judgment creditors in a petition filed in the cause to have a commissioner appointed, and a sale of the homestead property, and application of proceeds in accordance with the terms of the aforesaid judgment of 1898. This motion being refused, the petitioners appealed, and assigned as error the judgment of 1899 confirming the sale under the Tyson mortgage, which was excepted to at the time, and the refusal at September term, 1903, to order a sale by a commissioner, and application of proceeds to the judgment liens, and to make the administrator a party, and to discharge the receiver.

The judgment of 1898, refusing to decree a sale under the mortgage, was based upon a mistaken conception of Vanstory v. Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483. The land should have been sold under the mortgage, subject to the lien of the docketed judgment. The decree adjudg

ing the plaintiff subrogated to a lien upon the homestead to the value of the undivided interest of Frank Lash in the 50-foot strip raises a question which is not here presented, unless and until, under a sale of the property to pay the judgment liens, a surplus should arise, whose application to the balance due upon the plaintiff's mortgage shall be contested by the holder of the Brown mortgage. The sale under the Tyson mortgage by the decree made upon the motion, made in December, 1899, carried the property to the purchaser, subject to the lien of the judgments. The homestead having ceased, the judgment creditors might have sold under the judgment lien, but, as all the parties who could be interested are in court—the cause having been retained “for further orders”—it was very proper to bring the case forward, and ask for a decree of sale. *Harrington v. Hatton*, 129 N. C. 146, 39 S. E. 780. The administrator representing creditors should have been made a party, and also the heirs at law of Frank Lash, as there was a part of the homestead not covered by the Tyson mortgage, though their interest is remote, for, if the judgments and interest should not exhaust the property, the Brown mortgage and the balance due upon the plaintiff's mortgage will be quite sure to do so.

The purchaser under the Tyson mortgage obtained only Tyson's title in the part of the homestead covered by that mortgage, leaving in force the Brown mortgage upon the other part of the homestead, and leaving intact the judgment liens upon the entire homestead tract, which liens are prior to both mortgages.

Error.

(135 N. C. 292)

HOLDER v. CANNON MFG. CO.

(Supreme Court of North Carolina. May 11, 1904.)

MASTER AND SERVANT—DISCHARGE FROM EMPLOYMENT—PROCUREMENT BY THIRD PERSON—ACTIONS—MALICE—INSTRUCTIONS—EVIDENCE—HEARSAY—FAILURE TO OBJECT.

1. In an action by a servant to recover damages from defendant for causing the servant's discharge by his employer, testimony by the servant that when his boss discharged him he told him that he had a letter from defendant, and that defendant wanted him discharged, and that his employer's superintendent told him the same thing, was hearsay.

2. Where hearsay testimony is not objected to, it is before the jury as evidence, and no exception to it is to be heard on appeal.

3. One who causes the discharge of another from the service of a third person maliciously and willfully is liable to the injured party in damages; and to show malice it is not necessary to show actual ill will or hatred, but it is sufficient if the act be done without legal excuse.

4. In an action for damages for causing plaintiff's discharge by his employer, where plaintiff's evidence tended to show that he was discharged by defendant without cause, and was subsequently discharged by his employer, while giving satisfaction in his work, because of a

letter from the defendant demanding his discharge, it was proper for the court to refuse to instruct that the defendant did not wrongfully and unlawfully cause the discharge of plaintiff by his employer.

5. In an action for damages for causing plaintiff's discharge by his employer, a charge that, if the same person was assistant manager of defendant and of plaintiff's employer, and of his own motion directed plaintiff's discharge, the jury should find for defendant, was properly modified by inserting before the concluding phrase, “without demand or direction of the defendant.”

6. In order that a servant may have a cause of action against one who induces his employer to discharge him, it is not necessary that such one procure the discharge by false and fraudulent representations to his employer, but it is sufficient if the act was done willfully, maliciously, and unlawfully.

7. The conduct of a servant in going on a strike and refusing to make up for lost time cannot rightfully be used by his employer to effect his discharge from a subsequent employment.

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, Cabarrus County; McNeill, Judge.

Action by D. M. Holder against the Cannon Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. G. Means, for appellant. Montgomery & Crowell and M. B. Stickley, for appellee.

MONTGOMERY, J. The plaintiff brought this action to recover of the defendant damages for causing him to be discharged from the service and employment of the Gibson Manufacturing Company. There was evidence to the effect that in June, 1903, the plaintiff was employed and at that time in the service of the Gibson Manufacturing Company, and that his work was satisfactory to the company, according to the testimony of W. B. Stafford, the boss of the weaving room in which the plaintiff worked. The plaintiff testified that when Stafford discharged him he asked Stafford the cause of the discharge, and Stafford replied that he had had a letter from the Cannon Manufacturing Company, and that that company wanted him discharged, but that he hated to do it. He also testified that B. A. Price, the superintendent of the Gibson Mill, told him that he had a letter from the Cannon Company, and had to follow it. He said further that he asked Roberts, the boss weaver at the Cannon Mill, whether he or Barnhardt, assistant manager of the defendant, wrote the letter, and that Roberts made no answer. Price and Stafford both testified for the defendant that they had never received any letter from any person connected with the Cannon Mill in reference to the discharge of the plaintiff, and that they never said one word to the plaintiff about having received such a letter. That evidence of the plaintiff was nothing but hearsay, and would not have been received if it had been objected to by the defendant. But, not having been objected to, it went to the jury as evidence, and there is no exception to it to be heard by us.

¶ 3. See *Master and Servant*, vol. 24, Cent. Dig. § 1294.

E. C. Barnhardt testified for the defendant that he was assistant manager of both the defendant company and the Gibson Company, and that he had the authority to discharge or have hands discharged; that he, as assistant manager of the Gibson Mill, had the plaintiff discharged of his own motion, without conference or suggestion from any officer or agent of the defendant company, and that there was no letter about discharging him. On cross-examination that witness said that he discharged the plaintiff because he refused to make up some lost time at the Cannon Mill, and he did not want that kind of a man at the Gibson Mill; that the plaintiff had gone out on a strike at the Cannon Mill; and that, upon seeing his looms standing still, he asked the plaintiff if he was sick, and he answered that he was not. The witness further testified that the defendant company is a different company from the Gibson Company, but that the general officers, managers, and assistant managers are the same in both companies, and attend to the business of each and both. In the fourth allegation of the complaint it was alleged that the defendant company, through its officers or agents, while the plaintiff was in the employment of the Gibson Company, unlawfully, willfully, and maliciously, for the purpose of injuring the plaintiff in his occupation and reputation, and of humiliating him, and depriving him of the right to earn a living, conspired to have discharged, and procured the discharge of, the plaintiff from the employment of the Gibson Company by certain false and fraudulent representations. In the answer there was a general denial of that allegation. On the trial the defendant undertook to show by evidence that it had no communication with or suggestion from the defendant company on the subject of the plaintiff's discharge from the employment of the Gibson Company, but that the Gibson Company acted in the matter solely and entirely upon information which came to Barnhardt, the assistant manager of the Gibson Company, by reason of his connection with the defendant company. Upon Barnhardt's testimony the defendant could have asked the court to instruct the jury that, as the contract between the plaintiff and the defendant was indefinite as to time, the defendant company would not be responsible for the discharge of the plaintiff because of knowledge of the character of the plaintiff and of his conduct at the defendant's mill, acquired by Barnhardt as assistant manager of both mills. But no such request for instructions was made by the defendant. The jury took the view, notwithstanding the testimony of Price, of Stafford, and of Barnhardt, that no letter or communication had been received by the Gibson Company from the defendant on the subject of the plaintiff's discharge; that the plaintiff's testimony to that effect was true; and their verdict was rendered on that theory of the case.

The plaintiff's evidence tended to show that he was discharged without cause by the defendant company, and that he was discharged from the employment of the Gibson Company, while giving satisfaction in his work to that company, by a letter from the defendant demanding his discharge from the service of the Gibson Company, and upon that evidence, believed by the jury, the law applicable to the case seems to be clear. In order to constitute malice in a case like the present, it is not necessary that the defendant should show actual ill will or hatred to the plaintiff, but it is sufficient if the act done, to the apparent damage of the plaintiff, is without legal excuse. Any person who by any act causes the discharge of another from the service of a third party maliciously and willfully—that is, without lawful justification—is liable to the injured party for damages. *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Morgan v. Smith*, 77 N. C. 37.

There was no exception to the charge of his honor. The defendant asked the court to instruct the jury to answer the first issue: "Did the defendant wrongfully and unlawfully cause the discharge of the plaintiff by the Gibson Manufacturing Company as alleged in the complaint?" "No." And the instruction was properly refused. Again, the defendant asked for an instruction that, if the jury should find from the evidence that Barnhardt was the assistant manager of the Gibson Company, and as such manager had the right to direct the discharge of the employees of the company, and as such manager of his own motion and in the exercise of his authority directed the plaintiff to be discharged from the employment of the Gibson Company, whether such discharge was right or wrong, the jury will answer the first issue "No." His honor, under the evidence in this case, added to the instruction the words, "without demand or direction of the defendant," in connection with the right of Barnhardt to discharge the plaintiff from the employment of the Gibson Company. The addition was proper.

A further special instruction was asked by the defendant on the question of the duty of the plaintiff to satisfy the jury by preponderance of the evidence that the defendant, through its officers and agents, unlawfully and maliciously caused the discharge of the plaintiff, which was given, except the following portion thereof, viz.: "And although the jury may find from the evidence that the Gibson Manufacturing Company discharged the plaintiff from its employment in consequence of representations made to it by the officers, agents, and servants of the defendant, and he would not have been discharged except for such representations, yet, if the jury further find from the evidence that such representations were true, they will answer the first issue 'No.'" We think that his honor committed no error in refusing to give that part of the instruction which we have

quoted above. It is true that in the plaintiff's complaint there is an allegation that the defendant procured his discharge by conspiracy and by false and fraudulent representations to the Gibson Company, but such an allegation was not necessary or essential to the prosecution of the action by the plaintiff. It is sufficient that the act is alleged to have been done maliciously, willfully, and unlawfully. *Jones v. Stanly*, 76 N. C. 355; *Haskins v. Royster*, supra; *Morgan v. Smith*, supra. The question was not whether the plaintiff was discharged by reason of the false or fraudulent representations of the defendant, but was the discharge procured through malice; that is, without a lawful justification? The conduct of the plaintiff at the defendant's mill at the time he was discharged from the defendant's service was not such that the defendant could use with a subsequent employer to effect the discharge of the plaintiff. Furthermore, it did not appear on the trial what the representations in the letter were. The instructions asked and refused were based on the allegation in the complaint, and not on the evidence.

It is not to be understood by anything said in this opinion that one employer cannot inquire of another of the character and habits of a former employé of that other, and that an answer made in good faith and upon a knowledge of facts, and acted upon by the recipient, would subject the giver of the information to a suit in damages.

No error.

CONNOR, J. (dissenting). The plaintiff alleges that while he was in the employment of the Gibson Manufacturing Company, the defendant "unlawfully, willfully and maliciously, for the purpose of injuring the said plaintiff, * * * did contrive, conspire, and procure the discharge of the said plaintiff from the employment of the said Gibson Manufacturing Company by certain false and fraudulent representations to the said Gibson Manufacturing Company." The only evidence tending to sustain the allegation is that of the plaintiff, in which he says that Stafford, the boss of the weaverroom of the Gibson Company, told him that the defendant manufacturing company objected to his working there, and that he had a letter from the defendant company to discharge him. Passing by the objection that this was simply hearsay, there is not the slightest suggestion as to what officer, agent, or employé of the defendant company wrote or was authorized to write the alleged letter. There is not a scintilla of evidence tending to show that any letter was ever written by any officer or agent of the defendant company. On the contrary, Stafford and Price, the employés of the Gibson Company, denied that they or either of them had seen such a letter, or that they ever said to the plaintiff that such letter had been written or received by them. El C. Barnhardt, who was the

assistant manager of the defendant company and of the Gibson Manufacturing Company, testified that he had the plaintiff discharged from the Gibson Company as the assistant manager of that company, and not of the defendant company; that he had him discharged of his own motion, without any suggestion from any officer or agent of the defendant company; that there was no letter about discharging him. There was not the slightest contradiction of this testimony. Although the allegation made by the plaintiff is that the defendant unlawfully and maliciously procured his discharge, the issue submitted is confined to the "wrongful and unlawful" discharge of the plaintiff. Notwithstanding this form of the issue, the judge below said to the jury, "You can also, if the charge was malicious—that is, intentional and willful, and without cause, and for the purpose of depriving the plaintiff of his job or service—award what are called punitive or exemplary damages for the wanton conduct of the defendant in bringing about the discharge, if by its servants and agents it did so." The objection to this instruction is found in the fact, first, that no issue was submitted to the jury in regard to the malicious conduct of the defendant, and, next, because there was no evidence tending to show malice. It may well be that the defendant wrongfully and unlawfully procured the discharge of the plaintiff without having done so maliciously or wantonly. "The primary purpose of an action for damages is to recover compensation for the actual loss or injury sustained. The liability for punitive or exemplary damages, however, being for the purpose of punishment, or as an example, rests primarily upon the question of motive. And the jury are not at liberty to go beyond the allowance of a compensation, unless it be shown that the act was done willfully, maliciously, or wantonly, or was the result of a reckless indifference to the rights of others, which is equivalent to an intentional injury; and when there is no proof that the injury was so inflicted exemplary damages should not be allowed." *Joyce on Damages*, § 119; *Wood v. Bank (Va.)* 40 S. E. 931; *Gilreath v. Allen*, 32 N. C. 67. The wrongful injury gives the right of action for compensation. The malicious, wicked motive gives the right to punitive damages. *Holmes v. Railroad*, 94 N. C. 319. It is manifest that the jury awarded the plaintiff punitive damages because on his own evidence he was discharged about the 8th of August, and got a regular job on the 14th September. He testified that he earned \$7.50 a week. For the reasons pointed out, and others apparent upon the record, I am unable to concur in the conclusion reached by a majority of the court. I think that, in any point of view, the defendant is entitled to a new trial.

WALKER, J., concurs in the dissenting opinion.

(135 N. C. 186)

SELF et al. v. SHUGART et al.

(Supreme Court of North Carolina. April 26, 1904.)

LIMITATIONS—ACCRUAL OF CAUSE OF ACTION—SURETIES ON GUARDIAN'S BOND—FAILURE OF GUARDIAN TO ACCOUNT.

1. Code, § 155, subsec. 6, provides that actions against the sureties of a guardian must be brought by the ward within three years after the breach of the bond. Section 1617 allows guardian six months after the ward is of full age within which to account and settle with him. By section 1608 a guardian who wishes to resign must exhibit his final account for settlement. As to administration proceedings (which are analogous to guardianships), it is provided by section 1402 that administrators may be required to file their final accounts within two years from their qualification, and after that time, by section 1488, they shall not retain any of deceased's estate. Legatees and distributees, under section 1510, may sue to recover their legacies and distributive shares at any time after two years from the qualification of the personal representative, unless he shall have sooner filed his final account. By section 1525, after filing the final account, executors may petition for the settlement of the estate. *Held* that, as it is evident that a final account must precede a settlement, the ward's right of action for failure of the guardian to settle with him does not accrue, and limitations against it do not begin to run, until six months from the ward's majority.

Montgomery, J., dissenting.

Appeal from Superior Court, Surry County; Neal, Judge.

Action by the state, on the relation of Annie J. Self and another, against J. L. Shugart and others. From a judgment for relators, defendants appeal. Reversed.

Carter & Lewellyn and Glenn, Manly & Hendren, for appellants. Watson, Buxton & Watson and W. L. Reece, for appellees.

CLARK, O. J. On 23d April, 1888, the defendant Shugart qualified as guardian of Annie and James Franklin, and gave bond in the penal sum of \$150, with Hollifield and McKaughn as sureties. The guardian made no returns to the clerk (except returning the sale of some real estate 3d May, 1888) until 11th September, 1902, which was after the plaintiffs had made a demand for settlement in August, 1902. Annie Franklin became of age in April, 1890, and married in January, 1896. James Franklin became of age in April, 1895. The plaintiffs resided in Alabama. No demand for settlement was made on the guardian till August, 1902.

The guardian is insolvent, and the question whether or not he is protected by the statute is not raised. The sole controversy is whether the sureties are released by either the three, six, or ten years' statute of limitations, all of which are pleaded. If the sureties are released by the failure of the wards to bring suit within three years after arriving of age, neither the subsequent demand and refusal, nor the filing a final account, after the statute became a bar, would revive it and set it

in motion. Under the Revised Code (chapter 65, § 4) and statutes prior thereto, a delay of the ward for three years after attaining his majority to have a final settlement or to bring suit absolved the sureties from liability. *Johnson's Ex'rs v. Taylor*, 8 N. C. 271; *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131, 133. But the plaintiffs contend that this is otherwise since the adoption of the Code of Civil Procedure. It has been held expressly against this contention of the plaintiffs in *Norman v. Walker*, 101 N. C. 24, 7 S. E. 408. There the guardian qualified in July, 1872; the ward became of age in September, 1876; the guardian died, before the ward became of age, without having settled his trust or made any of the required returns; in 1887 the ward made his demand upon the sureties, and brought action against them. It was held that it was the duty of the guardian within three months after his appointment to exhibit his account under oath to the clerk of the court and to make annual returns (Code, §§ 1577, 1580), that his failure to do so was a breach of the bond, and that by the Code (section 155 [6]), an action against the sureties on the official bond could be brought only within three years thereafter, except that by virtue of section 163 the beginning of the running of the statute as to a minor was postponed till his arrival at age. The plaintiffs' contention that the statute ran only from the filing of a final account (Code, § 154) was overruled, and *Williams v. McNair*, 98 N. C. 336, 4 S. E. 131, 133, was distinguished and held not in point. In *Norman v. Walker*, supra, the guardian having died before the ward became of age, the failure to settle with the ward at his majority was not relied on as a breach, but his failure to file his annual accounts. In *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135, *Norman v. Walker* was quoted and approved, and it was held: (1) That an action for breach of the bond of an executor, administrator, or guardian is barred as to the sureties after three years from the breach complained of. Code, § 155 (6). (2) That, when a final account has been filed, an action to recover the amount shown thereby to be due is barred as to the sureties in six years from the filing of the account. Code, § 154 (2). (3) Whether a final account is or is not filed, if there is a demand and refusal, the principal, as well as the sureties, is absolved from liability if no action is brought within three years thereafter. This is because the refusal puts an end to the trust. (4) When there is neither final account filed nor demand and refusal, whether the executor, administrator, or guardian himself is protected by the lapse of six years or ten years was left an open question, though it was intimated that ten years would certainly be a bar. (5) That, when no final account has been filed, the statute begins to run from the arrival of the ward of age (Code, § 163), but whether, in such case, three years or ten years bars as to the prin-

cipal, quære. (6) When the statute begins to run, the subsequent marriage of the feme plaintiff will not stop it. Code, § 169. These authorities are conclusive that, though there has been a change in the phraseology of the statute, the ward's right of action accrues against his guardian upon his arrival at age, and that the sureties on the guardian bond are protected by failure to bring action thereon within three years from any breach by failing to file his final account and settlement with his ward, which it is the guardian's duty to do upon the majority of the ward, while if a final account is filed, though there is no breach of the bond, yet as to the sureties the balance shown by such final account is conclusively presumed to be paid after the lapse of six years. The general rule is, as above, that the statute of limitations begins to run against the maintenance of an action by the ward against his guardian and his bond at his majority. 15 Am. & Eng. Enc. (2d Ed.) 82, 121, and cases there cited; Angell on Limitations, § 178. The cases relied on by the plaintiffs are *Williams v. McNair*, 96 N. C. 336, 4 S. E. 131, 133, which was held not applicable to a case like this by *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468; *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 204, which was cited and followed in *Kennedy v. Cromwell*, supra; and, lastly, *Stonestreet v. Frost*, 123 N. C. 290, 31 S. E. 718. This last was an action against an administrator, whose office and duties, unlike those of a guardian, do not expire and absolutely terminate *ex vi termini* at a definite and predetermined date; and it was held that in such case, when there had been a demand and refusal to settle, and an action brought within three years thereafter, the sureties were not absolved from liability, although there had been a failure of the administrator, prior to the three years before action brought, to file his annual account. We think the true rule is that it is the duty of a guardian to settle with his ward on his arrival at age, and a failure to do this is such breach that, if the ward fails to bring action within three years, the sureties on the guardian bond are absolved from liability under the Code (section 155 [6]), for such failure to settle is necessarily "the breach complained of" in an action to recover any balance due by the guardian when no final account was filed, while, if such final account is filed in apt time, the balance shown thereby to be due the ward is presumed paid (as to the sureties) after six years.

As the guardianship ceases *ex vi termini* upon the arrival of the ward at age, the failure of the guardian to settle then is a breach of his duty for which the ward can maintain an action to recover the amount due, and the failure by the ward to bring such action within three years thereafter must release the sureties on the guardian bond, who have been exposed to an action during these three years, unless a final account is filed showing balance due, and then

the statute is six years. The provision in the Code (section 1619) that the clerk may require the guardian to file his final account at any time after the lapse of six months from the ward's coming of age is not intended to bestow upon the guardian the ward's moneys and properties for six months after he becomes of age, nor to deprive him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months, and after its lapse the clerk can call on the guardian to file his final account, with the receipts of the ward in full settlement, to complete the record in his office, for that section states that such return shall be "audited and recorded." Such final account is intended to be subsequent to the settlement with the ward, not preparatory thereto. The six-years statute, not the three-years statute, begins to run as to the sureties from this required final return, if any unpaid balance is shown, as the six-years' statute also runs from the final return of the administrator or executor, which is required to be filed at the end of two years from his qualification (Code, § 1402), but three years after the lapse of such two years is not a bar to an action against the sureties on the bond if the final account is not filed at the end of two years. That the three years runs as to sureties on the guardian bond from the arrival of the ward at age is held in *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (paragraph 5 of the headnote).

Upon the facts agreed, judgment should have been entered in favor of the defendant sureties. Reversed.

WALKER, J. (concurring in result). The conclusion of the court that the plaintiffs' cause of action is barred by the statute of limitations is, in my opinion, correct, but I cannot assent to the proposition that the statute begins to run when the ward becomes of age or *sui juris*, as a ruling to that effect would be in conflict with an express provision of the law. As a general rule, it is true that the statute runs from the time that the infant attains his majority, but an action or proceeding by him against his guardian for an account and settlement of the trust has been made an exception to the rule. It is provided, by section 1617 of the Code, that every guardian shall, within 12 months from the date of his qualification or appointment, and annually thereafter, so long as any of the ward's estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the property received by him and of the investments made by him, and also of his receipts and disbursements for the past year in the form of debit and credit; and if he fails to render an account, or files an insufficient or unsatisfactory one, he may be compelled by order of the clerk forthwith to file a full and satisfactory one; and by section 1619 it

is provided that the guardian may be required to file his final account at any time after six months "from the ward's coming to full age or the cessation of the guardianship, but such account may be filed voluntarily at any time." It thus appears that by statute the guardian is allowed six months after the ward is of full age within which to account and settle with him, and he may defer the settlement until the expiration of that time if he chooses to do so. No such provision has been made in the case of an executor or administrator, who is required to settle his administration at the end of two years after his qualification, for it is provided as to him that he shall file his final account for settlement at that time (Code, § 1402), and that he "shall not hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay, but all such estate, so remaining, shall immediately after the expiration of two years be divided and delivered or paid to the person" entitled thereto in law, or, in the case of an executor, under the will of the deceased (Code, § 1488).

An action against the sureties of a guardian must be brought by the ward within three years after the alleged breach of the bond. Code, § 155, subsec. 8. This does not refer necessarily to the failure of the guardian to file his annual account, but to any breach of the bond for which the ward, or any person suing in his behalf, may recover damages. In our case, the breach alleged is that the guardian, after the wards were of age, failed to account and to settle by paying the amount due from him to each of them. This is the substantial breach, the failure to file the annual account being only a technical breach, for which the damages would be nominal, unless a substantial injury could be shown. The cause of action, or, to be more accurate, the right of action (*McLendon v. Com'rs*, 71 N. C. 38), accrued when the guardian failed to account and settle at the time fixed by law. It surely was not intended that the guardian should be required to settle—that is, to pay to his ward the amount due by him—until he has filed his final account, provided he does not defer the filing of the account beyond the time prescribed by the statute. The Legislature, for some good and sufficient reason, perhaps because his trust, unlike that of an administrator, may continue during a long period of time, has seen fit to allow a guardian six months after the ward has arrived at full age to put himself in a state of preparedness for a settlement and to file his final account. Whatever may have been the reason for it, we find it so written in the statute, and to the provision we must give full force and effect.

In order to show that it was not intended there should be a settlement until the time when the final account of the fiduciary is due, or, in other words, that the filing of the account should precede the settlement, we need

refer only to several sections of the Code wherein that intention is manifested, premising that in this respect there is no difference between the law as to an executor or administrator and that as to a guardian. Section 1402 provides that an executor or administrator "may be required to file his final account for settlement at any time after two years from his qualification," and no executor or administrator shall retain after that time any of the deceased's estate, except the amount of necessary charges and disbursements and of unpaid debts (section 1488). Legatees and distributees may sue to recover their legacies and distributive shares at any time after the lapse of two years from the qualification of the personal representative, unless he shall sooner file his final account for settlement (section 1510). An executor or administrator, who has filed his final account for settlement, may at any time thereafter petition for settlement of the estate committed to his charge (section 1525). Any guardian who wishes to resign must "exhibit his final account for settlement" (section 1908). These provisions of the statute show conclusively that the Legislature intended the final account always to precede the settlement. How can the ward or the court know what is due, until the final account has been filed? As the guardian cannot, therefore, be called to account and required to pay over to his ward what is due from him to the latter until six months after the ward has reached his majority, it follows that no action can be brought against him for that purpose until that time has expired.

In *Cooper v. Cherry*, 53 N. C. 323, it is said by Pearson, C. J., for the court, to be the settled doctrine "that no statute of limitations can begin to run and become a bar until the cause of action accrues, for the plain reason that the Legislature cannot be supposed to intend to require a creditor to do an impossible act under pain of having his right of action barred." The principle thus laid down applies as well to an action by a ward as to one by a distributee or next of kin. The right of action, therefore, accrued to the wards, in this case, six months after they respectively became of age, and the statute commenced to run from that time, and not from the time they reached their majority. It may make no practical difference in this case which time is fixed for the starting of the statute, as much more than 3½ years elapsed between the time the plaintiffs arrived at full age and the commencement of this action; but it may become very important hereafter in cases in which time will be material, and it is well that the time from which the statute runs—the terminus a quo—should be definitely and correctly stated.

The case of *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468, is not in point. It appeared in that case that more than 3½ years had elapsed after the ward became of age and before the suit was commenced, and the ques-

tion was not therefore involved. The same may be said of *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. The Code (section 155 [6]) provides that the action against the sureties of a guardian on his official bond shall be barred within three years after the breach thereof alleged. The breach in this case is the failure to account and settle at the proper time. I do not see why the principle settled by this court, that the filing of the final account terminates the trust, does not apply. If the filing of the final account terminates the trust and sets the statute in motion, the failure to file it at the time when it is due must have the same effect. *Vaughan v. Hines*, 87 N. C. 445; *Hodges v. Council*, 86 N. C. 181; *Ivy v. Rogers*, 16 N. C. 58.

DOUGLAS and CONNOR, JJ., concur in the concurring opinion.

MONTGOMERY, J. (dissenting). The law in force up to the time of the adoption of the Code of Civil Procedure—August, 1869—in respect to the right of sureties on guardian bonds to obstruct a recovery against them by the ward after a lapse of a statutory time, was in these words: "Any orphan or ward, coming to full age, and not calling on his guardian within three years thereafter for a full settlement of his guardianship, shall be forever barred as to the sureties on the bond of the guardian, from all recovery thereon." Chapter 65, § 4, Rev. Code (Acts 1795, c. 15). In *Johnson's Ex'rs v. Taylor*, 8 N. C. 271, that section of the Revised Code was construed to require more than a mere demand for such settlement. Hall, J., who wrote the opinion, said: "I think it is incumbent on the infant, after arriving at full age, not only to call for a full settlement, but to have a final adjustment of all accounts, matters, and things with his guardian in three years, and either sue for any balance that may be due him, or notify the sureties to the guardian bond of the true situation in which he stands to the guardian." The period prescribed for the commencement of a suit against the sureties on bonds of guardians, executors, and administrators, by the terms of the Code of Civil Procedure, § 34, subd. 6 (now subdivision 6, § 155, Code), is in these words: "An action, against the sureties of any executor, administrator, (collector) or guardian, on the official bond of their principal; within three years after the breach thereof complained of." There is no similarity in the language of the two provisions of law above referred to, and the section of the Code must have been intended to alter the statutory period in the Revised Code as to the commencement of actions against the sureties on the bonds of executors, administrators, and guardians. But what change was intended is not very clearly stated to our minds. The section of the Revised Code was perfectly clear. The three-years statute of limitations in all cases of breach of the bond began to run against

the ward, from the day he became 21 years of age, as to the sureties. But what is meant by the words "within three years after the breach thereof complained of" in the Code section is not very clear to me, and I can find no decisions precisely on that point.

There are difficulties connected with this subject. The provisions of the bond of a guardian, as they are required to be by section 1574 of the Code, are stated in terms most general. It is required that the bond must be conditioned that such guardian "shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him." Breaches of such a bond may be stated, as, first, a failure to preserve and manage the ward's property, including not only that which he has received into his possession, but also that which he ought to have received; second, failure to properly care for and support the ward; third, to render an account of the balance to the proper court when required to do so, and to the ward when of age; and, fourth, to pay that balance to the ward when it is demanded by him. As to any breach of the bond which may occur during the minority of the ward, and which breach may be alleged in a suit by a ward against his guardian after he becomes of age, for a settlement of a balance due to him, as a breach complained of, the rule laid down in the Code is clear; as, for example, if the allegation should be that an annual return by the guardian was false, or that the guardian had failed to collect money or to get possession of property belonging to the ward, and which he could have collected or gotten possession of, then, if the ward did not commence his suit against the sureties on the bond within three years after he became of age, a plea of the statute of limitations set up by the sureties would be good; or, if there had been a final account filed by the guardian showing a balance due to the ward, and the ward had demanded the payment of that balance when he became of age, and the guardian had refused to pay it, then there would have been a breach of the bond, and the ward be compelled to commence his action against the sureties on his bond within three years from the refusal, or the sureties might obstruct the recovery by pleading the three-years statute of limitations. But in the latter case the law now in force (subdivision 6, § 155, Code) does not require that the ward shall commence his action within three years after his arrival at full age, but only within three years after the breach complained of. Suppose, then, that there had been no breach of the bond by the guardian during the minority of the ward, and that a final account had been filed which was true and satisfactory to the ward, and he should delay for a longer period than three years after the filing of the final account before demand of payment for the amount as due by the final account and

refusal to pay the same, the refusal to pay would then be the breach of the bond, and from that time the ward could bring his action within the next three years against the sureties, and they could not plead the statute of three years. The six-years statute, however, from the filing of the final account by the guardian, would obstruct a recovery by the ward, for the reason that it would protect the guardian, himself, when sued on his official bond (section 154, subd. 2, Code), and the court would not permit a surety on the bond to be bound after the principal on the bond was released by law. Of course, a guardian who has returned no final account, or who had returned one with an admitted balance against himself in favor of the ward, would not be allowed to plead the statute of limitations, and certainly he would not be allowed to hold in his hands a fund which he had admitted was due to his ward, because of a lapse of time; but the suit would have to be brought against him not on his bond, but as trustee. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. In the case before us the guardian never made any return to the court during the minority of the plaintiffs—the wards. More than 3 years had elapsed after the youngest one of them had arrived at 21 years of age. Seven years after that time the defendant guardian made a report, in the nature of a final account, to the superior court, in which there was an amount admitted to be due to the plaintiffs. They at once brought this action against the defendants, the guardian, and the sureties on his bond. His refusal to pay it, or not paying it when the report was filed, was a breach of the bond; and while in the complaint the failure to make annual returns was stated, yet nowhere was it alleged that they were the breaches of the bond complained of. On the other hand, the plaintiffs accepted the final returns as true, and brought an action to recover the amount therein stated, and that was the breach complained of. It may be said that this view of the law, instead of lightening the burdens of securities and freeing them from stale demands, has the opposite tendency and effect; but it is to be said that this court cannot make the laws. Its duty is to construe them when its judgment is asked.

I think there is no error.

(135 N. C. 419)

LANCE v. BUTLER.

(Supreme Court of North Carolina. Feb. Term, 1904.)

CONDITIONAL SALES—AGENCY—PARTNERSHIP—MORTGAGING FIRM PROPERTY—VALIDITY OF MORTGAGE—CONVERSION—CONFUSION OF GOODS—TRIAL—ISSUES.

1. A contract whereby the owner of goods delivered them to another, the owner retaining title, and the one receiving the goods agreeing to sell them and pay to the owner a specified portion of the price for which they were sold, creat-

ed a mere agency, and was not a conditional sale within Code, § 1275, requiring all conditional sales to be reduced to writing and registered.

2. The proceeds of sales made by an agent are a trust fund in the hands of the agent, except as to his commissions for selling.

3. An agreement whereby one is to receive part of the profits of an enterprise, as a means only of ascertaining his compensation, does not create a partnership.

4. A partner has no authority, without the consent of the other partners, to mortgage firm property for his own debt, irrespective of whether the mortgagee knew that the assets were partnership property.

5. Where one not the owner of goods gave a mortgage thereon, and the true owner sued in conversion the mortgagee, who had sold the goods under the mortgage, a request for an issue as to whether the plaintiff was damaged by the sale, and, if so, how much, was proper.

6. Code, § 530, provides that the amount of any judgment shall bear interest until paid. *Held*, that where one not the owner of goods mortgaged them, and the true owner sued the mortgagee in conversion, and the issue was submitted as to whether plaintiff was damaged by the sale under the mortgage, and, if so, how much, the jury in their discretion might have allowed interest from the date of the conversion.

7. Where one not the owner of goods mortgaged them, and the true owner sued the mortgagee in conversion, and the issue submitted was, "What was the value of the goods sold under the mortgage?" to which the jury responded, "\$300," it was error to allow interest except from the date of the judgment; Code, § 530, providing that the amount of any judgment shall bear interest until paid.

8. Such error in the judgment did not call for a reversal, but the judgment would be reformed so as to call for interest only from date of the judgment.

9. Where one who was an agent for another for the sale of goods mixed such goods with his own stock of goods, the title of his principal attached to the whole stock until the value of his goods were returned to him or properly accounted for.

10. Where one who was agent for the sale of goods for another allowed them to be mixed with his stock of goods, and then gave a mortgage on the entire stock, the mortgagee obtained no better title than the mortgagor had.

11. A contention that the court erred in giving undue prominence to the testimony of one particular witness was without merit, where his name was mentioned in the charge but once, and that on an issue which was answered as a proposition of law under an instruction of the court.

Appeal from Superior Court, Buncombe County; E. B. Jones, Judge.

Action by F. A. Lance against Washington Butler. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff entered into the following contract with Hunter & Lance:

"North Carolina—Buncombe County.

"This instrument of writing, witnesseth, that I have this day and with these presents do hereby consign to Z. T. Hunter and M. E. Lance, partners trading and doing business at Mills river, North Carolina, in Henderson County, under the firm name and style of Hunter & Lance, a certain stock of goods, wares, merchandise, books, accounts, choses in action and effects, together with the fix-

tures, including safe, show cases, scales, spool-cotton cabinets, etc., now in the store formerly occupied by T. C. Hunter & Co., at Arden, Buncombe County, N. C., and also one two horse wagon now in the blacksmith shop of Clayton & Reagan, at Arden, N. C., being all the property this day conveyed to me by Frank Carter, trustee.

"This consignment is made upon the following terms and conditions, to-wit: The said Hunter & Lance are to sell the goods in the course of their business for cash, at figures not less than the cost of the same to me, to-wit: One thousand and sixty-two and 52-100 dollars, the proceeds as they arise from the sale of said goods to be paid to me or my order, until the said cost, to-wit, \$1062.52 is fully paid and discharged. The balance of the proceeds arising from the sale of said goods, if any there shall be, to be paid as follows: One half to me and one half to be retained by said Hunter & Lance as their compensation for selling and disposing of the same.

"The title to said goods hereby consigned is to remain in me, and said goods shall be kept separate from the general stock of said Hunter & Lance, so that they may at any and all times be fully identified as the goods hereby consigned.

"Interlineation in the 27th line of the first page of this instrument made before signing.

"Witness my hand and [seal], this December 17, 1892. F. A. Lance. [Seal.]

"Witness: Frank Carter."

"We hereby agree to receive, hold and dispose of the property consigned to us by the foregoing instrument, upon the conditions and for the purposes therein set forth.

"Hunter & Lance.

"Witness: Frank Carter."

Subsequently Hunter & Lance removed the goods to Greenville, S. C., where Z. T. Hunter executed a chattel mortgage to secure his individual indebtedness to the defendant under which they were sold, the plaintiff being present and forbidding the sale. This action is to recover damages for the conversion.

Jones & Jones, for appellant. Zebulon Weaver, for appellee.

CLARK, C. J. The real controversy is upon the second exception, that the contract above set out, by which the plaintiff consigned the stock of goods, etc., to Hunter & Lance, was a conditional sale, and therefore invalid as to the defendant, under Code, § 1275, because not registered. In a conditional sale the transfer of title to purchaser, or retention of it by him, depends upon the performance of some condition. 6 Am. & Eng. Enc. (2d Ed.) 437. Here the title to the goods was not passed to Hunter & Lance, but they were merely agents to sell the goods, remitting proceeds to plaintiff.

They were to keep the goods separate and apart, so as to be identified, and the title was to remain in the plaintiff. After remitting \$1,062.52 of the proceeds, as received, to plaintiff, half of the balance of the proceeds were to be retained by Hunter & Lance as their compensation for selling and disposing of the goods. This was a mere agency, not a conditional sale, and registration of the instrument was not necessary. In *Empire Drill Co. v. Allison*, 94 N. C. 548, an agreement was held an agency to sell, though less clearly so than in this case, and though it was expressly styled therein a "conditional sale." It is clear, in this case, that the goods were not sold to Hunter & Lance, but they were to sell them to the public as agents for the plaintiff, and, after collecting and sending the plaintiff, out of sales, the amount he had paid for the goods (\$1,062.52), one-half of the balance of sales were to be retained by the agents as their compensation for selling. The proceeds of sales were a trust fund in the hands of Hunter & Lance, except as to the commissions for selling. *Brewery Co. v. Merritt* (Mich.) 46 N. W. 379, 9 L. R. A. 270; 6 Am. & Eng. (2d Ed.) 450.

In *Kootz v. Tuvlan*, 118 N. C. 393, 24 S. E. 776, it is held that while an agreement to share profits, as such, is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership; citing to that effect *Mauney v. Colt*, 86 N. C. 463; *Fertilizer Co. v. Reams*, 106 N. C. 296, 11 S. E. 467. But even if this had been a partnership between the plaintiff and Hunter & Lance, Hunter had no power, without the consent of the other partners, to mortgage the firm property for his own debt (*Hartness v. Wallace*, 106 N. C. 427, 11 S. E. 259), and it can make no difference whether the mortgagee knew that it was partnership assets or not (*Rogers v. Batchelor*, 12 Pet. 229, 9 L. Ed. 1063, and citations of that case collected in 3 *Rose's Notes*, 728, 729).

The defendant properly asked that the third issue should be, "Was the plaintiff damaged by said sale; if so, how much?" Had it been submitted in that form, the jury, in their discretion, could have allowed interest from the date of the conversion. *Stephens v. Koonce*, 103 N. C. 286, 9 S. E. 315. In the form actually submitted, "What was the value of the goods sold by the defendant under his mortgage?" the jury responded, "\$300." Upon this it was error to allow interest, except from the date of the judgment. Code, § 530. Besides, the date of the conversion, "6 February 1895," as stated in the judgment, is not found by the verdict. This error, however, does not call for a new trial, but the judgment will be reformed so that the \$300 shall bear interest only from the date of the judgment. The error in the form of the issue not having been prejudicial to the defendant, his excep-

tion cannot be sustained. It is not merely error, but error in a material matter, and shown to be prejudicial to the appellant, which can justify the order for a new trial.

The defendant further insists that as the goods were not kept separate, but were mixed by Hunter & Lance with their own, the plaintiff cannot recover. But, as is said in *Wells v. Batts*, 112 N. C. 291, 17 S. E. 419, 34 Am. St. Rep. 506, "the party who occasions, or through whose fault or neglect occurs, the wrongful mixture, must bear the whole loss." By the mixing, the title of the plaintiff attached to the whole of the stock of Hunter & Lance until the value of the plaintiff's goods was returned to him or properly accounted for, and the defendant by his chattel mortgage could obtain no better title than his mortgagor possessed.

It is further contended that the court erred in unduly stressing the testimony of one particular witness, but the witness' name is mentioned in the charge but once, and that upon the first issue, "Were the goods consigned to Hunter & Lance?" and that issue, the defendant admits, should be and was answered as a proposition of law under the instruction of the court upon its construction of the written agreement.

The exceptions in the record, other than those above stated, are not set out in the brief (*State v. Register*, 133 N. C. 751, 46 S. E. 21), and are without merit. The judgment will be modified by allowing interest only from the trial.

Modified and affirmed.

(135 N. C. 431)

COGDELL et ux. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 17, 1904.)

TELEGRAPHS—STATUS OF COMPANY—OBLIGATIONS AS COMMON CARRIER—FAILURE TO DELIVER MESSAGE—NEGLIGENCE—INABILITY TO FIND SENDEE—NOTIFICATION TO SENDER—PRESUMPTIONS—DEFENSES—MISSPELLING OF SENDEE'S NAME—DUTY TO MAKE INQUIRY—IDEM SONANS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE—APPLICATION OF DOCTRINE—APPEAL—HARMLESS ERROR.

1. A telegraph company is in the nature of a common carrier, and, subject to reasonable regulations, is required to receive and promptly transmit and deliver all messages tendered in good faith.

2. While a telegraph company may require prepayment, yet, if it accepts a message without such requirement, it is held to the same degree of care and diligence as if the proper charges had been prepaid.

3. If, for any reason, a telegraph company cannot deliver a message, it is its duty to so inform the sender, stating the reason therefor, so that the sender may supply the deficiency, whether it be in the address or additional cost of delivery; and the failure to so notify the sender of nondelivery is of itself evidence of negligence.

4. Proof, or admission, that a telegraph company received a message for transmission, and failed to deliver it to the sendee within a reasonable time, makes a prima facie case of neg-

ligence, and imposes on the company the burden of alleging and proving such facts as it may rely on in excuse, so that the plaintiff need not affirmatively prove the negligence; i. e., that the company might have found the sendee by proper diligence.

5. Where a fact admitted or proved raises a legal presumption of negligence which is not rebutted, any error in the admission of evidence tending to prove negligence is harmless.

6. A mistake in the spelling of the name of the sendee of a telegram does not relieve the telegraph company from the burden of showing that it could not have delivered the message with the exercise of reasonable diligence; but, if it could not have so delivered it on account of the misspelling, it devolved upon it to set up that fact in defense.

7. In order to impose on a telegraph company the duty of finding the sendee of a telegram, whose name is misspelled, it is not necessary that the similarity between the name as given and the correct name be sufficient to absolutely fix the identity of the sendee, but it must be such as to enable the company's employees at the terminal office to find the sendee with reasonable search and inquiry.

8. Where the name of the sendee of a telegram was written "Codgell," instead of "Cogdell," as it should have been, the question whether the similarity in the names was such as to suggest to the company's employees at the terminal office the identity of the sendee was properly submitted to the jury.

9. In an action against a telegraph company for damages for failure to properly deliver a message, a defense on the ground that the name of the sendee was misspelled by the sender does not raise the issue of contributory negligence, for the sender's negligence is antecedent to, and not concurrent with, the negligence of the telegraph company in failing to make proper inquiry as to the identity of the sendee; or, if there is no such similarity between the name as given by the sender and the correct name of the sendee as to enable the company to identify the sendee by the exercise of reasonable diligence, there is no negligence on the part of the company, and consequently no room for the application of the doctrine of contributory negligence.

Appeal from Superior Court, Mecklenburg County; Neal, Judge.

Action by C. M. Cogdell and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jones & Tillett and F. H. Busbee & Son, for appellant. Maxwell & Keerans, for appellee.

DOUGLAS, J. This is an action brought by the feme plaintiff to recover damages for mental anguish alleged to have been suffered by her on account of her failure to attend her father's funeral, which she would have attended but for the negligence of the defendant in failing to deliver a telegram informing her of her father's death. The telegram was as follows: "Mount Olive, N. C., Nov. 3, 1902. Mrs. Frank Codgell, Charlotte, N. C. Your father died suddenly this morning. W. F. Martin." It is admitted in the complaint that the name of the sendee in the message was misspelled "Codgell," instead of "Cogdell," as it should have been. The mistake was caused by transposing the two letters "g" and "d."

The assignments of error include 39 ex-

ceptions. Thirty-two of these, referring to the admissibility of evidence, become practically immaterial in the view we take of the case. The exceptions to the refusal of prayers and to the instructions as given, aside from the usual defensive prayers for nonsuit and direction of the verdict, are substantially included, in principle at least, in the following prayer: "That the defendant company, having received a telegram for transmission addressed to Mrs. Frank Cogdell, was under no obligations to find, or attempt to find, the feme plaintiff and deliver the message to her, and the jury are therefore instructed to answer the first issue 'No.'" The record states that the defendant introduced no testimony.

In discussing the points involved in this case we will not attempt to follow the order of the exceptions, but will state the general principles as they suggest themselves. It is well settled that a telegraph company is in the nature of a common carrier, and, subject to reasonable regulations, is required to receive and promptly transmit and deliver all messages tendered in good faith. It may require prepayment, but, if it accepts a message without such requirement, it is held to the same degree of care and diligence as if the proper charges had been prepaid. If for any reason it cannot deliver the message, it becomes its duty to so inform the sender, stating the reason therefor, so that the sender may have the opportunity of supplying the deficiency, whether it be in the address or additional cost of delivery. The failure to notify the sender of such nondelivery is of itself evidence of negligence. Proof or admission that the company received a message for transmission and failed to deliver it to the sendee within a reasonable time raises a prima facie case of negligence, and imposes upon the defendant the burden of alleging and proving such facts as it may rely on in excuse. In the case at bar it clearly appears that a message was received by the defendant, which was intended for the plaintiff, although her name was misspelled by the transposition of two letters. The defendant did not prove, or even allege, any effort whatever to deliver the message. There is no evidence that it was sent to Charlotte, nor was any notice given to the sender of its nondelivery until eight or ten days after it was received for transmission. Apparently not even then would such notice have been given had not the sender called at the office and inquired what had become of the message. We think the defendant must lie under the burden which it made no attempt to lift or shift. Under these circumstances the plaintiff was not required to prove affirmatively the negligence of the defendant, or, what is equivalent thereto, that the defendant might have found the sendee by proper diligence. It follows that whatever error there may have been in the admission of evidence tending to prove that

fact was immaterial and harmless in view of the legal presumption to the same effect. If any evidence had been introduced by the defendant to rebut the presumption so as to raise a question as to the relative weight of the evidence, the case would be different.

The above principles are too well settled by the decisions of this court to require any citations from other jurisdictions. The presumption of negligence from the acceptance and nondelivery of a telegram is held in the following cases: *Sherrill v. Telegraph Co.*, 116 N. C. 655, 21 S. E. 429; *Hendricks v. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Landle v. Tel. Co.*, 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; *Rosser v. Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *Hunter v. Tel. Co.*, 130 N. C. 602, 41 S. E. 796. In *Sherrill's Case* this court says, through Clarke, J., on page 656, 116 N. C., page 429, 21 S. E.: "The plaintiff having shown the delivery of the message to the defendant, with the charges prepaid (and it would have been the same if the defendant had accepted the message with charges to be collected), and the failure to deliver the message, a prima facie case was made out, and the burden rested on the defendant to show matter to excuse its failure." In *Hendricks' Case* this court says, on page 309, 126 N. C., page 545, 35 S. E., 78 Am. St. Rep. 658: "It is well settled that where a telegraph company receives a message for delivery, and fails to deliver it with reasonable diligence, it becomes prima facie liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure." The same language is quoted with approval in *Landle v. Telegraph Co.*, 126 N. C. 431, 436, 35 S. E. 810, 78 Am. St. Rep. 668. In *Rosser's Case* the court below charged the jury as follows: "If you find from the evidence that the message was delivered to the defendant with the charges prepaid, and you further find from the evidence that the defendant failed to deliver the message, a prima facie case is made out, and the burden would then rest on the defendant to show matter to excuse its failure." In approving this instruction this court, through Cook, J., says on page 256, 130 N. C., page 379, 41 S. E.: "The message having been shown by the testimony, and also admitted in the answer, to have been received by defendant and the charges prepaid, it then became its duty to deliver it to the addressee at the point to which it was addressed. If, however, that could not be done, then it was incumbent upon defendant to show that it had performed its part of the contract in exercising due diligence in endeavoring to do so. * * * All of the facts relating to the transmission of the message were within the possession of the defendant, and it did not choose to disclose them to the court and jury. From the very nature of telegraphy, neither the sender nor sendee could personally know what became

of the message, or why it was not received at its destination, or, if received, why not delivered."

That a telegraph company is in the nature of a common carrier, owing certain duties to the public irrespective of a personal contract, is held in *Cashion v. Telegraph Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, and *Landle v. Telegraph Co.*, 124 N. C. 528, 32 S. E. 886. In the former case this court says, on page 466, 124 N. C., page 747, 32 S. E., 45 L. R. A. 160: "One other principle must be kept in view: A telegraph company is in the nature of a common carrier. Claiming and exercising the right of condemnation, which can be done only for a public purpose, it is thereby affected with a public use. It owes certain duties to the public which are not dependent upon a personal contract, but which are imposed by operation of law. A simple contract is an agreement between two parties—a drawing together of two minds to a common intent—and must be voluntary as well as mutual. Whenever a man, at a proper time and place, presents a telegram to the company for transmittal, and at the same time tenders the proper fee, the company is bound to receive, transmit, and deliver it with reasonable care and diligence. It cannot refuse to receive it, and, while it may protect itself by reasonable regulations, it cannot insist upon a personal contract contrary to its usual custom or to public policy. As was said in *Reese v. Telegraph Company*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583, the failure of the telegraph company to promptly deliver a telegram "is not a mere breach of contract, but a failure to perform a duty which rests upon it as the servant of the people." In *Landle's Case* this court says, on page 533, 124 N. C., page 887, 32 S. E.: "Moreover, the defendant, as a common carrier, owed to the plaintiff a public duty which it should have performed with reasonable care and diligence. It cannot be relieved from liability for the proximate results of its own negligence, if it existed, by unreasonable regulations or technical objections."

That it is the duty of the telegraph company to promptly inform the sender of a message when for any reason it cannot be delivered is held in *Hendricks v. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Landle v. Tel. Co.*, 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; *Bright v. Tel. Co.*, 132 N. C. 324, 43 S. E. 841; *Hinson v. Tel. Co.*, 132 N. C. 467, 43 S. E. 945; and *Bryan v. Tel. Co.*, 133 N. C. 603, 45 S. E. 938. In *Hendricks' Case* this court says, on page 311, 126 N. C., page 546, 35 S. E., 78 Am. St. Rep. 658: "We think that it is the duty of the company, in all cases where it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence *per se*, it is clearly evidence of negligence. In many instances, by such a course, the damage could be greatly lessened, if not entirely

avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would tend to show diligence on the part of the company." This language is quoted with approval in *Landle's Case*. In *Hinson's Case*, *Connor, J.*, speaking for the court, says: "Viewed from this standpoint, the defendant had in its possession a message addressed to M. L. Hinson, with no direction as to place of residence other than the city of Columbia, S. C. Its duty, upon this state of facts, was to use every reasonable effort to find and deliver the message to the sendee, and, upon failure to do so, to ask for a better address."

This would dispose of the case provided there had been no mistake in the spelling of the name of the sendee. In any event we do not think that such a mistake would relieve the defendant from the burden of showing that it could not have delivered the message with the exercise of reasonable diligence. The defendant does not allege any effort whatever on its part, but contends that the misspelling of the name relieved it from any such obligation. This contention cannot be sustained upon any legal principle. Suppose a telegraph company were to receive a prepaid message addressed to a well-known resident named "Brown"; could it justify itself in keeping both the money and the telegram, without any effort whatever to deliver, simply because the addressee happened to spell his name "Browne"? If the company was unable, after reasonable diligence, to deliver the message on account of the misspelling of the name, it should set those facts up in defense. This would then invoke the doctrine of *idem sonans*, and raise a question of fact, to be determined by the jury, as to whether the correct spelling of the name and that used in the message were sufficiently similar in sound to suggest to the average telegraph operator the identity of the sendee. We do not mean to say that the similarity of sound must be sufficient to absolutely fix the identity of the addressee, but that it must be such as to enable the employees of the company at the terminal office to find the addressee with reasonable search and inquiry. In the case at bar this question was properly left to the jury. There is much similarity in sound and much greater similarity in looks. The mistake is caused by the transposition of two letters—an error that is frequently committed by careful writers and typesetters. On the second page of the record in this case the word "sworn" is printed "sown," the "o" and the "w" being transposed. In *Hermann v. Butler*, 59 Ill. 225, a petition for certiorari was refused to review a judgment in favor of Seth Butler against said Hermann, entered by default upon summons wherein the plaintiff was designated as "Seth Bulter." As will be seen, the mistake consisted in the

transposition of the letters "l" and "t." In *State v. Patterson*, 24 N. C. 359, 38 Am. Dec. 469, Gaston, J., speaking for the court, says: "It is also well established that a name merely misspelled is nevertheless the same name." Many variations in sound greater than that under consideration have been held to be merely misprisions in spelling in this state as well as in other jurisdictions; but it is useless to repeat them. A great many are set out in *State v. Collins*, 115 N. C. 716, 20 S. E. 452; and still more in 21 A. & E. Enc. (2d Ed.) 313 et seq. If the doctrine of idem sonans is applicable to criminal actions involving a long term in the penitentiary, we see no reason why it should not be invoked in civil cases where the attending circumstances justify its application. While the issue of contributory negligence was found in favor of the plaintiff, we feel compelled to say that in cases like the present we see no room for its application. The only negligence possibly imputable to the sendee is that of the sender in misspelling her name. This act of negligence was entirely antecedent to the negligence of the defendant, and in no sense concurrent therewith. Moreover, the defendant got the full benefit of that defense under the instructions as to the doctrine of idem sonans. If the dissimilarity in spelling were so great as to render it practically impossible for the defendant to identify the addressee after the exercise of due diligence, then there would be no negligence on the part of the defendant, and consequently neither occasion nor necessity for the defense of contributory negligence. If, on the contrary, the defendant could, by the exercise of reasonable diligence, have identified the sendee and delivered the message in spite of the previous negligence of the sender in misspelling the name, it could not set up such antecedent negligence in bar of recovery.

The judgment of the court below is affirmed. Affirmed.

(125 N. C. 474)

WOMBLE v. MERCHANTS' GROCERY CO.

(Supreme Court of North Carolina. May 17, 1904.)

SERVANT'S INJURIES—FALL OF ELEVATOR—NEG-
LIGENCE—SUFFICIENCY OF EVIDENCE—DUTY
OF MASTER—INSPECTION—INSTRUCTIONS—
CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF
RISK.

1. It is the duty of the master to provide the servant with safe appliances for his use.

2. A master is not bound to provide the servant with the safest, newest, and best appliances, but merely such as are reasonably safe and in general use.

3. It is the duty of the master to give the appliances which are used by the servant such inspection, in order to see that they are kept in proper repair, as, from the nature of the appliances and the circumstances connected therewith, a man of ordinary prudence and judgment would give.

4. In an action for injuries sustained by a servant, plaintiff relied on negligence in the original construction of the elevator the fall of which caused his injuries, and on a negligent failure to inspect it, and the court instructed the jury on both aspects of the case, but the issue was general in its terms. Held that, if the court committed error in instructing on either aspect of the case, defendant would be entitled to a reversal, since the court on appeal could not know on which aspect the jury founded their verdict.

5. In an action for injuries sustained by a servant owing to the fall of a freight elevator while he was operating the same, evidence held sufficient to render the question of defendant's negligence in the original construction of the elevator one for the jury.

6. In an action for injuries sustained by a servant owing to the fall of a freight elevator while he was operating it, it was proper to instruct that negligence was not to be inferred from the mere fact that an accident occurred.

7. The duty of a master to inspect a freight elevator, on which a servant rides while operating it, is a positive and affirmative duty, which is to be continuously performed.

8. In an action for injuries sustained by a servant owing to the fall of a freight elevator while he was operating it, the question as to whether there was sufficient inspection of the elevator is one for the jury.

9. In an action for injuries to a servant, contributory negligence is an affirmative defense, and any issue thereon must be tendered by defendant in order to be available.

10. A servant employed to operate a freight elevator does not assume the risk of injury owing to a fall of the elevator, in the absence of knowledge of any defect therein, and of any duty to inspect it.

Appeal from Superior Court, Guilford County; W. R. Allen, Judge.

Action by W. C. Womble against the Merchants' Grocery Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff alleged that the defendant company was engaged in the wholesale grocery business in the city of Greensboro, receiving and shipping large quantities of groceries and other goods, which were kept and stored in their storehouse in said city; that said storehouse was four stories high, in which there was an elevator for the purpose of carrying goods to the different floors and lowering them to the first floor for delivery and shipment. That plaintiff was employed by defendant, and among other duties required of and imposed upon him was that of transferring from floor to floor goods as aforesaid by the use of the elevator; that said elevator was furnished by the defendant company. That the said elevator was defective in its construction, and unsafe for the purposes for which it was used; that the defendant negligently failed to examine and inspect it, and that by reason thereof the defendant failed to ascertain its defective condition. That on the 31st day of August, 1900, while engaged in the work imposed upon him by the defendant, and not knowing of any defect in the elevator, plaintiff went upon said elevator in the discharge of his duty at the fourth floor of the said store; that by reason of its defective condition the

§ 3. See Master and Servant, vol. 24, Cent. Dig. §§ 236, 238.

cable or rope pulled out of its fastening, thus separating the elevator from the weight by which it was pulled, and by falling to the basement floor the plaintiff suffered serious injuries. The defendant denied the material allegations in the complaint, and alleged that the injury sustained by the plaintiff was incident to the risk assumed by him in his employment, and that the proximate cause of such injury was the negligence of the plaintiff. The court submitted the following issues to the jury: "(1) Was the plaintiff injured by the negligence of the defendant? Answer. Yes. (2) If so, what damage has plaintiff sustained? Answer. Three thousand dollars." From a judgment upon the verdict the defendant appealed.

W. P. Bynum, Jr., and King & Kimball, for appellant. Scales, Taylor & Scales, for appellee.

CONNOR, J. The defendant having demurred to the evidence and moved for nonsuit, its first exception is directed to the refusal of his honor to sustain the motion. The plaintiff testified, in substance: That he entered the employment of the defendant on January 20, 1899, coming to Greensboro from Chatham county, where he had lived up to that time. That he was hired to truck freight and handle goods. That the goods were trucked on different floors, and carried from one floor to another on an elevator. That he had seen one or two elevators before entering the service of the defendant, but had never been on one, and had never seen one work. In about a month after he entered the service of the defendant it removed its stock of goods to another building, and that the elevator by which he was injured was put into the building to which the defendant moved. That the elevator was a large one, run by a wire cable. That it would run with good speed. That a rope was used in pulling the elevator up, and there was a cable that ran over a pulley. That there was a weight in a box 2 feet by 8 inches at the back of the elevator on the side of the wall, and that the box ran from the upper floor to the bottom of a five-story building, counting the basement, and that the weight ascended and descended. That it ran to the fourth story. That goods were carried up from one floor to the other by this elevator, and that when the elevator was loaded the plaintiff would get on it and pull it up. That at the time he got hurt he usually rode on the elevator. A man who wanted to carry goods from one floor to another generally got on the elevator, and rode up if there was not too many goods on the elevator, and that sometimes as much as 2,000 pounds was put on, and that it was his duty to carry the goods from one floor to another, and that he did as others—rode on the elevator. That the proprietors and others rode on it. That he was certain he had

ridden on the elevator with the president of the company. That no one had told him not to ride on the elevator. That on the day he was hurt there was 600 pounds of goods on the elevator, besides his own weight. This was a very small load. There was no understanding with him about inspecting the elevator, and it was no part of his duty to do so. That there was another man in the house that did more of that kind of work than the plaintiff. The elevator was never inspected while he was at work for the defendant, to his knowledge. That he knew of no defect in it. There was a stairway leading from one floor to another, which was constantly used, and he had the option of going up and down the elevator, and rode on it of his own volition, and for the reason that everybody else rode on it. He did not ride on it all the time; sometimes walked down the steps, sometimes rode on the elevator—being merely a matter of choice. That he had been operating this elevator from the time it was put up early in 1899 to August, 1900, and that it was a new elevator. The box containing the weight ran alongside of the wall, and extended from the basement floor up as high as the plaintiff's head above the fourth floor, and that there was an open space in the box near the top and above the fourth floor, but that he had never noticed as to whether the condition of the weight and its fastening to the cable could be seen through this opening at the top of the box when the elevator car was at the bottom floor. The cable was a wire rope composed of several strands of wire, and was about three-quarters of an inch in diameter, but he did not know how it fastened to the weight. That at the time of the accident he took off the brake, and the elevator fell from the fourth floor to the basement. That this took place when he stepped on the elevator and released the brake.

A witness introduced by the plaintiff testified that he was booker for the defendant at the time of the injury in question; that the goods were taken to their proper place by the elevator, and brought down in the same way when shipped. That the plaintiff's duties were to take the list of goods given him by the shipping clerk and get the goods out and bring them to the front door and put them on the dray. The elevator was not used by the officers of the company, but he believed he had seen Simpson go up on the elevator, but not often; it was a freight elevator; that investigation was made by the company as to the cause of the falling of the elevator, and witness could see where the planks were rough or uneven. After the accident witness noticed fastening of the cable to the weight, and the cable was fastened by running through an eye in the weight and running back about 18 inches and the lapped portions were fastened with four clamps screwed together with bolts

and nuts; that one clamp held the cable ends together, and another fastened between that and the weight; that when witness first saw clamps after accident they seemed to be all right, and seemed to be securely fixed together, but the rope had slipped through; that the clamps were not loose; that the end of the cable was frayed; that the same clamps were used in fastening the cable back to the weight after the accident.

Defendant's first contention is that upon the plaintiff's evidence his honor should have dismissed the action. This contention presents the inquiry whether there was any evidence that the elevator was defective in its original construction or had become so by use, and whether there was any evidence of negligence in failing to inspect the elevator. We approve the instruction given by his honor in respect to the duty of the employer to furnish to his employé safe machinery and appliances. "When one enters the service of another, it becomes the duty of the employer to provide safe appliances for his use. It also becomes the duty of the employé from time to time to give inspection to these appliances, and to see that they are kept in proper repair. It is not the duty of the master to provide the safest and newest or best appliances, but the duty which the law imposes upon him is that he furnish reasonably safe appliances, such as are in general use, and that he give such inspection to them as from the nature of the appliances, and the circumstances connected therewith, that a man of ordinary prudence and judgment would have given." This charge is amply sustained by the authorities. *Labatt, Master and Servant*, § 14, and cases cited. The principle as applied to elevators used by employes is thus stated by the author of that very excellent work: "An employer may be held liable if the safety devices which he is bound to provide for an elevator designed for the use of his servants prove defective. The employer must also respond in damages if an elevator which is either conducted specially for the conveyance of the servants, or which, though constructed primarily for the carriage of freight, is also used with his acquiescence for the conveyance of servants, is in any other way abnormally dangerous to use." *Labatt, Master and Servant*, § 91; *Balto. Boot Co. v. Jarmar*, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428; *Chesson v. Lumber Co.*, 118 N. C. 59, 23 S. E. 925. The defendant, not controverting the duty which it owed to the plaintiff, insists that there is no evidence in the record proper to be submitted to the jury tending to show a breach of duty—that his honor should in response to its motion have dismissed the action. It will be observed that the complaint avers negligence in that (1) the elevator was defective in its original construction, and (2) that the defendant negligently failed to inspect it; that an inspection would have shown the defective condition of the cable, etc. His

honor could not have dismissed the action, because it is conceded that the elevator has been in use 18 months, during which time the defendant had made no inspection. The motion was therefore properly refused. The defendant, however, excepts to his honor's charge, for the same reason upon which the motion to nonsuit the plaintiff is based. His honor having instructed the jury in respect to both aspects of the case, and the issue being general in its terms, if there is error in the charge in either aspect, the defendant would be entitled to a new trial. This court could not see upon which view the jury found their verdict. *Pearce v. Fisher*, 133 N. C. 333, 45 S. E. 638. This, therefore, presents the question whether there was any evidence of a defective construction of the elevator. His honor instructed the jury that the burden of proof was upon the plaintiff; that he must show to them by the greater weight of the evidence that there was negligence on the part of the defendant, and that such negligence was the proximate cause of the injury. The elevator was operated by a wire cable which ran over a pulley; there was a weight in a box two feet by six inches, at the back of the elevator on the side of the wall, and this box ran from the bottom to the upper floor; the weight ascended and descended as the elevator ascended and descended; a rope was used in pulling the elevator up; the cable was fastened to the weight, went through an eye, and lapped back some 18 inches; the weight had torn some places in the shaft or box, more than at other places; the marks were fresh; the shaft was boxed up all the way except a few feet at the top; shaft was made of rough uneven planks; the lapped portion of the cable was fastened with four clamps screwed together with bolts and nuts; one clamp held the cable ends together, and another fastened between that and the weight; the clamps after the accident seemed to be all right, and seemed to be securely fixed together, but the rope had slipped through; the clamps were not loose; the end of the cable was frayed; the same clamps were used in fastening the cable back after the accident. The plaintiff insists that this testimony entitled him to go to the jury upon the allegation of a defective construction of the elevator. He relies upon the principle announced by *Gaston, J.*, in *Ellis v. R. R.*, 24 N. C. 138, that "although the burden is on the plaintiff to show negligence causing damage, when he shows damage resulting from the act of the defendant, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless." This principle has been frequently applied in this state. *Aycock v. R. R.*, 89 N. C. 321, and other cases. Applied to actions of this character, the doctrine is thus stated by La-

batt. § 834: "The rationale of this doctrine (spoken of in the cases as *res ipsa loquitur*) is that in some cases the very nature of the action may of itself, and through the presumption it carries, supply the requisite proof. It is applicable when, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a *prima facie* case without direct proof of negligence. * * * The doctrine does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it, or what shall be *prima facie* evidence of negligence." While it is true that the courts uniformly hold that a person or corporation operating an elevator for passengers are held to the highest degree of care, the same as common carriers, whereas one operating a freight elevator upon which employes ride in the discharge of their duty are held to a lower degree of care, this distinction does not affect the application of the doctrine of *res ipsa loquitur*. *Houston v. Brush*, 66 Vt. 346, 29 Atl. 380. Actions for injuries in either case are founded upon the averments of negligence—a breach of duty—the mode of proof may be the same. It may be that exculpatory evidence would be different. A defendant might be exonerated by showing a degree of care in one case which would be insufficient in the other. It is by no means clear that, in employment where human life is concerned and exposed, the distinction in regard to the degree of care is well founded. "When an accident has occurred, and the physical facts surrounding are such as to create a reasonable probability that the accident was the result of negligence in such case, the physical facts themselves are evidential, and furnish what the law terms 'evidence of negligence,' in conformity with the maxim, '*Res ipsa loquitur*.'" *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

In the note to *Huey v. Gahlenbec*, 15 Atl. 520, 6 Am. St. Rep. 792, the annotator says: "In such case, however, it is hardly accurate to say that negligence is presumed from the mere fact of the injury, but rather that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without the fault of the defendant. Such a case comes within the principle of *res ipsa loquitur*; the facts and circumstances speak for themselves, and, in the absence of explanation or disproof, give rise to the inference of negligence."

The doctrine is well illustrated in the case of *Houston v. Brush*, supra, the court, Thompson, J., after discussing the authorities and the reason upon which the doctrine is based, saying: "In the case at bar the defendants owed the requisite duty to the plaintiff to bring the case within the rule. It is evident that the accident would not have occurred if the pin had not worked out so as

to cause the wheel to fall. For aught that appears, the pin would not have worked out if it had been securely fastened into the block when the block was first attached to the derrick, and had been subsequently kept in that condition. It is not claimed that the pin could not have been fastened into the block so that it could not have worked out as it did. It did not appear that any new force or unforeseen or purely accidental occurrence intervened to remove the covering from the head of the pin, thus causing the accident, but it occurred while the derrick was being put to its ordinary use. * * * It was under the care and management of themselves [defendants] and their servants. The working out of the pin was an accident which in the ordinary course of things does not occur if those who have the care and management of a derrick use proper care. The case standing thus, we think the jury had a right to consider the fact that the pin came out as it did, and from it draw the inference that the defendants had failed to exercise ordinary care."

In *Balto. Boot Co. v. Jamar*, supra, the court said: "If the jury believed that maintaining the sheathing over the elevator, and especially over the portion of it where the shifting ropes were located, made its operation in that condition dangerous, that was itself a defect that might have been discovered by the use of ordinary care and diligence in inspecting the elevator."

In *Winkelmann v. Colladay*, 88 Md. 78, 40 Atl. 1078, the plaintiff, an employé, was injured by the falling of a dumb-waiter through a shaft running from the first to the fifth floor. The fall was occasioned by the breaking of the rope holding the dumb-waiter, but there was no evidence to show how or why the rope broke. It was held that the jury were authorized to infer from the fall of the dumb-waiter, unexplained, that the injury was caused by the negligence of the defendant in not providing safe appliances. The court said: "When something occurs which in the ordinary course of events would not occur without negligence, then the familiar doctrine of *res ipsa loquitur* is applied. This doctrine is particularly applicable to cases in which bodies fall, and fall in places where they are liable to do injury." In this case the contention was made that the doctrine of *res ipsa loquitur* did not apply between master and servant. It was rejected, the court saying, "No authority was cited for this contention in the court below, and none can be found." *Howser v. R. R.*, 80 Md. 148, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332; *Mulcairns v. Janesville*, 67 Wis. 23, 29 N. W. 565; *Posey v. Scoville* (C. C.) 10 Fed. 140.

In *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct. 292, and *Id.*, 88 N. Y. 645, it was held that "when an elevator fell without any apparent cause and injured the plaintiff, as ordinarily an elevator properly constructed

and properly managed does not fall, and as that elevator did fall, the presumption is that there was something wrong either with the elevator or with the management of it, and that presumption would warrant a verdict for the plaintiff, unless it were rebutted by the defendant's evidence."

The doctrine was applied in *Griffin v. Boston & A. Railroad*, 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526, to the unexplained spreading of the coupling link, resulting in the separation of cars, causing injury to an employé. It is said that while, either from the facts connected with the transaction, the manner in which the links spread, their appearance after the accident, or other circumstances, the jury could find that there was no negligence, yet the plaintiff was entitled to go to the jury.

In *Folk v. Schaeffer*, 186 Pa. 253, 40 Atl. 401, the injury was caused by the knot of a rope becoming untied and slipping. "There was no direct evidence of want of care in tying the knot, and the conclusion that it was improperly tied was an inference from the fact that it became untied. Ordinarily an accident would not have happened as this did if care had been exercised in tying the ropes. There was no difficulty in making them secure. Under the circumstances shown by the plaintiff, the burden was thrown on the defendant to show that due care had been used, and, in the absence of any explanation, the jury might infer want of care. The defendants were not required to satisfactorily explain the cause of the accident, but they were bound to rebut the presumption of negligence arising from the attendant circumstances." *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 32 Am. St. Rep. 464.

In *Kearny v. Railroad*, 5 L. R. Q. B. 411, Cockburn, C. J., says: "Now we have the fact that a brick falls out of this structure and injures the plaintiff. The proximate cause appears to have been the looseness of the brick and the vibration of the train passing over the bridge, acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendant to use reasonable care and diligence, and I think the brick being loose affords prima facie a presumption that they had not used reasonable care and diligence." *Scott v. Dock Co.*, Com. Law Rep. (N. S.) 134-220.

In the light of the foregoing and many other authorities, his honor correctly submitted the question of the defective construction of the elevator to the jury. It appears that the weights which should have ascended and descended free from obstruction or unnecessary friction struck against the sides of the box or shaft until they produced the condition described by the witness. The shaft or box was made of rough uneven

planks; how far this contributed to the rope slipping was for the consideration of the jury. They may well have found that in such respect the elevator (which includes all of its parts) was defective in its construction. The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence, and say whether upon all of the evidence the plaintiff has sustained his allegation. His honor, in view of this principle, correctly said to the jury, in response to defendant's request, "Negligence on the part of defendant is not to be inferred from the mere fact that an accident occurred, and that in consequence thereof the plaintiff was injured," etc.

In regard to the second proposition, regarding the duty of inspection, we are of opinion, both upon reason and authority, that a failure to inspect an elevator approaches very near, if it does not constitute, negligence. The law is fully and ably discussed in *Labatt on Master and Servant*, c. 11. "Negligence on the part of the master may consist of acts of omission or of commission, and it necessarily follows that the continuing duty of inspection and supervision rests on the master. It will not do to say that, having furnished suitable and proper machinery and appliances, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative, and must be continuously fulfilled and positively performed. Anything short of this would not be ordinary care." The duty of inspection being a positive and affirmative duty, to be continuously performed by the defendants, the court could not say, as a matter of law, how often such inspection should have taken place, or that it was proper to omit it at some particular time. It was for the jury to say whether the defendants had used reasonable care in this respect. *Houston v. Brush*, supra; *Labatt*, 157. We have, after a somewhat exhaustive examination of the authorities, found no case in which a failure to inspect an elevator for more than four months has been held sufficient to excuse the defendant. *Labatt*, § 158, note 6, "Elevator." A plaintiff was permitted to recover for injury where the clamp to which a derrick guy rope was fastened was inspected only once a week. *Welsh v. Cornell*, 63 N. Y. 44. In *McGuigan v. Beatty*, 186 Pa. 329, 40 Atl. 490, a failure to inspect a rope which held the weight for six months was evidence of negligence, the court saying: "In addition to this, there was an entire absence of testimony that the defendant had even inspected the rope, and the absence of such proof affords an inference that the duty to inspect

had been neglected." "An elevator needs, and should have, constant care and inspection. The friction of the rope is constantly wearing the strands, and when they part it is necessarily weakened." *Bier v. Standard Mfg. Co.*, 130 Pa. 446, 18 Atl. 637.

His honor's charge in respect to the duty of inspection is in accord with the authorities. A careful examination of the entire charge shows that the principles given to the jury for their guidance, and the contentions of the parties, were stated with great clearness and accuracy. The defendant, however, says that the plaintiff assumed the risk incident to his employment in the use of the elevator, and that he was guilty of contributory negligence. The last defense, if sustained by any evidence, is not open to the defendant, as it tendered no issue upon the question. It is always an affirmative defense, and the defendant carries the laboring oar. We find no evidence to sustain the plea, if presented. Without discussing the question as to whether the doctrine known as "assumption of risk" comes within the same rule, we have no hesitation in holding that there is nothing in the evidence to sustain the defense. *Appleton, J.*, in *Buzzell v. Mfg. Co.*, 48 Me. 113, 77 Am. Dec. 212, says: "The employé assumes the risks, more or less hazardous, of the service in which he is employed, but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer." There is no suggestion that the plaintiff knew of any defect in the elevator or any of the appliances for its operation, or that any duty was imposed upon him to inspect it. There is no aspect of the evidence in which the plaintiff can be said to have assumed the risk incident to the negligence of the defendant. *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611. The defendant's first prayer was properly refused, because there was no evidence to sustain it. The sixth prayer was substantially given; the others were given as asked.

Upon a careful examination of the entire record and the defendant's exceptions and assignments, we find no error. The judgment must be affirmed.

(120 Ga. 218)

STEPHENS v. HENDERSON, Marshal.

(Supreme Court of Georgia. May 12, 1904.)

INTOXICATING LIQUORS — MUNICIPAL REGULATIONS — VALIDITY — DOMESTIC WINES — SALE.

1. An ordinance enacted by the mayor and aldermen of Cartersville in 1887, providing for the inspection of all domestic wines sold in that city, fixing the fees of the inspector, and prescribing penalties for the violation of the ordinance, was not invalid as contravening the general domestic wine act of 1877 (Pub. Laws 1877, p. 83). It furnished sufficient foundation for

an amending ordinance passed in 1903, which was also valid.

2. Any city or town where the sale of domestic wines has not been prohibited by a special act or the local option law may regulate the sale of such wines within its limits, provide penalties for a violation of such regulations, and impose a tax upon each place where such wines are sold. This, however, is not applicable to sales of wine made from grapes or berries grown on the land of the seller, or upon land leased or rented by him, unless such person establishes a place of business to make such sales, or engages regularly in the business of selling same within the territorial limits of such city or town.

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

Habeas corpus by J. F. Stephens against J. A. Henderson, as marshal of the city of Cartersville, to secure relator's discharge from custody. From an order denying the petition and remanding the petitioner to custody, he brings error. Affirmed.

James B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., and T. O. Milner, for defendant in error.

CANDLER, J. On July 5, 1887, the mayor and aldermen of the city of Cartersville passed an ordinance creating the office of inspector of domestic wines. It was made the duty of this officer to inspect all wines offered for sale in the city of Cartersville, "and see that said wines are pure and unadulterated and not injurious to health, and in merchantable condition." It was also provided that all persons offering wines for sale in the city should first notify the inspector and have such wines examined in accordance with the terms of the ordinance. The ordinance also fixed the fees of the inspector, and prescribed penalties for the violation of its provisions. On November 5, 1903, this ordinance was amended by inserting therein a requirement that all persons offering domestic wines for sale should register their names in a book to be kept by the city for that purpose, changing the fee to be paid the inspector, and providing for a license tax to be required of all persons, firms, or corporations who should "establish a place of business for the purpose of selling domestic wines, or otherwise engage regularly in the business of selling domestic wines within the territorial limits of the said city of Cartersville." Stephens was arrested on a warrant charging him with violating the amendatory ordinance in selling wines without first registering and paying the special tax imposed by the city and the inspection fees required by law, and also in establishing a place of business for selling domestic wines in contravention of the ordinance of November 5, 1903. He sued out a writ of habeas corpus, alleging that his detention was illegal, because: (1) The mayor and aldermen had no legal power to adopt the ordinance of July 5, 1887, and hence that ordinance was not the subject-matter of the

amendment of November 5, 1903. (2) Petitioner is specially exempted by the act of 1895 of the General Assembly from the operation of said act as a manufacturer, unless he established a regular place of business for selling domestic wines. The writ was heard by the judge of the city court of Cartersville, who passed an order denying the prayers of the petition, and remanding the petitioner to the custody of the city authorities. Stephens excepted.

It will be seen that the only question for our decision is as to the constitutionality of the two ordinances of the city of Cartersville to which reference has been made, for only by the attack on their validity is the legality of the petitioner's detention called in question and room given for the operation of the writ of habeas corpus. We will not consider the point made by the plaintiff in error that, by the terms of the act of 1895 (Pol. Code 1895, § 757), he is exempted from the operation of the municipal ordinances of the city of Cartersville. That is a matter of defense in the municipal court, and involves questions of fact, which can only be determined on a trial of the case, and does not in any way affect the legality of the applicant's detention. The ordinances themselves, on their face, are in no way in conflict with the act mentioned, and the petitioner was arrested on a warrant charging him with a violation of their provisions. If, as a matter of fact, he is one of a class of citizens who are by general statute exempted from the operation of the ordinances in question, he must show it on his trial in the municipal court. It is not the function of the writ of habeas corpus, however, to determine the guilt or innocence of one accused of crime. Its only purpose is to ascertain the legality of the detention, and that is a matter to which the point now under discussion does not go.

2. The principal contention of counsel for the plaintiff in error is that the original ordinance passed in 1887 was invalid as contravening the general domestic wine act of 1877 (Pub. Laws 1877, p. 83), and from this it is argued that the amendment of 1903 was void, because it purported to amend something which in legal contemplation had no existence. We are satisfied that this contention is without merit. The original ordinance did not prohibit the sale of domestic wines; it merely provided for their inspection, as a safeguard against adulterations. It was clearly within the power of the municipal authorities under Political Code of 1895, § 1600, to enact such an ordinance as a general police regulation, just as a city may, without further express legislative authority. Pure food laws to protect its citizens against vicious and fraudulent adulteration of foodstuffs which might otherwise be foisted upon them by unscrupulous merchants may be enacted as police regulations. The domestic wine act of 1877 guaranteed

the right of the manufacturer to sell, in quantities not less than one quart, wine made from grapes grown on his land; but it did not take away from the cities of the state the authority to prescribe that such wines when sold shall be free from injurious adulterations. This being true, the ordinance passed in 1887 was legal and valid, and furnished a sufficient foundation for the amending ordinance of 1903. The provisions of that amendment were likewise valid and legal. For the most part it carried out the scheme of inspection and prevention of adulteration inaugurated by the ordinance of 1887. The only feature of the amendment not contemplated by the original ordinance was a provision for a license tax on places where domestic wines are sold, and this was in entire harmony with section 756 of the Political Code, of 1895. We do not hesitate to hold that from nothing that appears in the record does it appear that the detention of the petitioner was illegal, and consequently that the court below did not err in refusing the prayers of the petition.

Judgment affirmed. All the Justices concur.

(120 Ga. 36)

POWELL v. BRINSON et al.

(Supreme Court of Georgia. May 12, 1904.)

INJUNCTION — CUTTING TIMBER—PLAINTIFF'S TITLE—SUFFICIENCY OF EVIDENCE.

1. In an action, brought under section 4927 of the Civil Code of 1895, to restrain the cutting of timber on land alleged to belong to the plaintiff (there being no allegation in the petition that the defendants were insolvent or that the threatened damage would be irreparable), where one of the plaintiff's muniments of title consisted of a sheriff's deed, and the execution which was the basis of the deed was not introduced in evidence, nor its record proved, but parol evidence was resorted to to show that it had been lost, the "perfect title" required by the statute was not made out, and it was proper to refuse an injunction.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by O. A. Powell, administrator, to restrain S. Brinson and another from cutting timber on land. Judgment for defendants, and plaintiff brings error. Affirmed.

J. W. Haygood and Eldridge Outts, for plaintiff in error. Townsend & Dickerson and M. E. O'Neal, for defendants in error.

CANDLER, J. This was an action, under section 4927 of the Civil Code of 1895, to restrain the cutting, boxing, or working of timber on land alleged to belong to the estate of which the plaintiff is administrator, the petition setting up that the plaintiff, as administrator, "holds perfect title to said lot of land." There was no allegation that the defendants were insolvent, or that the damages would be irreparable. The abstract of title attached to the petition showed (1) a grant

from the state to Jesse Lockhart, dated December 4, 1829; (2) deed from Lockhart to Priester, dated August 28, 1851, recorded April 1, 1902; (3) judgment in favor of Priester against Bloodworth in Spalding superior court, dated November 22, 1858, reciting that the land in question is liable for the amount of the judgment for purchase money unpaid; (4) sheriff's deed from the sheriff of Miller county to Sears, reciting a levy on the property under the judgment mentioned above. From Sears the property descended in a chain of warranty deeds to the plaintiff's intestate. The sheriff's deed to Sears was dated October 2, 1860, recorded December 12, 1860, and re-recorded June 4, 1903. At the trial, in addition to the documentary evidence introduced to support the abstract of title, the plaintiff introduced the affidavits of various witnesses who testified, in substance, that the original *f. fa.* in favor of Priester against Bloodworth was lost, that diligent search had been made for it, and that it could not be found. It also appeared that the land in dispute was wild land, and that no one had been in actual possession of it for 10 years. The defendants introduced in evidence a deed from Bloodworth to Weems, dated February 13, 1855, three years prior to the rendition of the judgment in favor of Priester against Bloodworth, and recorded April 1, 1902. The bill of exceptions recites that "this deed was offered by the defendants with the statement that defendants claimed under it, and it was relied upon as showing title out of plaintiff's predecessor in title." It also recites that "after argument the court announced his decision that the plaintiff did not show perfect title, because of the fact that plaintiff failed to produce or prove the record of the *f. fa.* in favor of James W. Priester against S. W. Bloodworth, on which was based the sheriff's deed from Dunn to Sears relied upon by plaintiff as part of his title, and upon this express ground the court therefore ruled that plaintiff was not entitled to the injunction prayed for." To this ruling the plaintiff excepted.

It is well settled by the decisions of this court that the "perfect title" required by the Civil Code of 1895, § 4927, to warrant the grant of an injunction against the cutting of timber, in the absence of an allegation of insolvency or that the threatened damages will be irreparable, "must be a duly executed paper title, the exhibition of which will show both the 'right of possession' and the 'right of property' in the plaintiff. A paper title not meeting these requirements, or a title resting in parol, will not bring an injunction case within the provisions of this section." *Wilcox Lumber Co. v. Bullock*, 109 Ga. 532, 35 S. E. 52. See, also, *Camp v. Dixon*, 111 Ga. 674, 36 S. E. 878, where the subject is fully discussed; *Dixon v. Monroe*, 112 Ga. 158, 37 S. E. 180; *Jenkins v. Carmen*, 112 Ga. 476, 37 S. E. 719; *Morgan v. Baxter*, 113 Ga. 144, 38 S. E. 411. In the present case the absence of documentary proof of the existence or rec-

ord of the execution in favor of Priester against Bloodworth constituted a break in the plaintiff's chain of title which was fatal to his right to an injunction under the Code section cited. The execution was necessary to give the sheriff the right to sell the property, and, as we have seen, parol proof of its existence will not suffice to make out the kind of title necessary to afford the plaintiff the remedy he seeks, in the absence of an allegation of insolvency or of irreparable damages. It must be borne in mind that the relative merits of the claim of title set up by the plaintiff and that made by the defendants is not involved in this decision. The question before us is one not of title, so much as procedure, and the title to the property in dispute is involved only to the extent that it is necessary to show the plaintiff's right to the relief he seeks. As we have shown, the title set up by him rested partly in parol, and the court below was clearly right in denying the injunction sought.

Judgment affirmed. All the Justices concur.

(119 Ga. 970)

COOPER v. LAZARUS.

(Supreme Court of Georgia. May 11, 1904.)

APPEAL AND ERROR—BILL OF EXCEPTIONS—FILING—DISMISSAL.

1. There is upon the bill of exceptions no entry showing that the same was ever filed in the office of the clerk of the trial court. The clerk certifies that he has no recollection that the paper was filed in his office within the time required by law. A mandamus proceeding was instituted in the trial court against the clerk to compel him to indorse an entry of filing upon the paper, showing that it was filed within due time, and final judgment has been rendered in such proceeding in favor of the clerk. The case was called in the Supreme Court for final disposition at a time to which it had been regularly postponed under the law, and it was held that the writ of error must be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action between John R. Cooper, as receiver, and Rosalie Lazarus. There was judgment for the latter, and the former brings error. Writ dismissed.

Steed & Ryals, Hardeman, Davis, Turner & Jones, and Ross & Grace, for plaintiff in error. Jno. R. L. Smith, for defendant in error.

COBB, J. The bill of exceptions was certified on June 13, 1903. It was filed in the office of the clerk of the Supreme Court on August 5th, and was placed on the docket of the October term. No entry of filing in the office of the clerk of the superior court appears on the bill of exceptions. The clerk certifies that he cannot recall ever having heard of the bill of exceptions until the 29th day of July, when it was found in his office among the papers in the case, with no back-

ing to indicate what it was, and nothing to show that it had ever been filed in his office. On August 10th the plaintiff in error made an application to this court for a mandamus against the clerk to compel him to mark the bill of exceptions filed as of June 15th, it being alleged that it was actually filed on that date. Upon this application a mandamus nisi was issued against the clerk, returnable to the October term. The clerk filed an answer, in which he denied that the bill of exceptions was filed on the date above mentioned, or on any other date within the time allowed by law for the filing of the same. The ruling of the court on this application is contained in the headnotes in *Cooper v. Nisbet*, 118 Ga. 872, 45 S. E. 692, and need not be repeated here. In accordance with the ruling then made, an order was passed on October 31st dismissing the application for mandamus, and directing the clerk of this court to transmit to the superior court of Bibb county the original bill of exceptions, in order that such appropriate proceedings might be had in that court as would be necessary to relieve the defects. At the conclusion of this order appeared the following: "It is further ordered that said bill of exceptions be returned to this court before the last day of the present term, or in default thereof the writ of error will be dismissed." On October 5th a motion to dismiss the writ of error on the ground that the bill of exceptions had never been filed in the office of the clerk of the superior court was filed by the defendant in error. When the case was reached on the call of the Macon circuit, it was postponed until a later day in the term, and finally passed to the heel of the docket. Being thus placed among the cases in which oral argument could not be heard during the October term, it was heard by briefs both on the merits and on the motion to dismiss; such briefs being filed at the time required by the order of the court usually passed in reference to such cases. Thereafter, during the October term, application was made to strike from the order passed on October 31st the words above quoted, which provided that, unless the bill of exceptions was returned to this court before the last day of the October term, the writ of error would be dismissed; it being alleged that the mandamus proceedings were still pending against the clerk in the superior court; that a trial had been had resulting in a verdict in favor of the clerk; that a new trial had been granted; that a second trial had been had, which also resulted in a verdict in favor of the clerk; that the judge had overruled a motion for a new trial; that the mandamus case was then pending in the Supreme Court on a bill of exceptions assigning error upon the refusal of the judge to grant a new trial; and that such mandamus case would not probably be disposed of before the adjournment of the October term. Upon the hearing of this application, an or-

der was passed striking from the order of October 31st the words referred to, and it was further ordered that, as briefs had been duly filed in the case, the same should stand upon the docket until the further order of the court; it being distinctly provided in the order that nothing therein should prejudice the right of the defendant in error to move at the succeeding term, or thereafter, to strike the case from the docket, nor the right of the plaintiff in error to make such motion in reference to the case as the court might have authority to entertain, in the event the plaintiff in error is finally successful in the mandamus proceeding against the clerk of the superior court. Argument on the mandamus case was, by special order, heard during the October term, but the case was not decided during that term. Such was the status of the matter when the court finally adjourned for the October term. On March 20th the judgment in the mandamus case was affirmed. *Cooper v. Nisbet*, 118 Ga. 872, 45 S. E. 692. And when the cases which had been passed to the heel of the docket of the October term were called for reargument during the March term, as provided in the order above referred to, the case was again submitted to the court upon the briefs filed; the defendant in error still insisting upon her motion to dismiss.

It not appearing that the bill of exceptions had been filed in the office of the clerk of the trial court within the time required by law, and it being shown that the plaintiff in error had failed in the mandamus proceeding against the clerk to require an entry of filing to be placed upon the bill of exceptions, the writ of error must be dismissed. All the Justices concurring.

(120 Ga. 67)

McINTYRE v. McINTYRE.

(Supreme Court of Georgia. May 12, 1904.)

WILLS—PROBATE—CANCELLATION—EVIDENCE— MOTION FOR NEW TRIAL—EXERCISE OF DISCRETION.

1. Where a first application for a new trial is made on discretionary grounds, the trial judge must exercise his discretion in approval or disapproval of the verdict.

The order overruling the motion for a new trial in this case showing on its face that the judge did not exercise the discretion which the law vested in him, a new trial must result, unless the evidence demanded the verdict.

This is true though the failure of the judge to exercise his discretion was not made the subject of a special exception.

2. Where a paper found among a decedent's papers is offered for probate as a will, and appears to have been canceled or obliterated in a material part, a presumption arises that the cancellations or obliterations were made by the deceased, and that he intended them to operate as a revocation.

3. The rule of the English courts that cancellations with a lead pencil are presumed to have been deliberative, and not final, has not been generally adopted by the American courts.

4. The rule of presumption above stated applies where the cancellations are made with a

pencil, but the fact that they are so made may be considered by the jury, with other evidence, in determining whether the presumption of revocation has been rebutted.

5. Joint operation of act and intention is necessary to revoke a will.

6. Where an act is done by the testator which may or may not amount to revocation, revocation will not result if it appears that the act was dependent upon the efficacy of another act, such as the making of a new will, and that the testator did not intend to revoke his will unless the other act was consummated.

7. But where the will is completely revoked, the failure of another contemplated act cannot revive it.

8. The evidence did not demand the verdict rendered. The charge of the court was in the main correct, but in some respects not altogether accurate. The propounder was not an incompetent witness for the reason assigned in the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Proceedings by D. B. McIntyre for the probate of the will of Edward McIntyre, deceased, to which W. R. McIntyre filed a caveat. The will was admitted to probate, and from an order denying a motion for a new trial, caveator brings error. Reversed.

Osborne & Lawrence, for plaintiff in error. Adams & Adams, for defendant in error.

SIMMONS, C. J. A paper alleged to be the last will and testament of Edward McIntyre was propounded for probate. A son of the deceased filed a caveat on the ground that the paper, though once a will, had been revoked by cancellation and obliteration. The finding of the ordinary was in favor of the caveator, and the propounder appealed to the superior court, where a verdict and judgment were rendered setting up the paper offered for probate as the will of the deceased. A motion for a new trial was filed by the caveator, and on the hearing the following order was passed: "In this case it appeared to me at the trial that the evidence inclined against the will, but the jury are the sole and exclusive judges of all questions of fact, and I have no more right to require them to take the facts of the case from the court than they have to require me to take the law from them. Upon this branch of the motion, therefore, I think it would be a usurpation of power to interfere with the verdict upon the ground that the evidence did not authorize it, for the reason that there is sufficient evidence to support the verdict." The order then recited that no error of law was committed, and that a new trial would not be granted. The caveator excepted.

1. The application was for a first new trial, and was based partly upon discretionary grounds; that is, that the verdict was contrary to the evidence, and decidedly and strongly against the weight of the evidence. The order indicates that the trial judge did not exercise the discretion which the law

contemplates he shall exercise in every such case where the evidence is conflicting. The order is very similar in verbiage to that passed in *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912, where a new trial was ordered by this court solely on the ground that the trial judge had not exercised any discretion with reference to the approval or disapproval of the verdict. It is contended that *Thompson v. Warren* is not controlling, because in that case there was a special exception raising the point upon which the decision was made, whereas there is no such exception in the present case. We do not think this a valid distinction, or that it was necessary to do more than file a general exception to the overruling of the motion. It is to be noted that in neither of the somewhat analogous cases of *Rogers v. State*, 101 Ga. 561, 28 S. E. 978, and *Central of Ga. Ry. Co. v. Harden*, 118 Ga. 453, 38 S. E. 949, both of which are cited in *Thompson v. Warren*, was there any special exception. The judgment must be reversed on this ground, irrespective of others, unless, as contended, the verdict was demanded by the evidence.

2. The paper offered for probate had been duly and legally executed as a will. Some time after its execution the testator drew pencil lines through certain portions of the will, and also caused slips of blank paper to be pasted over certain clauses in the will, through which pencil lines appear to have been previously drawn. The lines were lightly drawn, and left the writing perfectly legible. The will purported to have been executed in Effingham county, and a line was drawn through the word "Effingham," and the word "Chatham" written in pencil to the left. The abbreviation "Edwd." in the name of the testator was canceled in the same way, and the full name, "Edward," written above it. The remainder of the formal part of the will was left intact. Pencil lines were then drawn through 9 or 10 lines making bequests to testator's wife and son, and over some of these lines a blank slip was pasted. The 14 lines following were unaltered; these describing certain real estate and personal property, and stating that they were given to —, a blank slip being pasted over the name of the beneficiary. On this slip was written, "leave two lines," and diagonally to the right and above the slip was written "2 blank lines." The clause following was dealt with in the same way, the name of the beneficiary being covered with a slip of paper on which was written "3 lines." No slip was pasted over the name of the beneficiary of the property described in the next clause, but pencil lines were drawn through it, and the words "2 blank lines" written in pencil to the right. Pencil lines were drawn through the next clause, disposing of a share of stock in a corporation to testator's grandson. The following clauses, providing for the payment

of debts, making disposition of cemetery lots, nominating testator's wife as executrix, and conferring upon her certain powers, were left intact. The date upon which the will appeared to have been executed was canceled with pencil lines, and the words "two (2) blank lines" written to the left. Pencil lines were also drawn through testator's signature and through the signatures of the witnesses, and the names of three other persons written to the left.

As a general rule, the burden is on a person attacking a paper offered for probate as a will to sustain the grounds of his attack. But by express provision of our statute, where a will has been canceled or obliterated in a material part, a presumption of revocation arises, and the burden is on the propounder to show that no revocation was intended. Civ. Code 1895, § 3343. See, also, *Howard v. Hunter*, 115 Ga. 358, 41 S. E. 638, 90 Am. St. Rep. 121; *Cutler v. Cutler* (N. C.) 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209. How far the cancellation or obliteration must extend before this presumption will arise, is not settled. See *Malone's Adm'r v. Hobbs* (Va.) 39 Am. Dec. 266. Where the paper is found among the testator's effects, there is also a presumption that he made the cancellations or obliterations. See cases cited in note to *Graham v. Burch*, 28 Am. St. Rep. 351. The presumption that revocation was intended will certainly arise where the testator draws lines through, and pastes slips of paper over, clauses of the will disposing of portions of his property, and also draws lines through his signature and those of the subscribing witnesses. It having been shown that the paper offered for probate in this case had been in the custody of the deceased up to the time of his death, the propounder was met with both of the presumptions above alluded to.

3, 4. There are cases, chiefly English, holding that a cancellation with a pencil is presumptively deliberative, and not final, and no presumption of revocation arises from such cancellations. See 2 Green. Evid. (16th Ed.) § 681, p. 626, note 12; *Mence v. Mence*, 18 Ves. Jr. 348, and cases cited in footnote "a." The American cases generally do not adopt this rule. *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269; *Gardner on Wills*, § 81, p. 258. Mr. Underhill characterizes the English rule as absurd, and says that "the true rule is that the cancellation of a will in lead pencil is only one fact to be considered in determining the effect of the cancellation, and the intention with which it was made. Where a will is produced with lead-pencil cancellations, it will be presumed that they were done by the testator *animo revocandi*; and it is upon the party claiming that they were deliberative, and not final, to establish that fact." 1 Under. on Wills, § 230. This statement of the law expresses our views.

5. Joint operation of act and intention is

necessary to revoke a will. *Howard v. Hunter*, supra. As aptly and concisely expressed by James, L. J., in *Cheese v. Lovejoy*, 2 P. D. 251-253: "All the destroying in the world, without intention, will not revoke a will; nor all the intention in the world, without destroying. There must be the two." Here we have certainly the act, and an act of such a character as to give rise to a presumption of intention to revoke. It is contended that the evidence demanded a finding that this presumption had been rebutted, but this contention, as we shall presently show, cannot be sustained.

6, 7. Reference is made in the brief of counsel for the defendant in error to what is known as the "doctrine of dependent relative revocation." Under the operation of this doctrine, it has been held that if a testator cancel or destroy a will, with a present intention to make a new will as a substitute for the old, and the new will is not made, or, if made, fails of effect for some reason, it will be presumed that the testator preferred the old will to an intestacy, and this testament will be given effect. We believe this doctrine to be sound, when properly understood and properly qualified. It is a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator. Some of the cases appear to go to extreme lengths in the application of this doctrine, and seem to defeat the very intention at which they were seeking to arrive. The doctrine, as we understand it and are willing to apply it, is this: The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then, if the new will be not made, or, if made, is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked—if the act of revocation is completed—as if the will be totally destroyed by burning, and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make a new will, or made one which cannot take effect, counts for nothing. In other words, evidence that the testator intended to make or did actually make a new will, which was inoperative, may throw light on the question of intention to revoke the old one, but it can never revive a will once completely revoked. See, on the subject, *Page on Wills*, § 276; *Schoul. on Wills* (3d Ed.) § 398; *Pritch. on Wills*, § 272; 1 *Woer. Am. Law Adm.* (2d Ed.) § 48, *90, 91; *Semmes v. Semmes*, 7 Har. & J. 388; *Banks*

v. Banks, 65 Mo. 432; *Hairston v. Hairston*, 36 Miss. 276; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363; *Gardiner v. Gardiner* (N. H.) 19 Atl. 651, 8 L. R. A. 383; *Will of Penniman* (Minn.) 18 Am. Rep. 375; *Johnson v. Brailsford*, 2 Nott & McC. 272, 10 Am. Dec. 601; *In re Olmsted's Estate* (Cal.) 54 Pac. 745, 747; *Thomas v. Thomas* (Minn.) 79 N. W. 104, 77 Am. St. Rep. 639; *Townshend v. Howard* (Me.) 20 A. 1077; notes to *Graham v. Burch*, 28 Am. St. Rep. 345. Applying what has been said to the facts of the present case, the following result is reached: There was evidence from which the jury could have found that, when the testator canceled the old will, he intended to make a new one. The canceled paper itself bore evidence of such an intention. If this was his intention, and he did not intend for the cancellation to operate as a revocation unless the new will was made, then the finding ought to be in favor of the propounder. On the other hand, there was evidence from which a jury could find that the cancellation was intended to operate as a revocation, and, if this is the truth, the finding ought to be against the will, notwithstanding it may appear that the testator contemplated the making of another will. These are questions for the jury to decide. The matter finally turns upon the intention of the testator, and no mere presumption can be allowed to defeat this intention when it has been made to appear.

8. The evidence did not demand the verdict rendered. A witness for the caveator testified that he was present in the room during the last illness of the deceased, and that he said to his son, the caveator: "Willie, I have left a pencil memorandum of a will. It is not a will. I was not able to finish [or complete] it, but I call upon Willie to carry out the provisions of this pencil memorandum." The witness testified positively and unequivocally that this was the exact language of the deceased. Where the issue is *revocavit vel non*, the declarations of the testator are, in this state, admissible, "although made at any time between the making of the will and the death of the testator." *Patterson v. Hickey*, 32 Ga. 156. The reply made by the propounder to this evidence is that, while admissible, it is of slight evidentiary value, and counts for nothing when weighed against the other evidence that the testator did not intend a revocation, and that, properly construed, the declaration itself really shows that the testator regarded the paper as his will. We have been unable to take this view of the matter. The evidence is of an explicit declaration by the testator that the paper was not his will, but contained only memoranda for a will. The request to the son was to carry out the provisions of memoranda, and not of a will. If not his will, it must have been revoked, for it was once a will. The preponderance of the evidence may have been to the effect that the testator did not intend

a revocation, but it cannot be said that there was no evidence to the contrary.

We send the case back, that it may be retried in accordance with the views herein expressed. The motion for a new trial contains several grounds, but most of them are covered in the foregoing discussion. One ground complains that the court allowed Mrs. McIntyre, widow of the deceased, and propounder of the will, to testify; the objection being that she was "interested in the result of the suit." Since the passage of the evidence act of 1866 and its amendments, interest does not disqualify a witness, but goes merely to his credit. Error is not assigned upon any portion of the testimony of Mrs. McIntyre, nor is it contended that she is disqualified as a witness under any of the provisions of the act of 1889 (Acts 1889, p. 85; Civ. Code 1895, § 5269); the sole objection being that she is interested. As to her competency to testify to transactions and communications between herself and the deceased, see *Buchannan v. Buchannan*, 103 Ga. 90, 20 S. E. 608 (1). The charge of the judge was, in the main, fair and accurate. The instruction on the subject of the burden of proof was, however, not altogether accurate.

Judgment reversed. All the Justices concurring.

(120 Ga. 174)

FINCH v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

INTOXICATING LIQUORS — ILLEGAL SALE — SUFFICIENCY OF EVIDENCE.

1. Evidence that a fluid sold by the accused was red in color, looked like liquor, burnt like liquor, and had an effect like cheap whisky or beer, is sufficient to authorize his conviction under an indictment charging him with having sold spirituous and malt liquors and intoxicating bitters without having registered as a dealer therein; it appearing that the accused had not so registered.

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

W. S. Finch was convicted of selling intoxicating liquors without having registered his name as a dealer, and brings error. Affirmed.

Tyler & Anderson and H. B. Strange, for plaintiff in error. Howell Cone, Sol., and B. T. Rawlings, Sol. Gen., for the State.

COBB, J. The indictment charged the accused with having sold spirituous and malt liquors and intoxicating bitters without having registered his name as a dealer. His motion for a new trial was based upon the general grounds only, and, having been overruled, he excepted.

There was but one witness in the case, and his testimony was, in substance, as follows: "I bought something from Mr. Finch in the fall of 1901. It was a pint flask, with something red in it. I paid him forty cents for

it. I don't know what it was. The bottle never had any label on it. I took three drinks of it. I can't say it was whisky. I don't know what it was. I called for something to drink, and he gave me the stuff I bought." On cross-examination the witness testified that, if what he bought was whisky, it was the poorest grade he ever drank; that it was not gin, nor rum, nor beer, and it was not bitter; that it was red, and had a burning effect like a cheap grade of whisky; that it had a similar effect to liquor, looked like whisky, and had an effect something like beer; that it was not as strong as good whisky; had an effect about like cheap whisky, rum, or gin; that it was stronger and burnt more than beer. While not sufficient to show what particular kind of liquor the accused sold, this evidence was, we think, sufficient to show that the witness bought from him some kind of liquor, probably whisky. The jury could read between the lines. They could see that the witness was making a palpable effort to dodge, and the testimony makes the same impression upon our minds that it did upon theirs—that the accused was guilty. It was not necessary to show what particular kind of liquor he sold, because, if he sold any liquor of the kind described in the indictment, he was guilty of the offense charged. The evidence was sufficient to show that the liquor was spirituous. It was red, looked like whisky, burnt like liquor, and had an effect like cheap whisky or beer. We think the jury were warranted in inferring from these circumstances that it was whisky, or some other spirituous liquor.

Judgment affirmed. All the Justices concurring.

(120 Ga. 180)

ADDIS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—INSTRUCTIONS.

1. The charge complained of, when taken in connection with the general charge, was not erroneous. The evidence authorized the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

John Addis was convicted of hog stealing, and brings error. Affirmed.

J. R. Grant and Hubert Estes, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

COBB, J. The accused was convicted of hog stealing. He assigns error upon the refusal of the court to grant him a new trial. Complaint is made of the following charge: "You take this case, gentlemen of the jury, and determine what the truth is. If the defendant is guilty, and you are satisfied of it to the extent I have charged you, it would be

your duty to convict him. If so, just say, 'We, the jury, find the defendant guilty.'" The criticism upon the charge is that the court should never instruct the jury that it was their duty to render a given verdict, and that the last sentence, being a complete sentence in itself, was an expression of opinion by the court on the evidence, and was equivalent to instructing a verdict of guilty.

We do not think the charge subject to the criticism made upon it. The judge had fully charged the jury as to the law of reasonable doubt, and also the rules to be followed in determining cases of circumstantial evidence; and if the jury, from the evidence, were satisfied, to the extent that he had charged them—that is, beyond a reasonable doubt—that the accused was guilty, it was their duty under the law to convict him, and there was no error in instructing them to this effect. Properly construed, there was nothing in the charge complained of which contained an expression of opinion, or which constrained the jury to find any other way than according to the evidence as it appeared to them. The circumstances proved were of such a character as to authorize a finding that the accused stole the hog, and we see no reason for reversing the judgment refusing a new trial.

Judgment affirmed. All the Justices concurring.

(120 Ga. 50)

GOULD v. GLASS et al.

(Supreme Court of Georgia. May 12, 1904.)

HUSBAND AND WIFE—GIFT TO WIFE—PRESUMPTIONS—REFORMATION OF INSTRUMENTS—PLEADING—FRAUD—INJUNCTION AGAINST EXECUTOR—MISMANAGEMENT OF ESTATE—PETITION.

1. A husband conveyed land to a creditor of his wife to secure the payment of a debt. Upon the payment of the debt the creditor executed a deed to the land to the husband and wife as tenants in common, such deed being duly recorded. About six years after the record of the deed the husband and wife united in a deed as tenants in common, conveying a portion of the land, and, simultaneously with the execution of this deed, the purchaser executed to the husband and wife, jointly, a mortgage to secure the purchase money. *Held*, that a presumption arose that the husband intended to give to his wife a half interest in the mortgage.

2. The presumption of a gift, arising from the act of the husband in allowing title to property owned by him to be taken in the name of his wife, may be repelled by evidence showing that the husband thereafter exercised acts of dominion over the property of such a character as were inconsistent with ownership by the wife. Acts of the wife apparently recognizing ownership in the husband are proper matters for consideration in determining whether there has been an acceptance of the gift.

3. A petition praying for the equitable remedy of reformation upon the ground of mistake is insufficient if it contains only general allegations of mistake, and does not state how the mistake was made, whose mistake it was, or what brought it about.

4. Mere general allegations of fraud are not sufficient to authorize the granting of equitable relief.

5. As a general rule, equity will not decree the reformation of an instrument at the instance of one who is a mere volunteer, and who was not a party to the instrument.

6. A court of equity will not, as a general rule, require an executor to give bond for the faithful management of the estate, or, upon refusal to do so, grant an injunction against the executor to prevent him from administering the estate, in the absence of an unequivocal allegation that the executor is insolvent; and this is so though there may be general allegations of mismanagement.

7. A petition against an executor which alleges in general terms mismanagement and threats to misappropriate the funds of the estate, and does not allege any specific act of mismanagement, or show any indebtedness to the estate on account of such acts, and does not pray for discovery, should be dismissed on demurrer.

8. A judgment disallowing an amendment to a petition, which, if allowed, would not have cured fatal defects in the petition, objection to which had been raised by demurrer, will not be reversed, although the allowance of the amendment might not have been erroneous.

9. Whether the allegations of the original petition and those of the amendments which were allowed be considered alone, or in connection with the averments of the amendment which was disallowed, the plaintiff was not entitled to the relief prayed for, and the judgment dismissing the petition will not be reversed.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Action by Carrie L. Gould against Ellen Teynac, as executrix of the estate of John F. Teynac, deceased. Judgment for defendant, and plaintiff brought error, pending which defendant died, and her executors, Ralph H. Glass and another, were substituted as defendants in error. Affirmed.

On May 14, 1900, Carrie L. Gould filed a petition which alleged, in substance, as follows: On February 20, 1847, John F. Teynac acquired title to a certain described tract of land, containing 28 acres, in Chatham county, Ga. On August 12, 1878, John F. Teynac conveyed to Ellen Teynac, as trustee for Carrie L. Glass, the plaintiff (she having since intermarried with Gould), for life, with remainder to her children, a portion of this property. Plaintiff is the daughter of Ellen Teynac, who is the widow of John F. Teynac, and petitioner's first husband, John F. Glass, was a nephew of John F. Teynac. On February 24, 1865, John F. Teynac borrowed from the Working Men's Mutual Loan Association \$1,000, and, to secure the payment of the same, executed a deed to the remainder of the property above referred to, which he then owned. This loan was afterwards paid, and the premises reconveyed to John F. Teynac. On August 31, 1877, John F. Teynac borrowed from the Railroad Mutual Loan Association \$1,000. The note for this sum was signed by Ellen Teynac, and from the books of the association the loan appeared to have been made to her. The deed made to the association to secure this

loan was signed both by John F. Teynac and Ellen Teynac, and upon this deed was a consent to the execution of the same by Ellen Teynac, as the wife of John F. Teynac. The association gave to Ellen Teynac a bond to reconvey the premises upon payment of the loan. At the time this transaction took place Ellen Teynac did not own the land conveyed to the association, or any part of it. It is averred that for this reason the bond to reconvey to her was of no force and effect. When the loan was made, on August 20, 1883, the association conveyed the land to John F. Teynac and Ellen Teynac. It is alleged that this "was a mistake of parties which operates as a gross injustice to the said John F. Teynac and to his estate, and gives an unconscientious advantage to said Ellen Teynac." Plaintiff did not know, until some time after the death of John F. Teynac, that Ellen Teynac claimed any interest in the land. On January 9, 1890, John F. Teynac sold to the Oglethorpe Real Estate Company all of the property above mentioned which he then owned, and three acres, known as the "Teynac Reservation," on which he lived and died. The purchaser of this property required the deed of conveyance to be signed both by John F. Teynac and Ellen Teynac, and also executed to both of them a mortgage on the property purchased, to secure an unpaid balance of the purchase money. This is alleged to have been a mistake of the same character as that above referred to. John F. Teynac died in 1892, leaving a will in which he gave all of his property to his wife for life, with remainder to plaintiff. Ellen Teynac qualified as executrix of the will, and took possession of the estate. She now claims that the land conveyed to the Railroad Association as security, and reconveyed by it to her and her husband, was owned by them jointly in his lifetime, and sets up a claim to a one-half interest in this property, adversely to her holding as executrix, and in contravention of her duties as such, notwithstanding that she knows full well that the entire title, interest, and ownership was vested in John F. Teynac up to the date of his death. On November 26, 1890, John F. Teynac gave a deed to part of the three acres known as the "Teynac Reservation" to secure a loan of \$1,000 from the Excelsior Loan & Savings Company, which gave him a bond to reconvey upon payment of the debt. This debt was paid by Ellen Teynac, as executrix, after John F. Teynac's death, and the security deed canceled. On April 7, 1891, John F. Teynac borrowed \$600, and secured its repayment by a deed to another part of the Teynac reservation. This loan was also repaid, and the deed canceled, after John F. Teynac's death. The status of the title to these three acres and to the other portion of the property is exactly the same, both being in John F. Teynac alone, and belonging to his estate, and Ellen Teynac is es-

¶ 5. See Reformation of Instruments, vol. 42, Cent. Dig. § 91.

stopped from asserting title to any portion of it to be in herself as an individual. It is alleged that it is inequitable, unjust, and contrary to good conscience for the mistake resulting from the reconveyance by the Railroad Association to Ellen Teynac to have the effect of vesting her with title to any portion of the property, she having no interest in it at the time the reconveyance was made. John F. Teynac was a child so far as business matters were concerned, and allowed his wife to manage his business for him, and he knew nothing of the legal effect of the reconveyance by the Railroad Association or the subsequent joint deed and mortgage from the Oglethorpe Real Estate Company. These conveyances were a part of a scheme on the part of Ellen Teynac to defraud plaintiff out of her remainder interest in all of the property of John F. Teynac. Carrying out her scheme to defraud plaintiff out of her remainder interest, Ellen Teynac, through misrepresentations, induced plaintiff to sign a deed to all of her interest to Ellen Teynac in 1898, under the pretense of its being a reconveyance under a former agreement between plaintiff and Ellen Teynac, which deed was afterwards canceled. She took advantage of the confidence reposed in her by John F. Teynac to gain an unconscionable advantage over him as to the claim to be a joint owner of the land and its proceeds. She abused his confidence and betrayed the trust he reposed in her by concealing from him the fact that her name was inserted as grantee in the deeds. Ellen Teynac never asserted any claim to any of the property until after the death of John F. Teynac. Notwithstanding Ellen Teynac receipted the Oglethorpe Real Estate Company as executrix for \$20,000, paid on the purchase price of the land sold it by John F. Teynac, she now contends that half of it belonged to her individually before the death of John F. Teynac. It is alleged that she is estopped to deny that this money belongs to the estate of her husband. It is alleged that, unless prevented, Ellen Teynac will squander and make use of one half of this \$20,000, and will waste and misapply the other half. She has threatened plaintiff with the destruction of the entire estate, to prevent her from marrying her present husband. The plaintiff waives discovery, and prays as follows: That the deed of reconveyance from the Railroad Association to Ellen Teynac and John F. Teynac be reformed by striking the name of Ellen Teynac as grantee, and that all other papers which purport to give to or recognize in Ellen Teynac any interest in any of the property be likewise reformed; that by decree the estate of John F. Teynac be declared to be the owner of the land which is unsold, and of the proceeds of that which was sold, so that plaintiff as remainderman may come into and enjoy, at the death of Ellen Teynac, what she is lawfully entitled to under the

will of John F. Teynac; that Ellen Teynac be required to give bond to preserve and protect the estate, and, on failure to give bond, be enjoined from disposing of any of the corpus of the estate during her lifetime, and that a receiver be appointed to take charge of the property of the estate, and manage it, in order to prevent the waste and destruction which she has threatened; that plaintiff have a decree for the value of the property already wasted or misappropriated, if such should be found to have been done; for general relief and process.

By amendments to the petition the various papers referred to therein were attached as exhibits. Among the exhibits was a paper showing that Ellen Teynac transferred to the Railroad Association five shares of stock therein owned by her to secure the loan of \$1,000 above referred to. General and special demurrers were filed by the defendant, and these were sustained. The plaintiff excepted to this judgment, and also to the refusal to allow an amendment to her petition, an abstract of which is as follows: The amendment reiterated the allegations of the original petition in reference to the Teynac reservation, and in reference to the time when Ellen Teynac first claimed to own an interest in the property during the lifetime of John F. Teynac. It then set forth: The will of John F. Teynac gave to Ellen Teynac all of his property, in trust for her use for life, with remainder to plaintiff, and empowered Ellen Teynac, as executrix, to sell the whole or any part of the estate, the proceeds to be reinvested and held under the trusts and uses mentioned. On March 7, 1892, Ellen Teynac qualified as executrix, and as such has assented to the legacy and devise to plaintiff. On March 15, 1894, the executrix received from the Oglethorpe Real Estate Company the sum of \$1,000 as a part of the property of the estate, and likewise has collected from that company various other sums from 1894 to 1899, all aggregating between nineteen and twenty thousand dollars. These sums of money have not been invested by the executrix as required by the will. The executrix is wasting and mismanaging the estate, and has threatened to squander and waste the money, and to dispose of the Teynac reservation and squander the proceeds thereof. In 1892 the executrix returned the property of the estate for taxes at a valuation, \$9,500 for land and \$10,000 for personal property, and in 1900 the land was returned at only \$5,000, no personal property being returned. This difference in value is caused by the waste and mismanagement of the executrix, and is part of an effort of the executrix to conceal from plaintiff the assets of the estate, so that they will not be forthcoming at her death. Unless Ellen Teynac be restrained from her waste and mismanagement, and from disposing of the estate, as she has threatened to do, the injury will be irreparable. Plaintiff has no adequate remedy at law, and Ellen Teynac is not worth

the value of the estate, to wit, about the sum of \$30,000 at the time of the death of John F. Teynac. The prayers are that the sum of \$20,000 possessed by John F. Teynac at the time of his death be declared to be a part of the estate; that the portion of the Teynac reservation remaining unsold be declared to be a part of the estate; that the executrix be required to state in full all the property of the estate, that the same may be ascertained and preserved; that the deed of reconveyance from the Railroad Association be declared to vest the title of the land therein described in John F. Teynac alone; that an accounting be had with Ellen Teynac as executrix and as trustee under the will.

Pending the case in this court Ellen Teynac died, and her executors were made parties defendant in error in her stead.

Jno. S. Schley, R. R. Richards, and Edward S. Elliott, for plaintiff in error. W. H. McLaws and Saussy & Saussy, for defendants in error.

CORB, J. (after stating the foregoing facts). 1. John F. Teynac had property, and married a widow, who had a daughter. The controversy is between mother and daughter over the property of the husband and stepfather, now deceased. Under his will the mother is entitled to a life estate in all of his property, and the daughter to an estate in remainder. The mother claims that a portion of the property passed to her during the lifetime of her husband, and that the daughter has no interest therein. The daughter denies this claim, and avers that the property is the property of the estate of her stepfather, and that she has an estate in remainder therein. The controversy had its origin in a transaction which took place on August 31, 1877, when Ellen Teynac and her husband, John F. Teynac, united in a deed to a loan association to a tract of land referred to in the statement of facts. The transaction was peculiar in more than one particular. The loan was made to Ellen Teynac. She signed the note, and transferred stock in the association, owned by her, as security for its payment. As additional security, land owned by John F. Teynac was conveyed to the association, the deed reciting that it was conveyed to secure a debt under the act of 1871 authorizing titles to be conveyed as security for debts. The deed was signed both by Ellen Teynac and John F. Teynac in the order named, and attached to the deed was a written consent by Ellen Teynac that her husband should make the deed. The law of force at that time required that a wife's consent should be obtained to a conveyance by her husband of his property to secure his debt, but there has never been any law which required a wife's consent to a conveyance by her husband of his property to secure her debt. While the transaction had these peculiarities about it, it was up to

this point nothing more or less than the husband pledging his property to secure the wife's debt, which, of course, he had a right to do as against every one, even his own creditors, if he was solvent. The bond to reconvey which was given by the association was made to Ellen Teynac, wife of John F. Teynac, and provided that, upon payment of the debt by Ellen Teynac, the association would reconvey the property to her "or to whomsoever she may elect." When the debt was paid, the association executed a deed releasing, quitclaiming, and reconveying the property to Ellen Teynac and John F. Teynac. This deed was dated August 20, 1883, was filed for record February 19, 1884, and recorded February 26, 1884. The land described in this deed embraced both what is called the "Teynac Reservation" and the lots sold to the Oglethorpe Real Estate Company. The latter, for convenience, will be hereafter referred to as the Oglethorpe land. As the two pieces stand upon a somewhat different footing, we will first deal with the question as to the status of the Oglethorpe land. Prior to the transaction with the association, the legal title to all of the land was in John F. Teynac. Under his deed the legal title passed to the association, but he was still the owner of the equity of redemption, and, in the absence of a stipulation to the contrary, the law would revert in him the title to the property upon payment of the debt either by himself or by his wife. The express undertaking, however, of the association was to convey the property, upon payment of the debt, either to Ellen Teynac or to some one whom she should select. John F. Teynac would not be bound by this unless he consented to it, and a conveyance by the association to any one other than John F. Teynac of any interest in the property would be unauthorized, in the absence of a consent or direction on the part of John F. Teynac to that effect. It would seem, from the terms of the deed executed by the association, that Ellen Teynac had elected that the land should be conveyed to John F. Teynac and herself as tenants in common. This would be the legal effect of the paper, provided Ellen Teynac had a right to direct how the deed should be made. The deed was recorded within the time allowed under the existing law for the record of such a deed, and about six years thereafter John F. Teynac and Ellen Teynac united in a deed conveying the Oglethorpe land as tenants in common, and, simultaneously with the execution of the deed, the purchaser gave to John F. Teynac and Ellen Teynac a mortgage to secure the purchase money. These facts are sufficient to raise a presumption of a gift by the husband to the wife to an undivided one-half interest in the mortgage, even if the presumption as to a gift of a one-half interest in the land did not arise prior to the sale and the mortgage. The general rule is that when a husband conveys property to his wife, or di-

rects or permits the title to be taken in the name of his wife to property purchased with his money, or to which he would have a right to demand that title be made to him, the law raises a presumption of a gift, and this presumption remains until it is shown affirmatively that there was no intention to give on the part of the husband. See *Deming v. Williams*, 26 Conn. 228, 68 Am. Dec. 386; *Thorn. on Gifts*, §§ 245, 246. There is absolutely no averment in the petition or its amendments, or even in the amendment which was disallowed, of any fact which would authorize a jury to find that the presumption of a gift arising from the facts above enumerated had been rebutted.

2. The status of the Teynac reservation is materially different from that of the Oglethorpe land. It does not appear that John F. Teynac ever did any express act, with reference to this property, like uniting in a conveyance recognizing that Ellen Teynac was interested therein. On the contrary, it is distinctly alleged that, after the conveyance of the Oglethorpe land, John F. Teynac conveyed on two occasions, by a deed signed by him alone, certain portions of the Teynac reservation to secure his debts. While, as stated above, the general rule is that, when a husband allows title to his property to vest in his wife, there is a presumption of a gift, still this is not a conclusive presumption, and the husband is permitted to repel it. See *Thorn. on Gifts*, § 245. See, also, in this connection, *Roberts v. Griffith*, 112 Ga. 146, 37 S. E. 179. Dealing with the property as his own, and ignoring the wife as a co-owner, would be a material circumstance to be considered in determining whether there was an intention on the part of the husband to make a gift; and the act of the wife in treating the property as that of the husband would also be proper to be considered in determining whether there had been by her an acceptance of the gift. The facts alleged were sufficient to raise a presumption of a gift as to a half interest in all the land embraced in the deed to the association. As stated above, there was nothing alleged to repel this presumption so far as the Oglethorpe land was concerned. The facts alleged in reference to the Teynac reservation were, however, sufficient to raise an issue of fact as to whether there was an intention on the part of the husband to include the whole tract in the gift, or that the same should be limited to the Oglethorpe land.

3. The averments of the petition are sufficient to make an issue for the jury as to whether the intention of the husband to give extended to the whole tract or was limited to the Oglethorpe land, and therefore it becomes necessary to determine whether, this being conceded as true, the allegations of the petition were such as to authorize in behalf of the plaintiff the relief prayed for by her. She prays that the different papers which are relied upon as raising the presumption of a

gift may be reformed so as to eliminate therefrom the name of Ellen Teynac altogether, upon the ground that her name was placed therein as a result of a mistake. The allegations of the petition in reference to mistake are of the most general nature. It does not appear how the mistake was made, whose mistake it was, or what brought about the mistake. In other words, taking the allegations as a whole, they are nothing more nor less than a statement to the effect that, as John F. Teynac owned the land, he certainly could not have intended that anybody else should have any interest therein, and that therefore any paper which showed a contrary intention must be founded upon a mistake. Stripped of all its verbiage, this is the substance of the petition in reference to this matter. A court of equity will not reform a paper upon the ground of mistake on any such general allegations.

4. The allegations of fraud are also general in their nature, and for this reason are insufficient to authorize a decree in the plaintiff's behalf. In order to set aside a conveyance for fraud, the allegations attacking the instrument must be specific in their nature.

5. The plaintiff is a mere volunteer. She is not an heir of John F. Teynac, nor was she a party to any of the conveyances sought to be reformed. Under his will she took a remainder interest in all of his property, subject to the life estate of her mother; but this, of course, gave her no interest in any property the title to which had passed out of him, either by gift or otherwise, during his lifetime. If John F. Teynac at the date of his death was the owner of the property in controversy, of course, as remainderman under his will, the plaintiff would be interested in the property; but if, for any reason, title to the property had passed out of him during his lifetime, she would have no interest in it, and would not be heard to reform papers made by him which had the effect to pass the title, or which could be used as evidence of an intention to that effect.

6. There was no distinct, unequivocal allegation that Ellen Teynac was insolvent, nor was there any prayer for discovery; and hence there was no equity in the petition, so far as the prayers which ask that the executrix be placed under bond, or that a receiver be appointed, and injunction issue, were concerned. This is true though there were general allegations of mismanagement and waste. See *Griffin v. Henderson*, 116 Ga. 310, 42 S. E. 482.

7. The petition alleged in general terms mismanagement on the part of the executrix and threats to misappropriate the estate, but did not contain any specific allegation showing any act of misappropriation or mismanagement, nor were there any averments from which it could be ascertained that the executrix had incurred any liability to the estate in any given sum, nor was there a prayer for discovery. It is conced-

ed that since the death of Ellen Teynac, even if the judgment should be reversed, there would be no equity in the petition so far as the application for a receiver and for injunction are concerned, but it is contended that the petition should remain in court for the purpose of an accounting. The allegations of the petition are entirely too general for this purpose. As stated above, there is no averment from which it could be shown that the estate of Ellen Teynac is liable to the estate of John F. Teynac for any given amount growing out of a misappropriation by her of the assets of that estate. The judgment, therefore, will not be reversed, in order that the case may be held in court for the purpose of an accounting. Even if the petition was amendable in this particular, the plaintiff in error should have availed herself of the opportunity to amend before the judgment was entered dismissing the case on demurrer.

8. There was no error in disallowing the amendment. It was in large part, if not entirely, an elaboration of the allegations of the original petition, making more specific certain averments and prayers as to the Teynac reservation. Taken as a whole, both that part which was practically a restatement of allegations in the original petition, as well as those portions which might be said to introduce new matter, there was nothing in the amendment which had the effect to relieve the petition from the infirmities under which it labored, and, even if allowed, would not have saved the case from the inevitable fate which the law had in store for it. It probably would not have been erroneous to allow the amendment, but, if it had been allowed, the petition would still have been demurrable.

9. After a careful consideration of the entire record and of the numerous points raised therein, we have reached the conclusion that the judgment complained of was the only proper judgment that could have been rendered under the facts as they appear in the record. Absolutely nothing appears in the petition or its amendments to rebut the presumption of a gift as to a one-half interest in the Oglethorpe land, and, under the facts alleged, a jury would be compelled to find that a gift was intended and was accepted. As to the Teynac reservation, the fact that John F. Teynac dealt with this property as his own, after he had treated his wife as a part owner of the Oglethorpe land, would be a strong circumstance that he did not intend the gift to extend to this portion of the property; and the fact that Ellen Teynac did act in her capacity as executrix which could be construed as treating the Teynac reservation, or, at least, a part of it, as still belonging to the estate of her husband, would be a circumstance which might be properly considered in determining whether there had been an acceptance by her of the gift, so far as the Teynac reser-

vation was concerned. In other words, the intention to give and the intention to accept were present in reference to the Oglethorpe land. Whether there was an intention to give, and whether there had been an acceptance, was questionable in regard to the Teynac reservation. But even if the Teynac reservation is the property of the estate of John F. Teynac, the plaintiff is not entitled to the relief prayed for in the present case, for, upon the death of Ellen Teynac, she became the owner of the Teynac reservation, and, so far as the specific property is concerned, she has a complete remedy to recover the same by an appropriate action against the person in possession. She had no right to recover it during the lifetime of Ellen Teynac, and Ellen Teynac's death pending the litigation does not give the plaintiff the right to proceed against her legal representative in the present action.

Judgment affirmed. All the Justices concurring.

(120 Ga. 135)

JOHNSON v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—EVIDENCE—FLIGHT OF ACCUSED—REQUEST TO CHARGE—INSTRUCTIONS ALREADY GIVEN.

1. On the trial of a criminal case, where evidence has been introduced showing that immediately after the commission of the crime the accused fled from the state, and that he was subsequently arrested in a distant city, it is permissible to show, as a circumstance connected with his flight, and tending to strengthen its probative value as evidence of guilt, that the accused denied his identity, and refused to return to this state until a requisition for him had been honored.

2. The requests to charge, so far as legal and pertinent, were covered by the charge as given; the evidence, while conflicting, was amply sufficient to warrant the conviction of the accused; and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

George Johnson was convicted of murder, and brings error. Affirmed.

W. M. Harper, for plaintiff in error. John C. Hart, Atty. Gen., and F. A. Hooper, Sol. Gen., for the State.

CANDLER, J. The accused was convicted of murder in Sumter superior court, and was recommended to the mercy of the court. He made a motion for a new trial, which was overruled, and he excepted.

1. The homicide was not denied, and it appeared that after the killing the accused fled from the state, and was arrested in the city of St. Louis. An officer from Americus went to St. Louis for the purpose of bringing the accused back to Georgia; and this officer was permitted to testify, over objection, that when he saw the accused in St. Louis the latter denied his identity, and refused to come back

to Georgia until a requisition for him had been honored by the Missouri authorities. The admission of this evidence is assigned as error. It is, of course, well settled that in criminal cases evidence of the flight of the accused may be introduced, not as proof of guilt upon which alone a conviction may be based, but as a circumstance to be considered by the jury, in connection with the other evidence in the case, to throw light upon the conduct of the accused in regard to the offense with which he is charged. For the same purpose the events and circumstances connected with the flight of the accused are equally admissible. The accused may explain his flight, and show that it was entirely consistent with his innocence, and in like manner the state may introduce evidence of circumstances connected with the flight which will strengthen its probative value as tending to show the guilt of the accused. For this reason, we hold that the admission of the evidence objected to was not error.

2. Other than as set forth in the foregoing, the amendment to the motion for a new trial complains only of the refusal of the court to give in charge to the jury certain instructions requested by counsel for the accused. Some of these requests failed to state correct principles of law. Those which were legal and pertinent were fully covered by the general charge, which was a full and fair exposition of the law applicable to the case. None of these grounds of the motion furnish a sufficient ground for the grant of a new trial. The general grounds of the motion, that the verdict was contrary to law and the evidence, are equally without merit. Numerous witnesses were introduced on both sides, the majority being negroes who were present at the "entertainment" at which the trouble arose which resulted in the homicide for which the accused was tried. As is usual in such cases, there was a hopeless conflict in the evidence of the various witnesses. The jury found a verdict which was amply sustained by the evidence. That verdict was approved by the trial judge, and we will not interfere with it.

Judgment affirmed. All the Justices concur.

(120 Ga. 177)

ROBERTS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

OBSCENE OR VULGAR LANGUAGE—USE IN PRESENCE OF FEMALE—INDICTMENT—EVIDENCE—INSTRUCTIONS.

1. Where an indictment charged the accused with using, on a named day and in the presence of a named female, "the following obscene, vulgar, and profane language, to wit: 'Look me in the eye. Are you satisfied with the man you married? I can whip any damn Groover of the name'"—and, so far as appears from the indictment, the words quoted were used together as a continuous part of one conversation, it was not error to overrule a demurrer to the indictment which sought to separate the words quoted, and to object to them, for the purposes of the indictment,

on the ground that they are neither profane, obscene, nor vulgar.

2. Where, however, it appeared from the evidence that the words, "Look me in the eye. Are you satisfied with the man you married?" were used on a different occasion, and not in the same connection with the words, "I can whip any damn Groover of the name," and there was nothing in either the indictment or the evidence to indicate that the words first mentioned were intended to convey an obscene or vulgar meaning, it was error, requiring the grant of a new trial, to charge that the use of such words by the accused would be sufficient to sustain and warrant his conviction.

(Syllabus by the Court.)

Error from Superior Court, Dawson County; J. J. Kimsey, Judge.

J. M. Roberts was convicted of using obscene and vulgar language in the presence of a female, and brings error. Reversed.

W. F. Findley, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

CANDLER, J. The accused was tried and convicted under an indictment charging that on a named day, in the presence of one Belle Groover, a female, he "did use the following obscene, vulgar, and profane language, to wit: 'Look me in the eye. Are you satisfied with the man you married? I can whip any damn Groover of the name.' " He demurred to so much of the indictment as charged him with using the words: "Look me in the eye. Are you satisfied with the man you married?"—on the ground that such words were neither obscene, vulgar, nor profane, and that they constituted no offense against the laws of the state. His demurrer was overruled, as was also his motion for a new trial filed after his conviction, and he excepted.

1. It was not error to overrule the demurrer to the indictment. As a general rule, words are profane, or not, according to the sense in which they are used; and it is necessary to show by other words coupled with them the sense in which they are used, to make a valid charge of using profane language. So far as appears from the indictment, the words quoted were used at one time as a consecutive sentence. In ruling upon the demurrer the court could look no further than the face of the indictment, and so it cannot be held that the ruling on the demurrer was erroneous.

2. The accused, however, did not deny having used the words, "Look me in the eye. Are you satisfied with the man you married?" but it appeared from the uncontradicted evidence introduced on the trial that the other language charged in the indictment, if used at all, which was denied by the accused and the witnesses who testified for him, was used at a different time and place. It appeared that the accused, a physician, had called at the home of Groover, the husband of the woman in whose presence the language was alleged to have been used. While in the house, in the presence of Groover,

ver, his wife, and several other parties, the accused said to Mrs. Groover: "Look me in the eye. Are you satisfied with the man you married?" This question was repeated several times, when Groover took offense and ordered the accused from the house. None of the witnesses made it appear that in using this language the accused had an indecent meaning. The accused himself, as before stated, admitted having used this language, but claimed that he was jesting at the time, and that Mrs. Groover so understood. After having left the house, he threatened to whip Groover if he would come out in the road; and it was at this point that the state's witnesses testified he said in the presence of Mrs. Groover, "I can whip any damn Groover of the name." The court charged: "Now, as to the first words, 'Look me in the eye. Are you satisfied with the man you married?' That is the first proposition. It is charged in the bill of indictment that those words are vulgar and obscene. Words get their point and meaning almost entirely from the time, place, and circumstances under which they are used. It is for the jury to say from the evidence what were used—whether this whole phrase, or substantially that phrase, was used, and, if used, what were the circumstances under which they were used; the time, place, and circumstances, and the intent with which they were used. After considering it all, was that vulgar or obscene, as expressed in the language of the law? * * * Whatever words the evidence may satisfy you were used, were they vulgar and obscene? If so, the defendant is guilty if they were used without provocation; and, if there was any provocation at all, it would have to be something that occurred then and there at the time that called them forth. It would be for the jury to say whether it was sufficient to justify their use under the circumstances." This charge was error. As was remarked in the first division of this opinion, from aught that appears in the indictment, the words there charged to have been used by the accused formed one continuous sentence. It is not charged that the words, "Look me in the eye. Are you satisfied with the man you married?" constituted an offense when used in the presence of a female. The words, in and of themselves, are neither profane, vulgar, nor obscene, and the indictment contains no intimation that by innuendo they conveyed an indecent meaning. It cannot be said that in their ordinary acceptance they imply an invitation to sexual intercourse, and there is no suggestion in the testimony of any of the witnesses that the accused sought to extend such an invitation by using the language quoted. This is quite a different case from that of *Dillard v. State*, 41 Ga. 278, where the language charged to have been used by the accused was an invitation to a married woman "to go to bed with him." There the words quoted plainly

implied a proposal of sexual intercourse, and, as such, were held to be vulgar and obscene, within the meaning of the statute, though it is significant that Mr. Chief Justice Brown, while concurring in the judgment, dissented from the reasoning on which it was based by the majority. A case more nearly in point is *Stamps v. State*, 95 Ga. 475, 20 S. E. 241, where it was held: "The language, 'I want to stay here awhile,' addressed by a man to a woman, is not, per se, either obscene or vulgar; and, although the indictment charged that by the use of this language the former meant to ask the latter to have sexual intercourse with him, the evidence entirely failed to support this charge, and therefore the conviction of the accused of the offense of using obscene and vulgar language in the presence of a female was contrary to law and the evidence."

While, for the reasons stated in the first division of this opinion, the demurrer to the indictment was properly overruled, in the light of the evidence subsequently introduced it was erroneous to charge the jury on what the court terms the two distinct propositions embraced in the indictment; and as it is impossible to say whether the conviction of the accused was based on the use of the words, "Look me in the eye. Are you satisfied with the man you married?" which was admitted, or of the words, "I can whip any damn Groover of the name," which was denied, a new trial must result.

Judgment reversed. All the Justices concur.

(120 Ga. 150)

ERWIN v. MAYOR, ETC., OF CITY OF CARTERSVILLE.

(Supreme Court of Georgia. May 10, 1904.)

INTOXICATING LIQUORS—KEEPING FOR ILLEGAL PURPOSE—SUFFICIENCY OF EVIDENCE—TRIAL—REMARKS OF JUDGE.

1. The evidence, though raising a strong suspicion of guilt, was insufficient to warrant a finding that the accused was guilty.

2. When a case has been tried before a mayor and appealed to the mayor and aldermen, it is improper for the mayor to state, in his capacity of judge, during the progress of the latter trial, that there was a variance in the evidence of a witness who had testified in both trials.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

John Erwin was convicted of violating an ordinance making it an offense to have and keep intoxicating liquor for illegal purposes. From a judgment of the superior court overruling a certiorari to review the judgment of the mayor and board of aldermen of Cartersville, defendant brings error. Reversed.

James B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., and T. C. Milner, for defendant in error.

EVANS, J. The defendant was tried before the mayor of Cartersville for violating

an ordinance making it penal to have and keep intoxicating liquor for illegal purpose. He was convicted, and appealed his case to the mayor and aldermen of the city of Cartersville. On the appeal the city marshal, who was the sole witness for the prosecution, testified that he saw Payne, the alleged purchaser from the accused, give to the defendant at a wagon yard a dollar or a half dollar, but would not swear positively that defendant furnished or sold to Payne any whisky. He saw Payne drink from a bottle, and witness tasted its contents, and found the same to be rye whisky. When witness tasted it about one drink had been taken from the bottle. Witness notified Payne he must appear before the mayor to testify, and Payne asked to be let off, and said he would promise not "to get into anything like that again." Payne denied that the accused sold him any whisky on this occasion. Witness had some whisky in his wagon, and of this whisky accused and witness took several drinks together. Witness denied that he gave accused any money. Witness stated accused separated from him, and on his return did not give him anything, but that he and accused drank out of witness' bottle, and when thus engaged the marshal came up, and asked to taste what was in the bottle, and witness let him do so. The defendant said he had known Payne a long time, and that Payne asked him if he could get him some whisky, and he replied that he could, as he always kept a little about his house. He then went home, got the whisky, and gave it to Payne. The whisky was in a pint bottle, and he and Payne took a drink from the bottle. He denied he sold any whisky to Payne and that he received any money from him. This was substantially the case made before the mayor and aldermen on the appeal. The evidence is insufficient to show that defendant had or kept intoxicating liquor for illegal purpose. While the marshal's testimony might raise a suspicion of a sale, he refused to testify that defendant either furnished or sold any whisky to Payne. One way of showing that intoxicating liquor is kept for illegal purpose is by a sale where the sale is prohibited by law. The evidence failed to show any sale or other facts from which the defendant's guilt could be inferred.

2. The mayor was a member of the appellate tribunal, and it was improper for him to state, in his capacity of judge, that the evidence of a certain witness was quite different to what it was in the trial before him. This statement of the mayor was prejudicial to the accused, and its possible harmful effect cannot be remedied by the answer of the aldermen that such statement of the mayor in no wise biased or influenced their minds against the accused. He had a right to be tried under legal rules of evidence. The record shows that the appeal was to the mayor and aldermen, and not to the aldermen, of the city of Cartersville. We have examined the various acts relating to the city of Car-

tersville, and do not find any provision for an appeal from the mayor's judgment; but, as the point is not made in the record, we will assume the existence of the right of appeal to the mayor and aldermen. But, aside from any question as to the legality or illegality of the trial on this ground, it would be improper for a member of the court to inject in a trial matters harmful to the accused by a verbal statement that there was a variance in the testimony of a certain witness in the two trials. This mode of impeachment is not recognized by the law. *Holliman v. City of Hawkinsville*, 109 Ga. 107, 34 S. E. 214.

We think there should be another trial, and accordingly the judgment of the superior court overruling the certiorari is reversed. All the Justices concurring.

(120 Ga. 205)

OWENS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW — INSTRUCTIONS — APPLICATION TO CASE — REQUEST TO CHARGE — EXCEPTIONS.

1. The law of voluntary manslaughter should not be given in charge to the jury in cases where this grade of homicide is not involved.

2. Where a charge comprehends only a brief summary of the abstract law pertaining to the case, an appropriate written request, submitted in due time, applying the law to the particular facts, should not be refused. But if the main charge fully and fairly submits to the jury the law applicable to the case, a refusal of a special written request to charge is not erroneous.

3. An exception to a charge containing a correct principle of abstract law cannot be considered unless the vice or error is specified.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; W. B. Butt, Judge.

Milton Owens was convicted of murder, and brings error. Affirmed.

G. Y. Harrell and B. F. Harrell, for plaintiff in error. F. A. Hooper, Sol., for the State.

EVANS, J. The plaintiff in error, Milton Owens, was tried in the superior court of Stewart county upon an indictment charging him with the murder of his father, Shew Owens. The jury returned a verdict of guilty, and the accused made a motion for a new trial, to the overruling of which he excepted.

The evidence upon which the state relied for a conviction was substantially as follows: The deceased was killed shortly before 11 o'clock at night, and early the next morning his body was found in his yard, some 15 or 20 steps from the back door of his house. There were signs of a considerable scuffle at the place where the body was found, and numerous tracks around it, made by several persons, apparently; the ground being wet and sticky, and some of the tracks being almost obliterated by others more dis-

¶ 1. See *Homicide*, vol. 28, Cent. Dig. § 652.

inct. Some twenty-eight cuts, inflicted with a knife or other sharp instrument, were upon the body; one of them being on the right side, near the heart, and two in the back. Four or five of them were of such a character as would likely produce death almost immediately. The skull of the deceased was crushed in several places; the wounds indicating that he had been struck on the back of the head with some blunt instrument, such as the head of an ax or hatchet. He had received 16 blows on the head, his throat was cut, and he was disemboweled. In his pocket was a pair of brass knucks, as well as a number of cartridges, but no knife or other weapon was found lying near his body. At the time of his death he was in the prime of his life, was an unusually large man, and was possessed of great physical strength and courage. There were no wounds on his body such as might have been produced by a pistol. "One hand was chewed all to pieces—his fingers and thumb." The accused, who admitted having done the killing, was apparently unhurt, save that he had one finger wrapped up in a rag. He voluntarily stated on the day following the night of the homicide that he was, at the time the difficulty began, sitting in one corner of the house; that "Shep Owens charged in the house, * * * and charged at him with a gun in one hand—a rifle in one hand and a knife in the other—and he [the accused] shot him down, and shot him again"; that his father then "got up and came at him again, and he began to cut him." The accused was asked as to how the wounds on the head of the deceased were inflicted, and replied he had inflicted them with the rifle "when he came out of doors; * * * that he ran back in the house and got the rifle; * * * that the cutting began in the house, but he hit him out there" in the yard. The accused subsequently said he did not return to the house and get the rifle "in the corner where his father first set it up when he first came in the house," but "got it on the ground out there where he dropped it." The person to whom the accused made this statement examined the rifle, but there was not a particle of blood upon it, nor any sign indicating that it had been used in inflicting the wounds made upon the head of the deceased. A witness who was introduced by the accused testified that he got from the accused a knife which had blood upon it and was broken, and that he had stated, upon being asked how he broke it, that he "broke it in the fight; * * * that was the knife he used in the fight." The witness further testified that another knife was found lying open on the floor in the main room of the house, but that he saw no blood on this knife. There was also evidence in behalf of the accused to the following effect: About 8 o'clock on the night of the killing, the accused, accompanied by his mother, his sister, and one of

his brothers, went to a neighbor's house, and while there something was said as to how the deceased had been mistreating members of his family. The neighbor advised the mother of the accused to go home and "do the best" she could. After having stayed at this neighbor's house an hour or more, she and the other members of her family started home. Shortly after their departure, Shep Owens called and inquired if his family had been there. He spoke of having had some fuss with his wife, and said "he was going to whip [the accused] that night before he slept." He was armed with a rifle. After having some further conversation with his neighbor, he left, remarking: "Well, me or Milton—one—will go to hell to-night, or do something." It was then 10 o'clock. He did not say "what he was mad at Milton for," but did tell the cause of the trouble between himself and his wife. The accused made a statement to the jury, during the course of which he said: When he and his brother Reece returned from work on the evening of the homicide, his mother complained that her husband had abused and threatened to kill her, and asked the accused to go with her to the neighbor's house above referred to. They went, but, after staying there some time, decided to go back home. On their arrival, they found the deceased was absent. A brother of the accused informed him that his father had left home with his Winchester, saying he was going to kill the accused. The accused then went and got his pistol and sat down in the house. The deceased soon appeared and demanded admission, and the door was opened by a member of the family. As to what then took place, the accused stated: The deceased "came in, and come at me with his knife and cut my coat, and I shot at him, and he dropped his gun and grabbed me, and we got to scuffling, and I got my knife and cut him; and, when I found that my knife was broken, I didn't know how bad I had cut him, and he threatened to kill me, and I knew if I didn't work to kill him and save myself he would kill me, and I run back and got the Winchester off the floor and punched him in the head with it; and what I done I done in self-defense, and there didn't no one else have anything to do with it but me. I was the first one he started at; he didn't have a chance to start at the others; and I don't want my mother or my brothers—either one—punished for what I have done in self-defense." The accused further stated that he got his "finger hurt in the scuffle mighty bad"; that he also got "knocked" on his hand, and that it swelled up, and his wrist swelled up; that he had a swelled place on his knuckles, and a scar on the joint of his wrist; that it was some time after he went back in the house before he had his finger tied up; and that it bled profusely, and the blood dropped down on the floor.

1. Only the grades of homicide involved in the case on trial should be given in charge to the jury. If neither the evidence for the state, nor the statement of the defendant, taken separately or conjunctively, presents a case of voluntary manslaughter, the judge should not charge on this grade of homicide. The office of a charge is to illustrate and apply the legal principles applicable to the facts of the case. From the evidence submitted by the state, a robust man, at his own home, is killed by his son. The number, character, and location of the wounds, the strength of the deceased, the evidences of a fierce conflict, and the absence of wounds upon the slayer's person, would indicate that more than one person participated in the homicide. However, the defendant assumes the whole responsibility, exonerating his mother and brothers. There is no suggestion in the state's testimony of the intermediate grade of homicide. The crime of murder was proved. The defendant's statement made out a case of justifiable homicide. He admits that, when he was informed that his father left home with his rifle, threatening defendant's life, he armed himself with a pistol, and sat down to await the coming of his father; that, as soon as the father entered the house he attacked defendant with a knife, cutting his coat; then defendant fired his pistol, etc. If the defendant's account of the homicide was true, he was justifiable. He exhibited no display of passion, but calmly prepared himself for the threatened attack, and defended that attack upon himself. He does not, in his statement, hint at anything authorizing the inference that he was guilty of voluntary manslaughter; and it would have been manifestly unfair to him for the jury, if they believed his statement, to find that he was not justified in doing everything he admits he did. There being neither evidence nor anything in the defendant's statement suggesting his guilt of voluntary manslaughter, a written request to charge the law bearing on that grade of homicide was properly refused.

2. The other written requests were fully covered by the charge. The law of justifiable homicide was elaborately discussed by the judge, and the written requests would not have given the same any additional force. Where a charge comprehends only a brief summary of the abstract law pertaining to the case, an appropriate written request, submitted in due time, applying the law to the particular facts, should be given. *Roberts v. State*, 114 Ga. 450, 40 S. E. 297. Yet in cases where the law is fully covered by the main charge, and the presentation of the legal principles is adjusted to the facts, a new trial will not be granted solely on this ground. *Simmons v. State*, 79 Ga. 697, 4 S. E. 894 (4); *McDuffie v. State*, 90 Ga. 788, 17 S. E. 105.

3. Exception is taken to the charge of the court on the subjects of confession and jus-

tifiable homicide. Movant does not point out the defects in these charges. They contain correct abstract principles of law, and the duty is upon the movant to specify in such cases the specific vice of the charge. *Anderson v. Southern Ry. Co.*, 107 Ga. 501, 33 S. E. 644. Failing to do this, such grounds of error cannot be considered. *Binion v. Ry. Co.*, 118 Ga. 282, 284-287, 45 S. E. 276.

The evidence fully warranted the verdict, and, no reversible error appearing, the judgment overruling the motion for a new trial is affirmed. All the Justices concurring.

(120 Ga. 178)

BICKERS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ASSIGNMENT OF ERROR—ERROR WAIVED IN APPELLATE COURT.

1. An assignment of error presented in a motion for a new trial, but not referred to in the brief of counsel for the plaintiff in error, or argued before this court, is to be treated as having been abandoned.

2. The newly discovered evidence relied on by the accused was merely cumulative, and not of such character as to likely affect the result should another trial be had.

3. The verdict of the jury, having met with the approval of the presiding judge, and being amply supported by evidence, should be allowed to stand.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

John Bickers was convicted of burglary, and brings error. Affirmed.

Wilfred C. Lane and John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

EVANS, J. The accused was charged with having committed the offense of burglary, and was found guilty. The evidence upon which the state relied for a conviction was to the following effect: Nine razors were stolen from the barber shop mentioned in the indictment, the barber shop having been burglariously entered through a window after it had been closed for the night. Within a few days afterwards, the owner of the razors found one of them in the possession of a negro barber named J. T. Wood, and another in the possession of J. E. Denton. The accused procured a companion of his to help him dispose of these razors to Wood and Denton, the accused himself receiving the money paid for the same, though his companion conducted the negotiations in his presence and advised him to sell at the price offered. The accused approached another acquaintance of his and endeavored to get his aid in disposing of some razors, saying "he had a lot of razors at home," which he would go and get and "sell them or pawn them, and it would be quick

¶ 2. See Criminal Law, vol. 15, Cent. Dig. §§ 2724, 2823.

money and all to the good if" his acquaintance "wanted to help him get rid of them." This conversation took place only a short time after the burglary was committed.

1. In addition to the general grounds of the motion for a new trial, the plaintiff in error made complaint that during the progress of the trial the presiding judge expressed an opinion as to what had been proven by a witness for the state; but counsel for the accused, neither in his argument before this court nor in his brief, insisted upon this ground of the motion. Accordingly, it is to be treated as having been abandoned. *McKinnon v. Hope*, 118 Ga. 462, 45 S. E. 413.

2. The newly discovered evidence relied on by the accused was merely cumulative, and would not likely affect the result should another trial be had. Where newly discovered evidence is of a cumulative nature, and especially when it does not bear directly on the main point at issue, but only upon collateral matters, it will be insufficient to authorize the granting of a new trial. *Isham v. State*, 112 Ga. 406, 37 S. E. 735; *Clark v. State*, 117 Ga. 255, 43 S. E. 853.

3. The evidence submitted by the state was of such strength as to establish the guilt of the accused beyond a reasonable doubt. The verdict of the jury has met with the approval of the trial judge, and, no error of law having been committed, his judgment denying a new trial will be affirmed. All the Justices concurring.

(120 Ga. 162)

NIX v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

MURDER—INSTRUCTIONS—DEFENSE OF PROPERTY.

1. In a case where the testimony of all the eyewitnesses to the occurrence makes a clear case of murder, and the theory of the accused is that the killing was either in self-defense or under the fears of a reasonable man that his life was in danger, Pen. Code, § 72, is inapplicable, and a refusal to charge the law contained in that section is not cause for a new trial.

2. In making his statement to the jury as provided for by statute, the prisoner, not being sworn as a witness, nor subject to cross-examination, nor restricted by the rules of evidence, cannot lay the foundation for introducing in his favor evidence that would otherwise be inadmissible. Hence evidence of uncommunicated threats will not be received, nor, in a murder case, testimony as to the character of the deceased for violence, unless such evidence is relevant and competent unaided by the contents of the statement.

3. The failure of the judge in a murder case to charge the jury the provisions of Pen. Code, § 76, will not be reason for granting a new trial, when it clearly appears from the charge that the jury were informed that, if they found the contentions of the accused to be true, they must return a verdict of not guilty.

4. The evidence warranted the verdict, and no reason appears for a reversal of the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

One Nix was convicted of murder, and brings error. Affirmed.

Cameron & Pinkston and Hatcher & Carson, for plaintiff in error. McNeill & Levy, A. W. Cozart, John H. Lewis, S. P. Gilbert, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

COBB, J. Nix was convicted of murder, and complains that the court erred in refusing to grant him a new trial.

1. Complaint is made in the motion that the court erred in refusing to give numerous instructions as requested. After a careful reading of the charge, we have reached the conclusion that, so far as these requests contained propositions of law which were legal and pertinent, they were sufficiently covered by the general charge, which appears to be free from any error which was so prejudicial to the accused as to require a reversal of the judgment. The only requests which have given us any serious difficulty are those which contain the proposition that Pen. Code, § 72, is applicable in any case where there is a forcible attack upon property at a place other than the habitation of the possessor. The section referred to is in the following language: "If after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that serious injury was intended, or might accrue to the person, property, or family of the person killing." In *Pound's Case*, 43 Ga. 89 (5), it was held that the law contained in this section was applicable only in cases where an attack was made upon property at the domicile and within the protection of the habitation; Mr. Chief Justice Lochrane saying, on page 137, in reference to this law: "This applies to the right of defense growing out of an attack upon a man, or his property, or family, where they are at his home. The household gods, so to speak, are regarded with peculiar sanctity in the protection of the law." In *Crawford's Case*, 90 Ga. 710, 17 S. E. 623, 35 Am. St. Rep. 242, the present Chief Justice, in referring to the *Pound Case*, said that the law contained in the section referred to did not apply to every attack on or invasion of property, and that, whether the construction placed upon the law in *Pound's Case* was correct or not, it had no application unless there was a serious injury intended, or might accrue, to the property which was the subject of the attack, and especially would have no application in a case where the property was of insignificant value, such as a small

portion of a side of meat, unless the circumstances were such as to show that the attack might culminate in the commission of a felony. It has never been held in terms that the words "serious injury" in this section were the equivalent of "felony." Neither has it ever been held that a mere trespass upon property would justify a killing. It may be that a case might arise where a trespass upon property would be of such a grave nature as to amount to a serious injury within the meaning of this section; in other words, that a trespass in its nature, gravity, and consequences would be such as the law might authorize the taking of human life to prevent its commission. But such a condition of affairs would be of rare occurrence in the transaction of human affairs, and certainly would not arise out of one of the ordinary and everyday quarrels about property rights. Manifestly, a case like the present does not disclose the serious injury to property which would authorize or justify the taking of human life. The father of the accused, and the deceased, were at issue in regard to the ownership of a strip of land containing about 15 acres. The deceased had planted a crop of oats upon the land, and was, with his son, proceeding to gather the oats. According to the testimony for the state, the accused went to the place where the deceased was at work with his son, and, without any provocation at the moment, deliberately fired upon the deceased while he was working with a cradle cutting the oats; at the time the fatal shot was fired the deceased holding the handle of the cradle with one hand, with the other stretched out to gather up the grain that had been cut. According to the statement of the accused, which must be considered in determining whether the request should have been given, he went out that morning to plant some watermelon seed, and carried his gun with him, as he claimed he usually did, to shoot crows. He planted some of the seed, and heard some one cutting oats on the land which was in dispute between his father and the deceased. Upon reaching that point he found the deceased cutting the oats, and said to him that he had come there to ask him not to cut the oats. Then followed a colloquy between the deceased and the accused in reference to the ownership of the oats and the land, during which the son of the deceased laid down his cradle, walked to a tree where a gun was standing, and approached his father. The colloquy continued, and the deceased became abusive, and said to the accused that he was going to cut the oats, and would either kill the accused or get killed; and as he said this reached back to his son, who was within three or four feet of him, to get the gun. At this time the accused fired the shot which killed the deceased. The son and the accused then exchanged shots at each other. Under this state of facts it is unnecessary

to determine whether the construction placed upon the section in question in Pound's Case was correct, or whether, under any circumstances, what would amount only to a trespass or a misdemeanor—that is, anything short of a felony—is the serious injury to property contemplated by the section. The judge charged the jury fully on the subject of the law contained in Pen. Code, §§ 70, 71. There can be no serious complaint made of the charge so far as it related to the law of self-defense and attacks upon the person, or the doctrine of reasonable fears. Taking the statement of the accused as true, the killing of the deceased was not for the purpose of preventing a serious injury to the property of his father—that is, the oats growing in the field—but it was for the purpose of saving his own life; and, even if the section is applicable in any case where the attack upon the property is not at the habitation, it had no application whatever in the present case, and it is therefore immaterial whether the court correctly construed it or not. It is questionable whether a child has a right under any circumstances to kill in order to protect the property of his parent. While one is guaranteed under the law the right to protect his property, under some circumstances even to the extent of taking human life, and children are justified in defending the person and reputation of their parents, we would be hardly prepared to hold, even if the question were directly before us, that the law of Georgia would authorize a son to take the life of a human being, simply because the person killed was at the time cutting and preparing to take away from the land of his father a portion of a crop growing thereon, even if there could be no question that the title to the land was in the father.

2. A number of witnesses testified to declarations made by the deceased in reference to the land and oats which were in controversy between him and the father of the accused. None of these declarations appear to have been communicated to the accused prior to the killing. Upon motion of the Solicitor General, all of these declarations were ruled out, upon the ground that they were not in their nature threats, and, if so, they were not shown to have been communicated to the accused. Error is assigned upon this ruling, the contention being that the declarations were threats, and that, even if they were not communicated, they were admissible to throw light upon the conduct of the deceased at the time of the killing. Without reference to the question as to whether the declarations could be properly construed to be in the nature of threats, there was no error in ruling them out; for, being uncommunicated, they were inadmissible for any purpose, unless it appeared from the evidence that, at the time of the killing, the deceased was the assailant. And, to make the threats admissible, it is not suffi-

cient that the fact that the accused was the assailant appeared from the prisoner's statement. It must have appeared from the sworn evidence. *Vaughn v. The State*, 88 Ga. 731, 16 S. E. 64. The principle of this decision also applies to that assignment of error which relates to the refusal of the court to admit evidence of the violent and turbulent character of the deceased.

3. Complaint is made that the court erred in failing to charge the jury the provisions of Pen. Code, § 76, which is as follows: "The homicide appearing to be justifiable, the person indicted shall, upon the trial, be fully acquitted and discharged." In *Walker's Case*, 102 Ga. 664, 28 S. E. 284, it was held to be error to fail to charge the provisions of this section, when the charge consisted merely of reading to the jury the preceding sections of the Penal Code. It clearly appears from the opinion of Mr. Justice Atkinson that, if the judge otherwise inform the jury that if they find the contentions of the accused to be true he would be entitled to an acquittal, the failure to read this section is not erroneous. In this case the judge distinctly instructed the jury that if they found the version of the accused to be the truth of the case they should acquit him.

4. The extracts from the charge upon which error is assigned, when taken in connection with the general charge, present no reason for ordering a new trial, even if they are erroneous at all. Under the evidence for the state the accused was guilty of murder; under his statement he was not guilty of any crime. In determining from the facts where the truth lay, it was utterly immaterial who was the owner of the land upon which the homicide was committed, and therefore there was no error in refusing to admit in evidence the deed showing title in the father of the accused, or the record showing the judgment in a suit between the father of the accused and the deceased in which the question of title was incidentally involved. There was no error in admitting evidence that the father of the accused, on Tuesday prior to the killing, which occurred on Saturday, carried his gun with him while working in the field, the father being introduced as a witness, and this evidence throwing some light upon the state of his feelings. The ground of the motion containing alleged newly discovered evidence furnishes no reason for reversing the judgment. Such a ground is addressed to the discretion of the trial judge, and it takes an extreme case for this court to control his discretion in such a matter. The alleged newly discovered evidence related to threats made by the deceased. As will appear from the foregoing, if this evidence had been offered at the trial, it would have been inadmissible in the then state of the evidence, and, as it appeared that all of the eye-witnesses had been examined at the trial, and no foundation was laid in the evidence for the admission of testimony of uncom-

municated threats, the discretion of the trial judge in refusing to grant a new trial on account of the discovery of other uncommunicated threats than those which were excluded at the trial will not be interfered with. The evidence for the state not only authorized, but demanded, a verdict for murder. The jury having seen proper to disregard the version of the transaction as detailed in the prisoner's statement, the trial judge having approved their finding, we will not interfere.

Judgment affirmed. All the Justices concurring.

(120 Ga. 190)

GRANTHAM v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW — SUFFICIENCY OF EVIDENCE — INSTRUCTIONS — NECESSITY FOR REQUEST — BURDEN OF PROOF — REASONABLE DOUBT.

1. The verdict of the jury was amply supported by evidence.

2. It was not, in the absence of a proper written request presented by the accused, incumbent on the judge to charge the jury more fully than he did as to what constituted a reasonable doubt of guilt.

3. The trial judge fully and fairly instructed the jury as to the burden resting on the state to show beyond a reasonable doubt the guilt of the accused, and no error prejudicial to him was committed in charging upon this branch of the case.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Ben Grantham was convicted of selling intoxicating liquors in violation of law and brings error. Affirmed.

Watts Powell, for plaintiff in error. M. F. Strozler, Sol., for the State.

EVANS, J. The defendant was charged with the offense of a misdemeanor, in that on a certain day he did unlawfully, for a valuable consideration, sell whisky, wine, beer, and other intoxicating liquors and intoxicating bitters in the county of Dooly, it being then and there a county in which the sale of such liquors is prohibited by law. He was tried and convicted, and his motion for a new trial was overruled.

1. Two witnesses testified, in behalf of the state, to a sale by the defendant of two quarts of whisky, for which the purchaser paid 60 cents a quart. In his statement the defendant denied making the sale to which these witnesses testified. The jury were not bound to accept this statement as true, and their verdict of guilty was fully supported by the evidence.

2. Complaint is made that the judge, in charging the jury, failed to define "reasonable doubt," but merely told them that "a reasonable doubt means just what it says; it is a reasonable doubt." If the defendant desired an amplification of the definition which the judge gave, he should have presented a

proper written request. Having failed to do so, the omission of the court to charge more fully upon the subject is not cause for a new trial.

3. Error is assigned upon the following charge of the court: "If you believe from all the facts in said case that the defendant did not commit the crime with which he is charged in this bill of indictment, either at the time mentioned in the indictment or at any time within two years prior to the finding of the bill of indictment, then you would be authorized to find the defendant not guilty." This charge is not technically accurate, for it tends to place the affirmative of the issue upon the defendant; but, when considered in connection with the context, it was not prejudicial to the defendant. Just previously to the giving of the charge complained of, the court distinctly instructed the jury that, if there should be a reasonable doubt in their minds as to the guilt of the defendant, they should "give the defendant the benefit of that doubt and acquit him." In addition to this instruction, the judge, at the beginning of his charge, informed the jury that there was a presumption of innocence in favor of the defendant, and that the burden was on the state to demonstrate his guilt beyond a reasonable doubt. It is therefore clear that the charge excepted to was not calculated to mislead the jury.

Judgment affirmed. All the Justices concurring.

(120 Ga. 142)

HALL v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

LARCENY OF BALED COTTON—INDICTMENT—ISSUES AND PROOF—ALLEGATION AS TO LOCALITY—STATUTE—INSTRUCTIONS—NECESSITY.

1. In criminal law an unnecessarily minute description of a necessary fact must be proved as charged, but an unnecessary description of an unnecessary fact need not be proved.

2. No locality except venue need be charged in prosecutions under Pen. Code 1895, § 186, which was intended to make the stealing of baled cotton a felony, regardless of value or of the place where the cotton was stored.

3. In view of the defendant's statement and some of the evidence offered in his behalf, it was error to refuse the written request to charge that, if he did not steal but bought the cotton from one who had stolen it, he could not be convicted under an indictment for stealing baled cotton.

(Syllabus by the Court.)

Error from Superior Court, Appling County; P. E. Seabrook, Judge.

P. F. Hall was convicted of larceny, and brings error. Reversed.

Hall, with two others, was indicted for stealing a bale of cotton from "under the ginhouse of Johnson, the place where the same had been stored, the said bale of cotton having been placed and located near the

press under said ginhouse." There was also a count for receiving stolen goods, which, however, was stricken on demurrer. There was ample evidence that the cotton had been taken from under the ginhouse of Johnson, though there was no proof that it had been taken from near the press. Possession of the property was traced directly to the defendant. In his statement he claimed that he had bought it from one Thomas, and there was some evidence to the same effect from witnesses for the defense. There was a motion for a new trial on the grounds that the verdict was contrary to law and to evidence, that there was no proof of the descriptive averment that the bale had been placed near the press, and because the court refused a written request to charge, "If you should find that another person stole the cotton, and afterwards the defendant bought or received it, then you would not be authorized to find the defendant guilty, but should acquit him."

W. W. Bennett and E. D. Graham, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

LAMAR, J. The intent of Pen. Code 1895, § 186, was to make the stealing of baled cotton a felony, regardless of its value, or of whether it was taken from a house or from within the curtilage, or whether the elements of burglary were present or not. It made the place where the cotton was located or stored immaterial. *Moseley v. State*, 74 Ga. 404. Venue of the crime was the only locality that had to be alleged and proved. Therefore the allegation that the cotton was under the ginhouse of Johnson and near the press under the ginhouse was mere surplusage, and not descriptive of any material element of the crime. The proof must identify the particular bale alleged to have been stolen, but it made no difference whether it was taken from one room or another, or from one end or the other of the open space under the building. There was ample evidence to show that the cotton described in the indictment was taken from under the ginhouse where it had been located, and it was unnecessary to prove that it had been placed near the press, even if, as a matter of law, nearness to the press was not involved in the proof that it was taken from the building containing the same. This case does not come within the rule that an immaterial description of a material fact must be proved, but, place being unimportant, it was rather an instance of an immaterial description of an immaterial fact. Besides what was contained in the statement of the defendant, there was some evidence that he bought the cotton, and he was therefore entitled to the charge requested, in writing, that, if instead of stealing he bought from one who had stolen, he could not be convicted under this indictment. Nor was the failure to give

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. § 531.

this charge cured by anything contained in the general charge, which was confined exclusively to a statement of the law applicable to the crime defined in Pen. Code 1895, § 186, and omitted any reference to defendant's theory.

This error requires the grant of a new trial, and the judgment is reversed. All the Justices concurring.

(120 Ga. 187)

HARRIS v. STATE

(Supreme Court of Georgia. May 10, 1904.)

ASSAULT WITH INTENT TO MURDER—CONVICTION OF OFFENSE OF SHOOTING AT ANOTHER—INSTRUCTIONS—HARMLESS ERROR—ALIBI.

1. On the trial of an indictment for assault with intent to murder, where there was evidence from which the jury might have found that the accused shot the prosecutor, and that the shooting was not justifiable, but that it was not done with the intention to kill the prosecutor, it was not error for the court to charge the law as to the statutory offense of shooting at another, nor will a conviction of that offense be set aside as contrary to law.

2. While it was error, in such a case, for the judge to charge the jury that the only thing for them to consider, in order to determine whether the accused was guilty of assault with intent to murder, was whether, if the prosecutor had died, the killing would have been murder, the fact that the jury did not find the accused guilty of assault with intent to murder shows that the error was harmless, and a new trial will not result on that account.

3. It is not error to charge, on the trial of a criminal case, that, in order for the accused to overcome evidence of his guilt by setting up an alibi, the evidence of the alibi must satisfy the jury that the accused "was at a place where it was impossible for him to have committed the crime."

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Joe Harris, Jr., was convicted of shooting at another, and brings error. Affirmed.

Travis & Edwards, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

CANDLER, J. The accused was tried under an indictment charging him with assault with intent to murder, and was found guilty of the lesser offense of shooting at another. The evidence for the state was in direct conflict with that introduced by the accused. The prosecutor testified that on the occasion under investigation he had a difficulty with one Barney at the home of the accused; that shortly thereafter he left to go to his own home, some 200 or 250 yards distant from where the accused lived; that the accused followed him, pistol in hand, overtaking him within a short distance, and telling him "that he didn't allow any row on the place"; that the prosecutor explained that he had been talking to the father of the accused when Barney had come in and "com-

menced to fuss"; and that after this explanation he turned to go on home, when the accused, entirely without provocation, shot him, the ball taking effect in the arm. Only one other witness was introduced by the state, and, while his version of the affair was materially different from that given by the prosecutor, the two accounts corresponded, in that they both made out a case of an unprovoked assault upon the person of the prosecutor, and one upon which the jury would have been amply justified in basing a verdict of guilty of assault with intent to murder. On the other hand, the defense introduced numerous witnesses who testified most positively that, at the time the prosecutor claimed to have been shot, the accused was inside his yard; that he had no pistol, and consequently that he did not fire the shot which, it seems to have been admitted, struck the accused. From evidence which was not contradicted, it also appears that at the time of the shooting there was in progress in the immediate vicinity of the home of the accused what was known as a "hot supper"—a form of social diversion which this court has had frequent occasion to observe is a most fruitful source of homicide among the colored population—and that the festivities were punctuated by numerous pistol shots at and near what one of the witnesses felicitously calls "the shouting house." Indeed, there seems to have been "a sound of revelry by night," for still another witness says: "It looked like a young war, there was so much pistol firing." Two widely different theories of the shooting of the prosecutor are thus presented by the evidence—one, that he was, without provocation, assaulted by the accused; the other, that he was struck by a random bullet fired by one of the participants in the "hot supper," the accused having no connection whatever with the shooting.

1. Without giving in detail the grounds of the motion for a new trial, to the overruling of which the accused excepts, there are three general questions which it presents for our consideration. The first is, were the jury warranted in finding the accused guilty of the statutory offense of shooting at another? He contends that under the evidence there was no middle ground, and that he should have been either convicted of assault with intent to murder, or else acquitted, and that under the ruling of this court in the case of *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286, a new trial should for that reason have been granted. While a casual reading of the evidence would seem to justify this contention, we are clear, after a more careful investigation of the record, that this case is easily distinguishable from the *Kendrick Case*, and that the verdict returned by the jury was not unwarranted. In a case of this sort the intention of the accused is always for the jury. A contrary rule prevails from that holding in homicide cases, and there is

¶ 3. See Criminal Law, vol. 14, Cent. Dig. §§ 1834, 1836.

no presumption of an intent to kill from the unlawful use of a deadly weapon. Having this rule in view, we think the jury were authorized to infer, from the short distance which separated the prosecutor and the accused, and the fact that the former was shot only in the arm, that there was no intention on the part of the accused to commit a homicide. As before stated, there was ample warrant for a verdict of guilty of assault with intent to murder; but such a verdict was not demanded, nor was the acquittal of the accused the only alternative for the jury. The jury might well have had a reasonable doubt of the intention to kill, which is an essential element of the crime of assault with intent to murder, and yet have been satisfied that the shooting was not justifiable, and upon that hypothesis it was entirely proper for them to return a verdict of guilty of shooting at another. But even if this were not so, the accused would have no reasonable ground to complain of the verdict rendered, or of the charge of the court on this branch of the law, to which exception is taken, for it appears from the context of that charge that it was given in compliance with a request made by his counsel in the progress of the trial.

2. Error is also assigned on the following charges of the court: "In order to determine whether or not the defendant is guilty of assault with intent to murder, you just simply ask yourselves the simple question, would it have been a case of murder if Lanzy [the prosecutor] had died from the shot?" "If this assault had resulted in the death of Lanzy, and under the facts and circumstances disclosed by the testimony in this case and the statement of the defendant, that killing would have been without justification or excuse, in whole or in part—it would have been a malicious killing—and he [the defendant] would have been guilty of murder; and if that is true from the facts and circumstances as disclosed by the testimony of the witnesses and the defendant's statement in this case, and you believe it to be the truth of it, then he would be guilty of assault with intent to murder." We have no hesitancy in holding that both these charges were erroneous. The correct rule on this subject was laid down in the case of *Gallery v. State*, 92 Ga. 463, 17 S. E. 863, where the exact question now under consideration was decided, and where it was held: "Where death results from the unlawful use of a deadly weapon, the law, by presumption, imputes to the slayer an intention to kill; but, where death does not result, intention to kill is not matter of legal presumption, but matter for inference by the jury. Consequently it narrowed the functions of the jury too much to instruct that 'if, under this indictment, a killing had ensued, and if the crime would have been murder, then the defendant would be guilty of assault with intent to murder.'" In view of the

fact, however, that the accused in the present case was not convicted of assault with intent to murder, but merely of the offense of shooting at another, we fail to see how he could have been injuriously affected by these charges, erroneous though they undoubtedly were. It is also to be noted that in a later portion of his charge the court, at the request of counsel for the accused, gave to the jury the correct rule of law as laid down in the *Gallery Case*, supra, and to that extent the error in the earlier charges will be considered as cured. At all events, error which the result of the trial conclusively shows was not harmful to the complaining party will not be held cause for a new trial.

3. Exception is also taken to the charge of the court to the effect that evidence of alibi, in order to overcome the presumption raised by the law, must be such as to satisfy the jury that the accused "was at a place where it was impossible for him to have committed the crime." It is contended that this charge lays down a stricter rule than that prescribed in the Penal Code of 1895, § 992, which is that alibi, as a defense, involves merely "the impossibility of the prisoner's presence at the scene of the offense at the time of its commission." It is further contended that this was particularly harmful to the accused, because, under the evidence in his behalf, he was not present at the scene of the offense, but was near enough thereto to make his guilt within the limit of possibility. A thoughtful consideration of the reason of the law of alibi as a defense must show that this contention is wholly unsound. Alibi is a physical circumstance, and derives its entire potency as a defense from the fact that it involves the physical impossibility of the guilt of the accused. An alibi which still leaves it possible for the accused to be the guilty man is no alibi at all, for, if he committed the offense, the scene of that offense is the place where he was at the time of its commission, and thus he is not within even the literal meaning of the words of the Code section. The matter of distance from the person assaulted or killed is of slight, if any, importance. It is conceivable that a man could be within a very few feet of another, and yet be so placed as to render his guilt of any crime in connection with him a physical impossibility. If this is proved on the trial, he has established an alibi. On the other hand, it is equally conceivable that a homicide or an assault could be committed, though a great distance intervened between the person assaulting and the one assaulted. The charge complained of accurately sets forth the true rule of law on this subject, and affords no ground for a new trial.

The foregoing practically disposes of every ground of the motion for a new trial which requires discussion here. While, as we have shown, the trial in the court below was not

free from errors, taking the record in its entirety, we are constrained to hold that no sufficient cause has been shown for a reversal of the judgment refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(120 Ga. 211)

MERCHANTS' & MINERS' TRANSP. CO. v. JACKSON.

(Supreme Court of Georgia. May 11, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—SAFE PLACE TO WORK—INSTRUCTIONS.

1. The charges complained of, when read in connection with the context, could not have been understood by the jury as instructing them that the master was an insurer, or bound to furnish or keep an absolutely safe place in which the servant was to work. There was evidence sufficient to support the verdict for the plaintiff.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Abraham Jackson against the Merchants' & Miners' Transportation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jackson sued the Merchants' & Miners' Transportation Company for damages for personal injuries, alleging that he had been employed to work in the hold of a vessel to move timber, which was lowered through an open hatchway; that it was the master's duty to furnish him a safe place in which to work; that in pursuance thereof a tender had been employed to stand at the hatch to inform those in the hold when any object was to be thrown or lowered therein, so as to give warning and an opportunity to get out of the way of falling objects; that the hatch tender had performed the duty imposed until about 7 o'clock a. m., when the vice principal of the company gave the signal which was customarily used for the purpose of calling all hands from their place of work; that when this whistle blew, and in obedience thereto, the hatch tender left the hatchway open and unguarded; that Jackson, who was in the hold, did not hear the whistle, and did not know of the fact that the hatch tender had been called away; that, in the exercise of ordinary care, and in the discharge of his duty, he remained at work under the opening, and while so engaged another employé threw a heavy object into the hatchway, inflicting serious injury on the plaintiff. The defendant insisted that the injury was occasioned by the negligence of a fellow servant; contended that the hatch tender was present; denied that there was any custom requiring the hatch tender to leave when the whistle was blown; and denied that any whistle was blown, or that the master's alter ego called the hatch tender from the position at which he had been stationed. The company also contended that,

if the hatch tender had in fact left, it was in disobedience to the master's orders, which required him to remain at the place selected at the time and place when the injury happened. The jury found a verdict for the plaintiff. The defendant made a motion for a new trial upon the ground that the court charged that the master was bound to furnish a servant with a safe place at which to work, and was bound to keep it safe. In the general charge the court instructed the jury that "It is the duty of the master to provide for his servant a reasonably safe place in which to work, and, to that end, he is bound to make reasonable provision for the protection of the servant against injuries to which he might be exposed while engaged in the work he is employed to perform. If you should find that, in order to discharge the duty due the plaintiff, the defendant placed a hatch tender at the hatchway to give those working in the hold of the ship the necessary warning, and the trucks which fell upon the plaintiff were thrown down the hatchway while the hatch tender was absent in disobedience of the company's instructions, or without its knowledge, and some other co-employé of the plaintiff threw the trucks in the hold, and thereby injured the plaintiff, then the company would not be liable. * * * If the company's hatch tender was actually present and failed to give the plaintiff warning, the company would not be liable, because the injury would then be attributable to the negligence of a fellow servant. * * * Should you find that the hatch tender had absented himself with the knowledge of the company, or because of instructions of the company, then the company would be liable. * * * There is no allegation in this case or proof submitted to show that the company placed a man known to be incompetent at the hatchway as hatch tender, or whom the company ought to have known, in the exercise of ordinary care, to be incompetent. So that, in order for the defendant to make out a complete defense, it is only necessary for it to show that the hatch tender was actually present, or, if not present, that he did not leave the hatch with the knowledge or by the order of the defendant." For a former report of this case, see 118 Ga. 651, 45 S. E. 254.

O'Connor, O'Byrne & Hartridge, for plaintiff in error. Shelby Myrick and B. L. Calding, for defendant in error.

LAMAR, J. From an examination of the charge as a whole, it is evident that the jury could not possibly have understood the court to instruct them that the master was an insurer, or bound to furnish and keep an absolutely safe place in which the servant was to work. On the contrary, he clearly, explicitly, and pointedly charged that the plaintiff could not recover if the hatch tender

was present when the heavy object was thrown into the hold; nor if the hatch tender had negligently or voluntarily abandoned his post of duty, so as not to be in a position to warn the plaintiff when the trucks were thrown into the opening. Taken in its context, the instruction as to the duty of the master to keep the place safe meant that it could not appoint a hatch tender, and then order him away. As a whole, the charge was an admirable presentation of the law contained in Civ. Code 1895, §§ 2611, 2612, in its application to the facts under investigation. There was no error in the charge, and the evidence being sufficient to sustain the verdict, the judgment is affirmed. All the Justices concurring.

(120 Ga. 145)

TUCKER v. MAYOR, ETC., OF GRAYSVILLE.

(Supreme Court of Georgia. May 10, 1904.)

CERTIORARI—SERVICE OF WRIT—OMISSION OF CLERK OF COURT—DISMISSAL OF WRIT.

1. The statute requires the clerk to issue the writ of certiorari and enter the same on the docket, but does not make it his duty to hand the writ to the sheriff for service.

2. The statute makes it incumbent upon the plaintiff in certiorari to have the writ served upon the officer whose judgment is sought to be reviewed.

3. If the clerk, at the request of the petitioner, undertakes to perform any act in connection with the service of the writ of certiorari, he does so, not as the agent of the law, but of the petitioner, and the failure or omission of the clerk is to be treated as the failure of his principal.

4. Where, through the mistake of such clerk, the writ is not served within the time required by law, and the officer for this reason fails to answer, the petition must be dismissed by the judge of the superior court.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

J. S. Tucker was convicted before the mayor, etc., of Graysville of violating an ordinance. A certiorari to review the judgment was dismissed by the superior court, and petitioner brings error. Affirmed.

On July 16, 1903, Tucker was found guilty of violating the ordinance of Graysville requiring its citizens to work on the streets. His petition for certiorari was sanctioned on August 5, 1903. On August 18, 1903, the clerk of Catoosa superior court issued the writ of certiorari, making the same returnable to the next term of the court to be held on February 4, 1904. This was served on the mayor January 25, 1904, less than 15 days before the court met. On this ground the attorney for the town of Graysville moved to dismiss the certiorari, whereupon counsel for petitioner proved by the clerk that two months before court the attorney for Tucker inquired of him whether the certiorari had been served, and, finding that

it had not been attended to, "he directed me to have it served at once. I then asked him why he did not serve the papers himself, to which he replied, 'Let the sheriff serve them and get his fee therefor.' I then handed the paper which I thought was the certiorari to the sheriff, and directed him to serve it. He took the paper, which was not the one I intended to give him, but another. Looking through my office about a week before this term of court, I found the certiorari, and at once gave it to the sheriff to serve on the mayor, which he did immediately. Neither the plaintiff in certiorari nor his counsel ever applied for the papers to serve them himself." From the testimony of the sheriff it appeared that the first paper supposed to be the writ of certiorari had been served six or eight weeks before court, and that the real writ had been served only about a week before court convened. On this showing the judge dismissed the certiorari, to which ruling Tucker excepted.

R. J. & J. McCamy, for plaintiff in error.
W. E. Mann, for defendant in error.

LAMAR, J. Certioraries and bills of exception intended to review judgments are not treated by our statute as writs or processes which must be served by an officer. Compare Civ. Code, §§ 5547, 4643. The law makes it incumbent upon the complaining party to give notice to his adversary of the sanction of the writ of certiorari and of the time and place of the hearing. Civ. Code 1895, § 4644. The statute requires the clerk of the superior court to issue the writ, and place the same on the docket, but requires nothing further from him. If thereafter he acts at the instance of the plaintiff in certiorari, he does so as agent of the latter, and not as agent of the law. If he gives to the sheriff the wrong paper, it is not a case of misprision of a ministerial officer (Civ. Code 1895, § 5125), but the mistake of the plaintiff's agent, and what he does through his agent is to be treated as though it had been done by himself, and with the same legal consequences as if Tucker by mistake had handed the wrong paper to the sheriff. Civ. Code 1895, § 4643, contemplates that the writ of certiorari shall be delivered to the judge of the lower court by the party applying for the same, his agent or attorney, and this is the usual practice. There may be cases, however, in which the plaintiff might not desire to make this service, and therefore the statute permits it to be done through a sheriff, deputy sheriff, or constable. But this is not a duty incumbent upon the officer until after he has been furnished with the writ by some one acting for the plaintiff. It is not made the duty of the clerk as clerk to hand the papers to the sheriff for service. The case is controlled by *Zachery v. State*, 106 Ga. 124, 32 S. E. 22, where it was said: "After the writ has been issued, the duty

is placed upon the party applying for the certiorari to see that the same is served upon the judge whose decision is sought to be reviewed." The failure to have this done fifteen days before the session of the court to which it was made returnable was not the fault of the officers of the law as such, but the misfortune of the plaintiff in certiorari through the omission of one acting as his agent.

Judgment affirmed. All the Justices concurring.

(120 Ga. 199)

GRANT v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW — MALICIOUSLY DESTROYING BRIDGE — INDICTMENT — PROOF — VARIANCE.

1. An indictment charging the accused with willfully and maliciously cutting and destroying a bridge alleged to be the private property of four persons is not supported by proof showing that only one of the parties named had any interest in the bridge, and that he claimed only an easement therein.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Isaac Grant was convicted of destroying a bridge, and brings error. Reversed.

W. B. Sloan, F. M. Johnson, and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

CANDLER, J. The indictment charged that the accused did, on a named day, "willfully and maliciously injure and destroy a certain bridge on a private road leading from Bolding's Bridge and Bark Camp to the Rocky Ford Road; said bridge being the property of D. M. McKinney, William Grant, W. R. Smith, and J. T. McKinney." On the trial it appeared from the evidence that the bridge had been built at the place named by the parties who were alleged in the indictment as its owners, but that at the time of its destruction the road was used by D. M. McKinney, T. L. Robinson, Wm. A. Latham, and Dr. McKinney; that it was used for a mill road, and as a nearer way by which the parties named could go to church; that this private road had been located approximately where it was at the time of the trial for more than 20 years; and that it had been maintained at that place for about 5 years prior to the time the indictment was returned. The land upon which the bridge was built did not belong to the parties who built it and who were alleged to be its owners, but the owner of the land did not object to the building of the bridge. The bridge was cut down in August, 1902, having been built about two years prior to that time. It was shown that the accused admitted cutting down the bridge, but claimed at the time that he owned the land on which it was built, that it was built without his permission, and that it was ruining his land. D. M. McKin-

ney, one of the parties who assisted in building the bridge, testified that none of those who were alleged to be its owners or who built it claimed to own the land on which it was built; that he only claimed "an easement in it for the purpose of this road." The accused was found guilty, whereupon he made a motion for a new trial. In addition to the general grounds, the motion complained that the following charge of the court was error: "If the people mentioned in the bill of indictment, or any one of them, owned the property, that would be sufficient. It would not be necessary for the state to show that every one of them owned it. If they all had a qualified interest in the property, or if any of them had a qualified interest in the property—that is, the bridge—that would be sufficient, so far as ownership is concerned."

The indictment was based on Pen. Code, § 729, which provides: "All other acts of willful and malicious mischief, in the injuring or destroying any other public or private property not herein enumerated, shall be misdemeanors." As has been seen, it was alleged that the bridge in question was "the property of D. M. McKinney, William Grant, W. R. Smith, and J. T. McKinney." The evidence showed that the bridge was built by these parties, but that it was used by a community of persons other than those named as owners. From the evidence as a whole, it appears that the road was a way used by certain persons in the community as a convenience for going to church and to mill. The bridge which the accused was charged with having destroyed was built on the land of another, who had nothing to do with its erection. It was in no sense the private property of its builders. They were not in possession of it. Under the laws governing private ways, they may have had the right to travel on the road and to cross the bridge, but neither could be said to be their property. The state having alleged private ownership of the bridge in the four parties named in the indictment, it was necessary, before the accused could be legally convicted, to prove that they owned it; and it is needless to say that this is not done by proving that one of the parties named had an easement in the bridge.

This case is clearly distinguishable from that of *Castleberry v. State*, 62 Ga. 442. There the accused was indicted for cutting down a dam which let water into a ditch, through which it was conveyed for mining purposes. The indictment alleged that the property was that of one John A. Parker. The evidence on the trial showed that the title was in a corporation, all the stock of which belonged to Parker, and he was in actual possession of the property. The fact of his possession would of itself have supported the allegation of ownership in the indictment, regardless of whether he owned the property or not. The case under con-

sideration is totally different as to its facts, and is not in any sense in conflict with the case cited. See *Harris v. State*, 73 Ga. 41; 2 Whart. Cr. L. (7th Ed.) § 2012. For the reasons stated, we conclude that the charge quoted was error, and that the case should go back for another hearing.

Judgment reversed. All the Justices concur.

(120 Ga. 17)

MILLER v. GEORGIA R. BANK.

(Supreme Court of Georgia. May 11, 1904.)

JURY TRIAL—DEMAND—PLEADING—SERVICE OF AMENDMENTS—REVIEW—REMISSION OF EXCESS RECOVERY—AFFIRMANCE.

1. In the absence of a demand for a jury trial, all cases filed in the city court of Richmond county are triable by the judge without a jury; and in a case in that court where no such demand was made it is not a ground to reverse a judgment in favor of the plaintiff that the suit "was not founded on such an unconditional contract in writing as would make it legal for the court to render judgment without the verdict of a jury."

2. There is no provision of law for the service upon the defendant of amendments filed to the plaintiff's petition.

3. Where, in a suit brought against him, the defendant files no plea and makes no appearance, and when the case is called for trial the plaintiff amends by making allegations which are necessary to support the prayers of his original petition, these allegations will not be taken as true because not answered, but must be supported by proof.

4. In a case in which no plea is filed by the defendant, where judgment is rendered in favor of the plaintiff for the principal of the debt sued for, together with interest, costs, and attorney's fees, and the judgment is without objection except as to attorney's fees, if the amount of such fees is written off by the plaintiff the judgment will not be reversed.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Georgia Railroad Bank against M. F. Miller to recover on a note. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error.
Jos. B. & Bryan Cumming, for defendant in error.

CANDLER, J. This was a suit in the city court of Richmond county on a promissory note for \$10,000 principal, dated January 17, 1903, and providing for the collection of 10 per cent. attorney's fees in the event the amount of the note was not paid when due. The original petition alleged that prior to the execution of the note the defendant had procured to be conveyed to the plaintiff as security for all existing and future indebtedness due by her to it a described tract of land, and prayed for a judgment for the principal and interest of the note and for attorney's fees. It contained no allegation, however, that 10 days' written notice had been

given the defendant of the plaintiff's intention to sue, as provided by the act approved December 12, 1900 (Acts 1900, p. 53; Van Epps' Code Supp. § 6185). The defendant did not file a plea, and did not appear in court when the case was called. At the trial the plaintiff was permitted to amend its petition by alleging that simultaneously with the execution of the security deed to the plaintiff it had executed and delivered to the defendant a bond to reconvey the premises on payment of the debt; and, further, "that the defendant had ten days' written notice of plaintiff's intention to bring suit upon the note described in the petition." The plaintiff introduced in evidence the original note sued on "and the original agreement as to waiver, filing," etc., and the court, without further evidence, rendered judgment in its favor for the principal, interest, and costs, and also for \$500 attorney's fees; the judgment providing for a special lien on the property described in the deed referred to in the petition. The defendant brought the case to this court by bill of exceptions, complaining (1) that the suit was not founded on such an unconditional contract in writing as would justify the rendition of a judgment without the verdict of a jury, for the reason that the petition prayed for attorney's fees, and there was no proof that notice had been given the defendant as required by the act of 1900, and for the further reason that the petition also prayed for a special lien against specific property; (2) that the amendments allowed by the judge were never served on the defendant, were never consented to by her or any one representing her, and were allowed without notice of any kind to her; (3) that no evidence was submitted identifying the property against which a special lien was given in the judgment; (4) that no evidence was submitted showing that written notice was served upon the defendant as required by the act of 1900; and (5) that the judgment rendered was for a greater amount of costs than had legally accrued. The last assignment of error was, however, abandoned in this court.

There is nothing in the contention that the judgment complained of could not be lawfully rendered without the verdict of a jury, for by the act establishing the city court of Richmond county (Acts 1880-81, p. 579, § 23) it is expressly provided that all cases shall be tried by the judge without a jury, unless a demand for a jury is made by one of the parties; and no such demand appears to have been made in the present case. The point that the amendments which were allowed by the court were not served upon the defendant is equally without merit, for there is no provision in our law for the service of amendments to pleadings. Service of the original petition is supposed to bring the defendant into court and put him on notice of the nature of the complaint against him, and there is no need to further notify him of any

matter which can properly be made the subject of an amendment, except to place it on the records of the court to which he has been summoned. The real question in the present case is whether the court was justified, in the absence of proof that 10 days' notice of the plaintiff's intention to sue had been given to the defendant, in rendering judgment for attorney's fees. Had the original petition alleged that such notice was given, it is clear that the defendant's failure to appear and plead would have dispensed with the necessity for proof on the subject. But the provision of the law that allegations of a plaintiff which are not answered by the defendant will be taken as prima facie true has been expressly held by this court to be not applicable to amendments to the petition. *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874. Since the passage of the act of 1900, attorney's fees cannot be recovered unless the ten-days notice of intention to sue therein required is given. This is a vital element of the suit for attorney's fees, and should be alleged in the petition. It would seem clear, therefore, that although the defendant, by reason of her failure to answer the plaintiff's petition within the time required by law, was cut off from making a defense to the suit, a judgment for attorney's fees could not be had without proof to support the allegation of the amendment that the necessary ten days' notice had been given. Since, however, the defendant filed no plea, and does not contest the validity of the judgment against her for principal, interest, and costs, opportunity will be given the plaintiff to retain so much of the judgment in its favor as is clearly warranted and legal. If, within 10 days after the filing of the remittitur from this court in the court below, the plaintiff will write off from its judgment the sum of \$500, recovered as attorney's fees, the judgment is affirmed, otherwise it is reversed.

Judgment affirmed on condition. All the Justices concurring.

(120 Ga. 62)

KAVANAUGH & CO. v. SOUTHERN RY. CO.

(Supreme Court of Georgia. May 12, 1904.)

CARRIERS—TRANSPORTATION OF GOODS—CONNECTING LINES—CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE—LIABILITY OF CARRIER—WAIVER.

1. Civ. Code 1895, § 2298, providing, when there are several connecting railroads under different companies, and goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus, and until delivery to its connecting road; that the last company which has received the goods as "in good order" shall be responsible to the consignee for any damage, open or concealed, done to the goods; and that such companies shall settle among themselves the question of ultimate liability—is not, as applied to shipments from beyond the state, repugnant to

the clause of the Constitution of the United States conferring on Congress the power to regulate commerce among the several states of the Union.

2. The statutory remedy afforded by this section can be waived by special contract between the consignor and the initial railroad, and, when so waived, the consignee's remedy is upon the common-law liability of the carriers over whose lines the shipment is made.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Kavanaugh & Co. against the Southern Railway Company to recover damages for injuries to a shipment of goods. From the judgment, plaintiffs bring a bill of exceptions, and defendant a cross-bill. Judgment on main bill of exceptions affirmed, and cross-bill of exceptions dismissed.

O'Connor, O'Byrne & Hatridge, for plaintiffs. Osborne & Lawrence, for defendant.

EVANS, J. Kavanaugh & Co., sued the Southern Railway Company in the city court of Savannah to recover for damage alleged to have been done to certain apples shipped from County Line, N. Y., to Savannah, Ga. The cause of action was based on the statutory liability of the defendant under Civ. Code 1895, § 2298, as the last connecting carrier receiving the apples "as in good order." The defendant pleaded a special contract with the consignor as waiving this statutory liability, and also set up the defense that the statute was repugnant to the clause of the Constitution of the United States conferring upon Congress the power to regulate commerce among the several states. The plaintiff proved the damage to the apples, and that the defendant was the last connecting carrier receiving them "as in good order." The defendant proved the special contract discussed in the opinion. The court directed a verdict for the defendant, and the case is now here upon a bill of exceptions sued out by the plaintiff, and a cross-bill sued out by the defendant.

1. The section of the Code above cited reads as follows: "When there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability." The shipment of apples was delivered to the Southern Railway Company, the last connecting carrier, at Alexandria, in the state of Virginia. Its receipt for the apples as in "apparent good order" was equivalent to a receipt for the consignment as in "good order." *Forrester v. Georgia Railroad*, 92 Ga. 699, 19 S. E. 811. In the case just cited it was held

that this section meant that "each of several connecting railroads shall be responsible only to its own terminus and until delivery to the next connecting carrier; but if any company, either actually or constructively, receives a consignment of freight 'as in good order,' it will become responsible even though the goods, before delivery to it, were damaged through the negligence of some other carrier, and it must look to the company actually at fault for reimbursement." Page 703, 92 Ga., page 812, 19 S. E. This was a case of intrastate shipment, and no point was made that the statute attempted to regulate commerce between the states. The power of Congress to regulate interstate commerce is plenary and exclusive. No fixed rule can be prescribed, defining what will amount to a regulation of commerce. "Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Sherlock v. Ailing*, 98 U. S. 103, 23 L. Ed. 819. In the case of *Hall v. De Cuir*, 95 U. S. 488, 24 L. Ed. 547, Chief Justice Waite said: "The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." If the statutes of a state are for the purpose of facilitating the safe transportation of goods, without undertaking to regulate commerce or to interfere in any manner with the right of the parties to fix their liability by contract, they will be upheld, notwithstanding they may have an indirect or remote effect upon commerce. "A statute is in no just sense a regulation of commerce which does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. A state may enact a statute, the object and effect of which are to make it more sure that railroad companies shall perform the duty resting upon them, by virtue of their employment as public carriers, to use the utmost care and diligence in the transportation of passengers and goods." *C., M. & St. P. Ry. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688. The above-quoted section of our Code imposes no burden on the carrier. It does not require the carrier to accept goods upon specific terms. It contains no restriction upon the parties to contract. No right or duty of the carrier which may properly arise from contract with the shipper is modified or abridged. There is no alteration of the rule of liability of rail-

road companies as common carriers as the same existed in this state at the time of the adoption of this section of the Code. The "only change which this statute makes is to give the consignee a remedy against the last road receiving the goods 'as in good order' which he might not have had before the adoption of this section of the Code. This is a cumulative remedy existing and established in addition to those remedies which he had already." *Falvey v. Georgia R. R.*, 76 Ga. 600, 2 Am. St. Rep. 58. This additional remedy is afforded through the medium of a rule of evidence prescribing the probative value of a voluntary admission.

If the goods are in good order when received by the last connecting carrier, and are negligently damaged by it, the liability would exist independently of the statute. The delivering carrier, under such circumstances, would be liable to the consignee, although the act of negligence causing the damage may have occurred in another state. The last connecting carrier is not bound to accept as in good order freight which is already damaged. If the goods are damaged, he may so specify in his receipt, and be protected. He has full control over the matter, and, if he knowingly accepts goods which are damaged, receipting therefor "as in good order," acceptance on such terms might be construed as an assumption of the previous carrier's liability. Conduct like this would at least lead to confusion in the endeavor to fix the responsibility for damage. The consignee would be put to great disadvantage in ascertaining which of a large number of connecting carriers might be responsible for damage to freight. The carriers ought to know in the first instance where to fix responsibility for damage resulting from the negligent handling of freight. If the last carrier issues its token that no damage to the goods occurred before they were received by it, can it be said that a legislative enactment ordaining the conclusiveness of such an admission is in any wise a measure regulating commerce? The Legislature may provide the nature and extent of the legal presumption to be deduced from a given state of facts. *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677. Section 2298 affords a remedy to the consignee based upon an admission of the last carrier. It does not create any new liability. At common law the carrier could only excuse nondelivery by showing it was prevented from compliance with its obligation to deliver by the act of God or the public enemy. If the goods are received in good order, the duty is to deliver in good order. Under this statute the carrier may defend by showing the goods, though apparently in good order, were in fact damaged before their receipt by the initial carrier. *Central R. R. v. Rogers' Sons*, 57 Ga. 336. Or the carrier may excuse itself by showing the damage resulted from inherent defects, such as de-

cay, unmixed with negligence on the part of the carrier. *Forrester v. Georgia R. R.*, 92 Ga. 699, 19 S. E. 811. This last defense is likened to the act of God. In the absence of the statute under review, the carrier could dispute the truth of the statement in the receipt that the goods were in good order when received by it. The statute declares, however, that the carrier making the admission shall be bound by it; the evident purpose being, not to fix a new liability, but to give a remedy to the consignee to recover on an admission that the goods were in good order, irrespective of their actual condition when received. The carrier is not hurt. If its admission is true, its liability would exist at common law. If the admission is not true, the ultimate liability can be settled among the connecting railroads. We are constrained to hold that this section is not such a regulation of commerce as to be void because of its opposition to the interstate commerce clause of the federal Constitution.

2. A common carrier is not bound to issue a bill of lading for transportation of freight beyond its own terminus; and, if it does so, it may stipulate as a condition to the undertaking that its liability shall extend only to injuries occurring on its own lines. *Central R. R. v. Avant*, 80 Ga. 195, 5 S. E. 78; *R. & D. R. Co. v. Shomo*, 90 Ga. 498, 500, 16 S. E. 220. A limitation of its legal liability as a common carrier cannot be accomplished by any entry on the receipt given, but must be the subject-matter of a special contract. *Civ. Code 1895*, § 2276. And if the contract had been executed in Georgia, it would not be binding unless signed by the shipper. But the contract was executed and partly performed in the state of New York, and the record discloses that by the law of the state of New York the mere acceptance by the shipper of a bill of lading containing a limitation makes a valid contract. Under the New York law, in the absence of fraud, concealment, or improper practice, the party receiving a bill of lading is presumed to have assented to all its stipulations, not unusual and unreasonable, limiting its common-law liability as carrier. *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Belger v. Ex. Co.*, 51 N. Y. 166. The bill of lading embraced the following stipulations: "1st. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof, or any damage thereto by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay. 2nd. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. 3rd. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier, or to

consignee." This bill of lading having been executed and partly performed in the state of New York, these stipulations were binding on the shipper to the same extent as if he had expressly assented to the same by a special contract. Being a valid contract under the law of the state where executed and partly performed, it is enforceable in this state. This contract is inconsistent with the liability imposed on the last connecting carrier by section 2298 of the *Civil Code of 1895*, and the defendant pleaded the same to the statutory liability fixed in this section of the Code. The consignee's remedy in such a case is to sue the carrier causing the injury. His right to sue the last connecting carrier receiving the goods "as in good order," irrespective of causing the damage, has been waived by the special contract of his consignor. An action framed under section 2298 of the *Civil Code of 1895* cannot be converted into a suit upon the common-law liability for negligence. The liability in the first instance is statutory, and in the other it exists at common law. *Exposition Cotton Mills v. W. & A. R. R. Co.*, 83 Ga. 441, 10 S. E. 113; *Columbus & Western Ry. Co. v. Tillman*, 79 Ga. 607, 5 S. E. 135. The evidence showing a special contract in effect waiving the liability fixed by the statute, the court properly directed a verdict for the defendant.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concurring.

(120 Ga. 38)

RUSSELL v. BRUNSWICK GROCERY CO.

(Supreme Court of Georgia. May 12, 1904.)

GARNISHMENT—CLAIMANT'S BOND—INSTRUCTIONS—DELIBERATIONS OF JURY—TAKING PAPERS TO JURY ROOM—SUFFICIENCY OF EVIDENCE.

1. A husband and wife had the same initials. The husband, L. M. R., was sued, and summons of garnishment served on an insurance company. The garnishee answered, admitting liability on a policy of insurance, but setting up that the policy was issued to L. M. R., the wife, and that it had paid the money due thereon to L. M. R., the wife, upon her giving a bond to dissolve the garnishment, and that it was not, and never had been, indebted to L. M. R., the husband. The plaintiff in the suit traversed the answer of the insurance company, averring that the answer was untrue, in that the policy was not issued to L. M. R., the wife, but was issued to L. M. R., the husband, and that the liability of the insurance company was a liability to the husband, and not to the wife, and the allegation in the answer that the insurance company was indebted to the wife, instead of the husband, was and is untrue. *Held*: (1) That the traverse submitted an issue of fact, and the court did not err in refusing to strike the same because the traverse formed no issue; (2) that the terms of the bond given by the wife to dissolve the garnishment conformed to *Civ. Code 1895*, § 4720, providing for dissolution of garnishment by claimants, and the court properly treated the wife as a claimant, and not as a defendant.

2. There was no substantial error in the charges complained of. Any verbal inaccuracies

were fully cured by the charge as a whole, which fairly submitted the issues to the jury.

8. It is not cause for a new trial that a verdict rendered in a former trial and indorsed on the pleadings was taken to the jury room—especially so when there was no request to detach, erase, or in some other way conceal the former verdict.

4. The evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from City Court of Brunswick; J. D. Sparks, Judge.

Action by the Brunswick Grocery Company against L. M. Russell, defendant, and the St. Paul Fire & Marine Insurance Company, garnishee. Judgment for plaintiff, and Mrs. L. M. Russell, claimant of the property, brings error. Affirmed.

The Brunswick Grocery Company sued L. M. Russell, and, in aid of the suit, filed its affidavit and bond for process of garnishment. Summons of garnishment issued, and was served on the St. Paul Fire & Marine Insurance Company. The insurance company answered that it did not owe the defendant anything, except that the defendant, L. M. Russell, held a policy of insurance for \$500 at the date of the service of the garnishment, and that subsequently the garnishee paid this sum to the defendant upon the filing of a bond to dissolve the garnishment. This answer was afterwards amended by the garnishee as follows: The "use of the word 'defendant' in connection with L. M. Russell, the owner of the policy of insurance mentioned in the said answer, and the use of the third personal pronoun in the masculine gender (as 'him') in describing the person to whom said company paid the loss accruing under said policy, was inadvertently overlooked by this deponent in signing the said answer; it, the said answer, having been prepared by * * * the plaintiff's attorney, and this deponent supposing the same to have been drawn in accord with the actual facts of the case, which are as follows: The garnishee did not treat or settle with L. M. Russell, the male, as the creditor of this company or the owner of said policy of insurance, and did not pay him anything at all, and at no time since the service of the said summons of garnishment has it owed or paid him anything, or has it in its possession any money, property, or effects belonging to him; but, on the contrary, this garnishee treated and settled with L. M. Russell, the female, that is, Mrs. L. M. Russell, as the creditor of this garnishee, and the owner of the said policy, and it was to her that this garnishee paid the said sum of money due under the said policy—the five hundred dollars mentioned in the said answer." Whereupon the plaintiff in the case below filed its traverse to the amended answer, averring that "said answer is untrue, in that the policy of insurance referred to in said answer was not issued to L. M. Russell, the female, but was issued to L. M. Russell, the male, and husband of L. M. Russell, the female. The lia-

bility of said insurance company was a liability to the husband, and not a liability to the wife, and said answer, wherein said answer avers that it was indebted to the wife, instead of the husband, was and is untrue." Mrs. Russell filed a written motion to dismiss the garnishment proceedings, alleging that she was originally a defendant, and while she was a party defendant executed her bond, as defendant, to dissolve the garnishment, and that afterwards the plaintiff dismissed its case as to her, which action of the plaintiff discharged her and her security from liability on the bond. The bond given by Mrs. Russell recited that the Brunswick Grocery Company had instituted its action in the city court of Brunswick against L. M. Russell, and had sued out summons of garnishment, directed to the St. Paul Fire & Marine Insurance Company, and was conditioned as follows: "Now if the said Mrs. L. M. Russell shall pay to the said Brunswick Grocery Company the sum that may be found due to said defendant, upon the trial of any issue that may be formed upon the answer of said garnishee, or that may be admitted to be due in said answer, if untraversed, then this bond to be void." Upon the hearing of this motion, the court held that Mrs. Russell executed her bond as claimant of the fund, and not as a defendant in the suit instituted by plaintiff, and refused to dismiss the garnishment proceedings. Exception pendente lite was taken to this ruling. Mrs. L. M. Russell moved to strike the traverse to the answer because the traverse did not form any issue of fact, and did not allege that there were any assets of the defendant in the hands of the garnishee at the time of the service of the summons of garnishment. The court overruled the motion to strike, and exception pendente lite to the overruling of the motion to strike the traverse was signed by the court.

On the trial of the case, the plaintiff introduced a policy of fire insurance which purported to have been issued on March 20, 1897, in the name of L. M. Russell, as the insured, on a stock of groceries and store fixtures. The agent who issued this policy testified that "Mr. Russell ran a grocery store" located in the building described in the policy, and that "the policy was issued to L. M. Russell." The agent further testified in this connection as follows: "Subsequent to the issuance of the policy, Mr. Russell wanted an indorsement of removal placed on the policy, and wanted it transferred to his wife. I think that was January 15, 1898." He came to my office and said "he wanted it transferred from the corner of Monk and Oglethorpe to the corner of B and H streets, and that he wanted it put in his wife's name, as he owed her some money. I put the removal indorsement on the policy, and was ready to put the other indorsement on it, and asked Mr. Russell what his wife's name was. He said, 'L. M. Russell.' I said: 'Mr. Russell, it is now in the name of L.

M. Russell, and I don't think it is necessary to make any indorsement on it." "It is not my recollection that when he came there to get the removal indorsement he stated the policy should read, 'Mrs. L. M. Russell.' He stated he wanted the policy to secure his wife; that he owed his wife money, and he wanted the indorsement made in her name. And I was prepared to make the indorsement, when he told me his wife's name was L. M. Russell, and I told him that I didn't think it was necessary to make the indorsement. * * * I certainly granted Mrs. Russell the right to remove the goods, and I would not have hesitated a moment to make the indorsement to her if she had had any other initials, but it was my understanding that the policy was in her name from that date." The witness testified further along the same line; adhering to his statement that he issued the policy to Mr. Russell in the first instance, and that the latter recognized such to be the fact when he subsequently asked that it be transferred to his wife as security for a debt he owed her. Witness also stated he did not remember who paid the premium on the policy, but thought that Mr. Russell did, and that the policy was delivered to him, he not disclosing that he was "acting for his wife." The president of the plaintiff company testified: Mr. Russell never disclosed, when buying goods from the company, that his wife had any interest in the stock of groceries. After the fire occurred, on Friday or Saturday, the witness asked Mr. Russell "how the matter of the insurance stood, and he said it was about to be settled." Witness asked that the proceeds of the policy be turned over to him, and Russell replied he would see witness about it the next day. Russell subsequently said, "if he did not get the matter adjusted, that he would get the money from somewhere out West and pay" witness, and did not inform him that Mrs. Russell was the holder of the policy.

Evidence was introduced in behalf of Mrs. Russell which tended to support her claim that the policy of insurance was originally issued to her, she furnishing the money to pay the premium, and that she was the owner of the policy at the time the fire occurred. The jury, however, returned a verdict in favor of the plaintiff company. Mrs. Russell filed a motion for a new trial, which was overruled, and she thereupon caused a writ of error to be sued out to this court.

Alvan D. Gale, for plaintiff in error.
Krauss & Shepard, for defendant in error.

EVANS, J. 1. A very sharp issue of fact was made by the traverse to the garnishee's answer. It was admitted that the insurance company, being indebted to L. M. Russell on a policy of insurance, had paid over to Mrs. L. M. Russell, on her giving a bond to dissolve the garnishment, the amount due

thereon. The husband's name was L. M. Russell. The wife's name was L. M. Russell. The answer of the garnishee alleged that the policy was issued to the wife, and the money was due to her. The traverse denied the policy was issued to the wife, but averred that it was issued to the husband, and the money was due to him. The traverse was drawn to meet the answer, and presented the issue which the judge submitted to the jury. The condition of the bond given by Mrs. Russell to dissolve the garnishment is in the exact language of section 4720 of the Civil Code of 1895, providing for the condition of bonds given by claimants to dissolve garnishments. The court properly held that she had dissolved the garnishment as claimant of the fund, and not as defendant in the original suit.

2. The court fairly submitted the real and only issue in the case to the jury. That issue was whether the policy of insurance had been issued to the husband and was his property, or had been issued to the wife and was her property. Throughout the entire charge this issue was made clearly to appear. While the charge of the court may contain an irrelevant and immaterial rule of evidence, and a few verbal inaccuracies, such as using the word "testimony" where the word "evidence" would be more technically accurate, yet, taken as a whole, the issue was fairly submitted to the jury, and these verbal inaccuracies, construed in the light of the whole charge, were not calculated to mislead or confuse the jury.

3. The verdict of the jury in the first trial was indorsed upon the traverse, and was not concealed or erased when the papers were given to the jury. The judge certifies that no request was made to detach or conceal the former verdict. If a request had been made, the judge would have probably complied with it. The omission to conceal from the jury the verdict previously returned in the case seems to have been a clear inadvertence. Each juror made affidavit that he was not influenced by the former verdict, but that his verdict was based solely on the evidence given on the trial now under review. The inadvertent sending to the jury room pleadings containing a verdict formerly rendered in the same case by a prior jury will not be sufficient ground for vacating a verdict, unless some harmful result is shown. *Southern Ry. Co. v. Coursey*, 115 Ga. 602 (1), 41 S. E. 1013; *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448; *Ga. Pacific Ry. Co. v. Dooley*, 86 Ga. 300, 12 S. E. 923, 12 L. R. A. 342.

4. The evidence was conflicting. The plaintiff company sold its goods to the husband, and very probably some of these very goods were covered by the policy of insurance; the storehouse was rented to the husband; and the testimony of the insurance agent who issued the policy very strongly suggests conviction that he was dealing with

the husband when he wrote the policy of insurance. This is the second verdict for the plaintiff; the trial judge approved it; and, no material error of law having been committed, this court will not disturb the judgment of the trial court.

Judgment affirmed. All the Justices concurring.

(120 Ga. 183)

HALE v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

FORGERY—MISSPELLING NAME OF OSTENSIBLE SIGNER—SUFFICIENCY OF EVIDENCE.

1. The essence of forgery is the making of a false writing with the intent that it shall be received as the act of another than the party signing it, and the misspelling of the name of the ostensible signer will not prevent the act from being a forgery.

2. The evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

A. C. Hale was convicted of forgery, and brings error. Affirmed.

S. O. Crane, for plaintiff in error. O. D. Hill, Sol. Gen., for the State.

EVANS, J. 1. The alleged forged check purports to have been signed by J. A. Grier. The witness offered by the state to show the falsity of the check was J. A. Greer, who spelled his name "Greer." There was testimony that the defendant stated the alleged maker was a commissionman, and J. A. Greer, the witness, did a commission business in the locality where defendant uttered the check as true. Objection was made to receiving the check in evidence because it was signed "J. A. Grier," as maker, and the state's witness to prove the alleged forgery was named J. A. Greer, and there was no proof that J. A. Grier had not made and signed the check. The court admitted the check in evidence. The false making of the writing, the intent to defraud, and the tendency and capacity of the writing to prejudice the right of another person, are the essential ingredients in the crime of forgery. Whether spelled "Greer" or "Grier," the pronunciation of the name is the same, and the evident tendency of the writing is to prejudice the right of another. In cases of counterfeiting, the similitude of the false writing to the genuine should appear, but in forgery the essence of the wrongful act is the execution of the writing with intent that it shall be taken as the act of some other than the person signing. It is not at all necessary there should be a resemblance between the forged and genuine signatures. If the name affixed to the forged instrument be such as to indicate a given individual's name is intended, it is immaterial that the true name is misspelled. Thus it was held in North

Carolina that a forged order signed "J. M. Hawwood" was such a false writing that from its nature and the course of business it might deceive another as having been executed by "J. M. Haywood." *State v. Covington*, 94 N. C. 913, 55 Am. Rep. 650. A duebill signed "Mr. Daniel Threet," if forged or uttered with intent to deceive in the neighborhood in which one "Daniel Thweatt" lives, will support an indictment for forgery. *Gooden v. State*, 55 Ala. 178. These and other authorities are to the effect that the misspelling of the name of the ostensible signer will not prevent the act being a forgery.

2. Forgery and falsely uttering as true a forged instrument may be charged in the same count. *Thomas v. State*, 59 Ga. 784. It is essential to a conviction for uttering a forged paper that it must be published as true, when the party knew it to be fraudulent, and with intent to injure some one. These elemental constituents of the offense were proved in the present case. Carpenter, the person named in the indictment as the party to whom the check was uttered as true, was actually defrauded in the sale of his groceries, and paying the cash difference between the purchases made by the accused and the face value of the check. The accused represented to Carpenter that the check was given to him for work done for Greer. The accused sought to establish an alibi, but relied on no other defense. If, as the jury was warranted in finding, he was really the person who uttered the check, his knowledge of the forgery might well have been inferred from his simulating the name of Johnson, when he claimed to be the holder of it; his presentation of the check after banking hours; his false statement that he had worked for Greer, a commissionman, who had given him the check too late for him to get the money on it, and that it was Saturday night, and he was obliged to get the check cashed in order to buy some groceries for immediate use. The verdict of the jury has the sanction of the trial judge, and, as no error of law was committed, the verdict will not be disturbed.

Judgment affirmed. All the Justices concurring.

(120 Ga. 9)

McELMURRAY v. BLODGETT.

(Supreme Court of Georgia. May 11, 1904.)

MORTGAGES—SALE WITH RIGHT TO REPURCHASE—PRACTICE—DEMURRER—RES ADJUDICATA.

1. Upon its merits, this case is controlled by the decision in *Felton v. Grier*, 35 S. E. 175, 109 Ga. 320, which is conclusive.

2. Even if there was any error in allowing the answer to the amendment to the petition, on the ground that it was not filed within a reasonable time after the amendment was allowed, the error was harmless, for the reason that there was no evidence offered to prove the allegations of the amendment, and the failure to answer the same would not have the effect of admitting the truth of the averments therein contained.

3. The decision on the demurrer to the amendment did not necessarily involve the construction of the paper which was the foundation of the controversy.

4. There was no error in granting a nonsuit. (Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by F. L. McElmurray, as administrator, against C. S. Blodgett. Judgment for defendant, and plaintiff brings error. Affirmed.

On March 8, 1900, Elvira Marshall presented to Hon. E. L. Brinson, then judge of Richmond superior court, her petition, which sets out that on July 9, 1888, she conveyed a certain lot of land to a loan company to secure a loan, repayable in 120 months, in monthly installments of \$4.50, the entire amount called for being \$540, and the company gave her bond to reconvey on repayment; that up to July, 1895, she had repaid \$340, but was \$33 in arrears, learning which, one Blodgett, her grandson, proposed to her to pay off the arrears, and lend her \$10, if she would transfer the bond to him to secure him for these amounts and anything further he might pay out for her on the loan, she to have the right to redeem the bond at any time within five years by repaying him any amounts so paid out by him, and 8 per cent. interest; that she agreed to this, and on July 3, 1895, to effectuate the same, transferred the bond to him, and executed with him an agreement which recites that he "has purchased from" her, for \$10, the bond, and that if, at any time within five years from date of the agreement, she "desires to purchase back from him his interest under said bond for titles or to the property itself," and shall repay the \$10 and all paid by him on the loan or property, with 8 per cent. interest, then he "gives her the option to purchase back"; that the bond was transferred by a transfer indorsed thereon, and absolute on its face, and the contemporaneous agreement was separately drawn; that his conduct in having the papers separately drawn, so that on the face of the bond he seemed absolute owner thereof and could thereby obtain title to the property, was a fraud upon her, for reasons stated; that under the agreement he advanced her \$200, balance due on the loan, and on its repayment obtained on July 10, 1898, a deed to the property from the company, which saw only the absolute transfer of the bond when presented by him, and knew nothing of the contemporaneous agreement; that for some time after obtaining the deed he did not disturb her possession, but finally claimed the property as absolutely his thereunder, and on March 5, 1900, swore out a dispossessory warrant against her, whereunder a constable was about to eject her; that he was seeking to sell or make other disposition of the property, which, under his recorded deed, he could do to some innocent purchaser, to her irreparable injury, he being a mere day laborer and

wholly insolvent; that she was not due him more than \$300 under their agreement, whereas the property was well worth \$800; and that she had no adequate legal remedy in the premises. Wherefore she prayed that the warrant be enjoined, and that Blodgett be enjoined from making any disposition of the property or interfering with her possession or enjoyment thereof, and be decreed to convey it to her on payment of what might be justly due him under their agreement, and for general relief. The court sanctioned the petition, and restrained him and the constable as prayed.

On March 24, 1900, Blodgett filed his answer, which admits the transfer and agreement, and says "that she transferred to him said bond for titles, and signed said written agreement, marked 'Exhibit A,' attached to her petition, as security for all amounts that this defendant should have to pay on her account to said investment company, and for the purpose of redeeming the land"; admits that the company had made him a deed, but sets up that he had advanced her more than \$200, and alleges that she "is indebted to him in the sum of \$462.97, with 8 per cent. interest from March 19, 1900, an itemized statement of said account being attached," which account is in the shape of a bill, "Elvira Marshall to Charles Blodgett, Dr.," and contains divers items of debit, and a credit of "Amts. received from Elvira Marshall," and shows a balance of "Total amt. due up to March 19, '00—\$462.97"; denies insolvency or fraud, or that he is her grandson or is contemplating any disposition of the property, or that it is worth \$800, averring its value to be about \$450; and admits swearing out the warrant, but avers it was done because she had failed "to reimburse him" and was injuring the property; and prays judgment against her for the \$462.97.

On April 17, 1901, defendant filed an amendment to his answer, which strikes from this allegation thereof: "That she transferred to him said bond for titles, and signed said written agreement marked 'Exhibit A,' attached to her petition, as security for all amounts that this defendant should have to pay on her account to said investment company, and for the purpose of redeeming the land."

On June 1, 1900, Elvira Marshall died, and on April 17, 1901, A. S. Ulm, then her administrator, filed an amendment to his intestate's petition. This amendment alleges: (1) That at the time of the agreement of July 3, 1895, Blodgett was well aware that, by the terms of her contract with the loan company, Elvira was entitled to the possession of the land. (2) That the agreement of July 3, 1895, was not an absolute sale of the bond for title, but simply a hypothecation thereof to secure Blodgett for what he might pay out for Elvira thereunder, and the right of possession of the land was still to remain in Elvira. (3) That if Blodgett had, under

said agreement, any right to obtain a deed to himself, the deed was simply a security, as the bond had been. (4) That from date of the agreement up to February, 1900, Elvira was in continuous, undisturbed possession of the property, living and keeping store in one house thereon, and renting out another, but about latter date, by reason of the infirmities of age and approaching blindness, became unable to conduct her store, and removed to a daughter's, intending to rent the store out; that immediately thereafter Blodgett set up a claim that the property was his absolutely, and by such claim prevented her from renting out the store, and intimidated her tenants in the other house from paying her rent, whereby, her daughter being only a poor washer-woman, and only able to afford her shelter, she was in a distressed and destitute condition; and, while in this state, Blodgett swore out the dispossessionary warrant against her, and, to obtain means of subsistence and legal aid to defend herself, she was compelled to sell two \$40 shares in the loan company, all the property she then had; and that said warrant was sworn out maliciously and without probable cause, Blodgett then well knowing that Elvira was not his tenant, and did not owe him \$250, or any part thereof, as rent arrear, as he deposed. (5) That at the hearing on the rule nisi, Blodgett did not attempt to sustain the warrant, but dismissed the same, whereupon Elvira, on April 9, 1900, rented out the store at \$5 per month till October 1, 1900, to a tenant, whom she put in possession, and from whom she received the rent for April. (6) That on learning of such renting, on April 10, 1900, Blodgett, by his claim that he owned the property absolutely, and by threats of eviction, intimidated her tenant in the store and her other tenants into attorning and paying rent to him, thereby totally depriving Elvira of any income from the property. (7) That being thus harassed, and deprived of all her property and means of subsistence, Elvira succumbed to grief and privation, died on June 1, 1900, in utter indigence, and was buried at the public expense. (8) That continuously since May 1, 1900, Blodgett has tortiously held possession of the property, and received its rents, of the value of \$120 per year. (9) That by his tortious dispossession and usurpation of rents during Elvira's lifetime, defendant profited, whereby a right of action to recover damages therefor in this action accrued to her, and has survived to her administrator. (10) That, by like retention and usurpation since Elvira's death, a like right has accrued to her administrator. (11) That the said damages to Elvira are \$200 actual and \$200 punitive damages. (12) That said damages to her administrator are \$200 actual and \$200 punitive damages. (13) That Blodgett has acted in the premises in bad faith, and has been stubbornly litigious, and put Elvira and her administrator to unnecessary trouble and expense, to wit, counsel fee of \$60. (14) That plaintiff amends the

prayer by praying damages actual, punitive, and expenses of litigation, as above stated, and that the property be decreed property of Elvira's estate, and, if debt be found against, and no damages for, plaintiff, the property be sold, the debt paid, and the residue turned over to plaintiff.

On April 18, 1901, defendant filed his demurrer to the petition as amended on the grounds: (1) No cause for action. (2) Amendment sets forth new and distinct cause of action. (3) Joinder of causes ex contractu and ex delicto. (4) No tender. (5) No compliance with agreement of July 3, 1895, alleged. (6) Said agreement "shows on its face that it was an option to purchase land, and that the time limit therein specified, to wit, July 3, 1900, has expired," without Elvira or her administrator exercising the same. (7) That "said contract or option was a personal one, and was limited to Elvira Marshall only, and was not to be assigned or devised, and her administrator cannot exercise the right therein given." (8) That "said bond for title and said agreement show upon their faces that they were not given as security for a debt—that Marshall owed no debt to Blodgett—but said exhibits show a bargain and sale, with a contemporaneous agreement to repurchase in Marshall." (9) "Defendant specially demurs to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, and 14 of said amendment, upon the ground that these counts sound in tort and ask for punitive damages, and that said items of damage are not recoverable in this action, the same being founded on a contract."

On February 21, 1902, the court rendered judgment on the demurrer: "Said grounds of demurrer numbered 1, 2, 4, 5, 6, 7, and 8 are hereby overruled. The grounds of demurrer numbered 2 [3?] and 9 are hereby sustained, and all claims for punitive damages alleged in plaintiff's petition are hereby dismissed and stricken." Neither party excepted to this judgment.

On April 23, 1903, defendant filed an answer to the above-stated amendment of April 17, 1901, which answer is: "(1) That he is not prepared to admit the truth of the allegations as contained in paragraphs 1, 2, 3, 4, and 5 of plaintiff's amended petition, and respectfully prays that he be required to prove each and every one of the same. (2) That paragraphs 6, 7, 8, 9, 10, 11, 12, 13, and 14 of said petition having been stricken on demurrer, defendant does not feel called upon to answer the same." On the next day, April 29, 1903, the cause came on for trial before Hon. Wm. T. Gary, then judge, and, before the introduction of any testimony, defendant moved to amend his above-stated answer of April 23, 1903, by striking therefrom paragraph 1, and inserting in lieu thereof the following: "(1) That for lack of sufficient information, he is not prepared to admit or deny the truth of the allegations contained in paragraph 1 of the amended pe-

tion. (1a) That he denies the truth of the allegations contained in paragraphs 2, 3, 4, and 5 of the amended petition." Plaintiff moved to strike above-stated answer of April 28, 1903, on the grounds (a) that the same was not a legal answer, inasmuch as it did not admit or deny the allegations of the amendment of April 17, 1901, to the petition, or state that defendant could neither admit nor deny those allegations, for want of sufficient information; and (b) that said answer was not filed until April 28, 1903. Plaintiff at the same time objected to the amendment offered on April 29, 1903, objecting generally to said amendment, as a whole, on the grounds (a) that there was nothing to amend by, inasmuch as the answer of April 28, 1903, sought to be amended, was not a legal answer, as it did not admit or deny the allegations of the amendment of April 17, 1901, to the petition, nor state that, for lack of sufficient information, defendant could neither admit nor deny the same, and was not filed till April 28, 1903; and (b) that it was not duly verified—and objected specially to paragraph 1 of said proposed amendment on the ground that it failed to give any reason for, or explanation of, defendant's ignorance of the matters therein referred to. Defendant then verified said proposed amendment "that he did not omit the facts set out in the above amendment to the answer for the purpose of delay, and that the answer is not now filed for delay." The court overruled said motion to strike the answer filed April 28, 1903; and overruled said objections to said proposed amendment to said answer, and allowed said amendment. These rulings were excepted to, and error is assigned thereon.

Salem Dutcher, for plaintiff in error. Wm. H. Barrett, for defendant in error.

COBB, J. 1. The case, upon its merits, turned upon the construction of a paper. The plaintiff contended that the agreement contained therein was simply one whereby one of the parties agreed to transfer to the other an interest in property to secure the payment of a debt. The defendant contended that the paper contained an absolute transfer of the title, with the right reserved to repurchase the property within a given time upon the payment of certain amounts. At the date of the trial the time specified in the contract had expired. Such being true, the case is brought within the principles laid down in the case of *Felton v. Grier*, 109 Ga. 320, 35 S. E. 175, which is directly controlling. The judge therefore did not err in granting a nonsuit, provided the case was in such condition that he could pass upon the merits at the time the motion was made. Whether the case was in such condition depends upon the determination of other questions raised in the record, which will be now decided.

2. It was contended that the court erred in allowing an answer to be filed to an amendment to the petition; such answer not having been filed, as it was claimed, within a reasonable time. It is unnecessary to determine whether the court erred in allowing the answer to be filed, for the reason that, as the amendment to the petition was offered after the appearance term had passed, the allegations of the amendment would have to be proven, even though the defendant had failed entirely to answer it. See *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874. Even if it could be properly held that the court abused its discretion in allowing the answer to be filed, the error was harmless, for the reason that there was no evidence offered to substantiate the allegations of the amendment.

3. It was contended that the nonsuit was erroneous, for the reason that the court, in passing upon the demurrer to the petition, had, in effect, held that the paper over which the controversy arose was an agreement to secure a debt, and not a sale with an option to repurchase. It is well settled that if the court, upon demurrer, holds that the petition sets forth a cause of action, this decision, so long as it stands unreversed, is res adjudicata in the subsequent stages of the case. *Kimbro v. Railway Co.*, 56 Ga. 187 (1); *Turner v. Cates*, 90 Ga. 742, 16 S. E. 971 (2); *Ellis v. Almand*, 115 Ga. 336, 41 S. E. 642 (2); *Ga. Northern Ry. Co. v. Hutchins*, 119 Ga. 505, 46 S. E. 659. It has also been held that a judgment on demurrer, until reversed, concludes the parties on all questions necessarily involved in the decision. *Ga. Northern Ry. Co. v. Hutchins*, supra. It would seem to follow from this that it would not conclude upon any question not necessarily involved in the decision on the demurrer. When the petition, the amendment, the demurrer, and the judgment on the demurrer are all considered together, it sufficiently appears that the question as to the proper construction of the paper was not necessarily involved in the decision rendered on the demurrer. The demurrer set up, as a reason why the petition should be dismissed, that the paper exhibited thereto contained a contract of absolute sale, with an option to repurchase. The court overruled this ground of the demurrer. As there were allegations of fraud in the petition, which, if true, would have authorized a recovery even if the defendant's construction of the contract was correct, the court, in overruling the demurrer, which was simply holding that the petition set forth a cause of action, did not necessarily pass upon the character of the paper in question.

4. It was contended that the nonsuit was error, for the reason that the defendant had admitted in his answer that the paper which was the foundation of the controversy merely created a security for a debt. If this admission had remained in the answer, it may

be that the plaintiff would have been entitled to take advantage of it, either as in the nature of a waiver of the defendant's strict rights under the paper, or as a consent by him that the case might be determined upon that theory, without reference to what was the correct interpretation of the paper. But this portion of the answer was stricken by amendment, and therefore it stood simply as an admission by the defendant as to what was the true interpretation of the paper. Admissions of fact in a pleading can always be taken advantage of by the opposite party, even though the pleading should be stricken or withdrawn. *Lydia Pinkham Med. Co. v. Gibbs*, 108 Ga. 140, 141, 33 S. E. 945; *Cooley v. Abbey*, 111 Ga. 443, 36 S. E. 786; *Ala. Mid. Ry. Co. v. Guilford*, 119 Ga. 523, 46 S. E. 655; *Civ. Code 1895, § 5066*. This rule, however, has no application where the admission is simply an opinion on the part of the party making it as to the legal effect of a paper. See, in this connection, *Baldwin Fertilizer Co. v. Carmichael*, 116 Ga. 765, 42 S. E. 1002, and cases cited. If the paper containing the contract is ambiguous or doubtful in meaning, the interpretation placed upon it by one of the parties may, under certain circumstances, be of some importance. But where, as in the present case, the paper is free from ambiguity, and there can be no doubt about its legal meaning, it is immaterial what may have been said by one of the parties, either in court or out of court, as to what the paper meant, when such statement has not been acted upon by the other to his prejudice.

After a careful consideration of the record, we see no reason for reversing the judgment. Judgment affirmed. All the Justices concurring.

(120 Ga. 181)

BRADY v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

WITNESSES — ATTENDANCE — SUBPENA — CRIMINAL LAW — ABSENCE OF WITNESS — CONTINUANCE.

1. A witness once duly served with a subpoena is required to attend from term to term until the case is tried.

2. Where the court offers to issue an attachment to compel the attendance of a witness who has been summoned for the defendant, and his counsel declines to take the same, but, instead thereof, relies upon the service of a second subpoena, which latter the witness likewise disobeys, there is no abuse of discretion in refusing a continuance on account of the absence of the witness, particularly where it appears that there has already been a continuance on the ground of his absence.

(Syllabus by the Court.)

Error from City Court of Americus; G. R. Crisp, Judge.

Tom Brady was convicted of larceny from a house, and brings error. Affirmed.

Brady was charged with larceny from the house. On the call of the case he made a perfect showing for a continuance on the ground of the absence of a witness, John Fletcher. From the note by the trial judge it appears that at the August term, 1903, the case was continued on account of the absence of Fletcher, a witness, Lizzie Osborne, being then and there in the courtroom. At the November term, 1903, the case was continued on account of the absence of Lizzie Osborne, the witness Fletcher being present in the courtroom. The court continued the case until the next term, and set it for hearing on Monday of the January term, 1904. It was called as the first case, and counsel for the defendant requested that it be passed until the next day, and later counsel notified the court that John Fletcher was not present, and requested that the case be passed until Wednesday, which was done. The court notified defendant's counsel that he would give him an attachment for Fletcher, "but he didn't take it." It appears from the motion that Fletcher, who had previously been subpoenaed, was served with another subpoena after the case had been assigned to be heard on Wednesday, and that Fletcher had promised that he would be in attendance at that time. The motion also alleged that Fletcher was the only witness by whom the defendant could prove that he was at the house of Lizzie Osborne at the time of the alleged larceny from the ginhouse of the prosecutor, several miles distant. The court overruled the motion to continue, and this, with the general grounds, was assigned as a reason for the grant of a new trial.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., and J. A. Ansley, Jr., Sol., for the State.

LAMAR, J. There had already been one continuance because of the absence of the witness Fletcher. He had been subpoenaed prior to the August term, 1903, and this was sufficient to require his attendance from term to term. When, therefore, he failed to appear on the call of the case at the January term, 1904, he was *prima facie* in contempt, and subject to an attachment. *Civ. Code 1895, §§ 5260, 5263*. Continuances are only allowed to the diligent (*Civ. Code 1895, § 5135*), and to those who avail themselves of the means provided by law for compelling the attendance of those by whom facts material to the cause are to be proved. When, therefore, the court of its own motion offered to issue an attachment, and the defendant declined to accept the same, he was lacking in legal diligence. With knowledge that the witness had disobeyed one subpoena, he chose to rely on another, which was no better than that already served. There was no abuse of discretion in refusing the continuance and ordering the case

¶ 2. See *Continuance*, vol. 10, Cent. Dig. § 31.

to trial. *McRae v. State*, 52 Ga. 290; *Anderson v. State*, 72 Ga. 98; *Runnals v. Aycock*, 78 Ga. 554, 3 S. E. 657 (3a).

The testimony for the state showed that the defendant was caught in the very act of stealing seed cotton from the ginhouse of the prosecutor, the evidence was ample to sustain the verdict, and the judgment refusing the new trial must be affirmed. All the Justices concurring.

(120 Ga. 990)

COMMERCIAL BANK OF AUGUSTA v. WARTHEN et al.

(Supreme Court of Georgia. May 11, 1904.)

CORPORATIONS—MISMANAGEMENT BY OFFICERS—INSOLVENCY—LIABILITY ON SUBSCRIPTIONS TO STOCK—PROCEEDINGS TO ENFORCE—PARTIES—BANKRUPTCY.

1. One extending credit to a corporation cannot complain of acts of mismanagement on the part of officers and agents of the corporation prior to the time when the credit was extended.

2. While unpaid stock subscriptions are assets of an insolvent corporation for the benefit of its creditors, of which a court of equity will, by proper proceeding in personam, compel payment when the corporation fails or refuses to call for or collect the same, the corporation is a necessary party to such a proceeding.

3. The right of action in a corporation against a defaulting stock subscriber for unpaid subscriptions is a right of action arising upon contract, and on the adjudication of the corporation as a bankrupt passes to the trustee, under section 70, subd. 6, Bankr. Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]. The foregoing is true although the subscriber claims that the subscription has been paid in full and the corporation is contesting that issue with him.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by the Commercial Bank of Augusta against Thomas Warthen and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error. R. H. Callaway, for defendants in error.

SIMMONS, C. J. On October 1, 1901, the Commercial Bank of Augusta brought suit against W. B. Lamkin and Thomas Warthen, alleging in its petition substantially as follows: In September, 1898, defendants formed a partnership under the name of W. B. Lamkin & Co. for the conduct of the retail grocery business. The capital stock was \$5,000, which was furnished by Warthen. After conducting business for a short time as a partnership, Lamkin and Warthen applied for a charter to carry on the business as a corporation under the name of the W. B. Lamkin Company, which charter was granted on November 22, 1898. The capital stock was to be \$5,000, of which 10 per cent. was alleged to have been paid in. At the time of the granting of the charter the stock and other assets of the firm were not worth \$5,

000, having been diminished by sales at least \$2,500; the proceeds having been used in payment of goods bought by the firm. Ten per cent. of the capital stock had not been paid in, as alleged in the petition for incorporation, nor was it thereafter paid in. After the charter was granted, defendants held no meeting and opened no books of subscription; no subscriptions were made by either of the defendants; the charter was never accepted; no rules, regulations, or by-laws were adopted; no subscriptions to capital stock were made, and nothing was paid on account of capital stock. It was agreed between Lamkin and Warthen that Lamkin was to have 1 share of stock and Warthen 49, and that Lamkin was to be president and manager and Warthen vice president. Various acts of mismanagement are alleged, some of which occurred before the plaintiff became a creditor of the corporation, as hereinafter stated; it not appearing when the others took place. In June, 1899, the store and merchandise of the company were destroyed by fire, and after the collection of the insurance money there was in hand about \$8,250 in cash. It is alleged that a portion of this sum was misappropriated by the joint action of the defendants. After the fire the business was continued in the same negligent manner as before. On May 16, 1901, the corporation was adjudged an involuntary bankrupt. The trustee, upon taking possession of the effects of the corporation, found it wholly insolvent. The debts were placed at \$4,786.55 and assets at \$7,500, but were actually sold for only \$1,686.83. It is alleged that the losses, insolvency, and bankruptcy were due to the misconduct of the defendants, and their negligent management of the business, and their failure to perform the duties which were required of them by law.

It is alleged that defendants are jointly liable for the sum of \$2,000 unlawfully diverted from the assets of the corporation, and for \$3,600 drawn out as salary without any vote or corporate action authorizing the same. Defendants were in reality directors of the corporation and trustees for the creditors, and liable for the sums lost through their misconduct and mismanagement. In April, 1901, when the corporation was actually insolvent, and when its assets were worth less than \$2,000, petitioner loaned to it the sum of \$1,400, though petitioner was not aware of its condition until after the bankruptcy proceedings, nor until that time did it know of the acts of misconduct and mismanagement above referred to. The loan was made on the faith of statements that Lamkin was solvent, and owned property worth \$5,000. The money loaned was used by the corporation in its business. Petitioner has proved its claim for \$1,400 in the bankrupt court. The prayers are: (1) That defendants be made to account for all sums due by them by reason of the facts alleged; (2) that they be

required to replace and make good the \$2,000 in cash withdrawn from the assets of the corporation; (3) that they be required to make good all loss and waste occasioned by their negligence, misconduct, and failure to comply with their duty as officers and directors of the corporation; (4) for a judgment for \$1,400, besides interest; (5) for general relief and process. The application for a charter by the defendants and the order granting the same were exhibited with the petition. Amendments were allowed containing allegations with reference to misconduct and mismanagement on the part of the defendants, averring that no part of the capital stock of \$5,000 was ever subscribed, that the net worth of the partnership stock, which was used as a basis of operation for the corporation was only \$1,500, and praying for a judgment against the defendants for the whole of the capital stock, to wit, \$5,000, or for a judgment for the difference between that amount and the true value of the assets of the partnership which went into the business of the corporation. Warthen filed a demurrer setting up that the petition alleges no cause of action, that there is no equity in the petition, there is a misjoinder of causes of action and of parties defendant, as well as nonjoinder of defendants, and that plaintiff, having proved its debt in bankruptcy, has no right under the bankrupt act to maintain a separate suit for the collection of its indebtedness. There were other grounds of demurrer, which need not be set forth. The court sustained the demurrer and dismissed the petition. The plaintiff excepted.

1. So far as the petition alleges mismanagement on the part of the defendants in their alleged capacity as officers and directors of the corporation and the withdrawal of assets, it sets forth no cause of action in behalf of the plaintiff. It distinctly appears that the \$2,000 alleged to have been withdrawn was so withdrawn before the plaintiff extended credit; and, while there is no distinct allegation that the \$3,600 was withdrawn before that time, or that the other acts of mismanagement alleged took place before, it appears inferentially that such is the case, for the petition avers that in April, 1901, when the loan was made, the assets were worth less than \$2,000. It was incumbent upon the plaintiff to show that the mismanagement of which it complains was at a time when it would result in injury to it. While one extending credit to a corporation may properly complain of fraudulent statements made in reference to the affairs and condition of the corporation at the time the credit is extended, he cannot complain of mismanagement on the part of the officers of the corporation that took place prior to the time that the credit was extended. See, in this connection, *Thomp. Lab. Off. & Agts. Corp.* p. 460.

2. It is claimed that the petition is maintainable under the provisions of Civ. Code

1895, § 1856, which declares that "persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for, are liable to creditors to make good the minimum capital stock, with interest." But, even treating the averments of the petition as being sufficient to set forth a liability under this section, is the suit maintainable unless the corporation is a party? This does not seem to be an open question in this court. See *King v. Sullivan*, 98 Ga. 621, 20 S. E. 76. It is to be noted that in the case of *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121, from which section 1856 was codified, while no question of parties was raised, the corporation was made a party to the case. See, also, in this connection, *Wilkinson v. Bertock*, 111 Ga. 193, 36 S. E. 623; *Morgan v. Gibian*, 115 Ga. 145, 41 S. E. 495; *Tichenor v. Williams Pavement Co.*, 116 Ga. 307, 42 S. E. 505. In *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647, the suit was by the receiver of a corporation, which was in law a suit by the corporation. In a proceeding against the corporation a receiver had been appointed, and this receiver, under an order of the court, was proceeding to sue the stockholders for their unpaid subscriptions.

3. There is, however, an additional reason why the judgment sustaining the demurrer was right. Upon the adjudication in bankruptcy the right to bring a suit of the character under consideration vested in the trustee, and this alone was a sufficient reason for sustaining the demurrer and dismissing the petition. Under the bankrupt act of 1898 the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, and with all "rights of action arising upon contracts, or from the unlawful taking or detention of or injury to his property." See *Bankr. Act* July 1, 1898, c. 541, § 70, subd. 6, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]. There are a number of cases decided under the bankrupt act of 1867 which hold that the right to collect unpaid stock subscriptions passed to the assignee in bankruptcy. See *Payson v. Stoeber*, Fed. Cas. No. 10,863; *Michener v. Payson*, Fed. Cas. No. 9,524; *Myers v. Seeley*, Fed. Cas. No. 9,994; *Lane v. Nickerson*, 99 Ill. 234. See, also, *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. The case of *Dutcher v. Marine Bank*, Fed. Cas. No. 4,203, 12 Blatchf. 435, is not in conflict with these decisions. It was simply held there that the right to enforce a constitutional or statutory liability on the part of stockholders for debts of the corporation to the amount of the stock held by them did not pass to the assignee in bankruptcy, and it was expressly stated in the opinion that the rule would be different as to unpaid subscriptions to stock, which were assets of the corporation and passed to the assignee. The same distinction is to be noted as to the

case of *Pfohl v. Simpson*, 50 How. Prac. 341. The provisions of the act of 1867 were, however, somewhat broader in their terms than those of the act of 1898. Our attention has been called to but one case under that act which appears to be at all in point—that of *In re Crystal Springs Bottling Company*, 3 Am. Bankr. R. 194, 96 Fed. 945, a decision by District Judge Wheeler of Vermont. In that case it was held that corporate stock subscriptions are a primary fund for the payment of corporate debts, but a call is necessary before such subscriptions can be collected, and that, where the corporation has gone into bankruptcy, the trustee is the proper one to make the call. It was further held that the court of bankruptcy has jurisdiction to order the call and to entertain a suit to enforce the payment. The liability of a stockholder upon his stock subscription depends upon the contract of subscription. There would seem to be no room for question that the right of the corporation to enforce the payment of subscriptions is one arising upon contract. Nor would it make any difference that the stockholder claims to have paid the subscription. The right of action remains the same, and the defense set up raises merely an issue of fact, which can be tried in the suit by the trustee on the contract as well as if the suit had been brought by the corporation. Even if the petition set forth a cause of action at all, it was subject to the objections that the corporation was not a party, and that the suit should have been brought by the trustee in bankruptcy.

Judgment affirmed. All the Justices concurring, except LAMAR and EVANS, JJ., disqualified.

(120 Ga. 45)

WATKINS v. COUNTRY CLUB.

(Supreme Court of Georgia. May 12, 1904.)

PRIVATE WAY—OBSTRUCTIONS—PETITION FOR REMOVAL—ADVERSE USER.

1. Where, in a petition to have obstructions removed from an alleged private way, the petitioner based his alleged right to the relief for which he prayed upon seven years' continuous and uninterrupted use of the way, and failed to allege that the land over which the way was claimed was improved land, a demurrer predicated upon such failure was properly sustained. (Syllabus by the Court.)

Error from Superior Court, Richmond County; W. F. Eue, Judge.

Action by R. S. Watkins against the Country Club. A judgment sustaining a demurrer to the petition was affirmed on certiorari to the superior court, and plaintiff brings error. Affirmed.

F. W. Capers, for plaintiff in error. Jas. C. O. Black, for defendant in error.

FISH, P. J. This was a proceeding before the ordinary of Richmond county to have certain obstructions removed from an alleged

private way. The original petition made a case, in behalf of the petitioner, of title by prescription to the way, by reason of 20 years' continuous and uninterrupted user thereof. The respondent to the rule nisi demurred to the petition upon various grounds, two of which have been argued here, viz., because it was not alleged that the way was ever laid out by the petitioner, and because it was not alleged that the owners of the land over which the right of way was claimed ever had knowledge that the way was laid out, used, and enjoyed. Pending this demurrer, the petitioner amended the paragraphs of the petition in reference to the user of the way, "so that said paragraphs when amended [should] read as follows"; that is, that the described way had been used in the manner alleged "for more than seven years," and "for said term of seven years" had been kept open and in repair by the petitioner. The petition as amended was then demurred to upon all the grounds of the original demurrer, and upon this additional ground that the petition, as amended, did not allege that the land over which the right of way was claimed was improved land. The ordinary sustained the demurrer and dismissed the petition. The petitioner carried the case by certiorari to the superior court, where the judgment of the ordinary was sustained. The bill of exceptions before us alleges error in this judgment of the superior court.

Was the petition defective in not alleging that the land over which the way was claimed was improved land? The ground of the demurrer raising the question was not good against the original petition, but, in our opinion, it pointed out a fatal defect in the petition as it stood after it was amended. It will be observed that the amendment, instead of simply adding additional paragraphs to the petition, amended certain paragraphs thereof so as to sweep therefrom the allegations in reference to 20 years' user of the way, and substitute in lieu thereof the allegations of more than 7 years' user. As the amended petition was not sufficient to withstand this ground of the demurrer, we do not deem it necessary to expressly rule upon any of the other grounds taken by the demurrer. But as the two other grounds above indicated have been ably discussed by counsel for the respective parties, and as we have devoted considerable time to the investigation and consideration of the questions raised by them, we will say, in passing, that it seems section 672 of the Political Code, upon which these grounds are based, is intended to apply only to private ways laid out under statutory proceedings. It is apparently intended as a statute of limitation upon the right of the owner of land over which a private way is laid out to have his damages for the subjection of his land to the servitude of the way assessed and paid. That the "six months' knowledge" of the owner of the land, in this section, refers to knowledge of the laying out of a way

under the statutory proceedings, seems apparent, when this section is considered in connection with the section which immediately precedes it, which provides that, if a private way is "established" over the wild lands of a person who has no notice of "the proceeding," he may proceed within six months after he receives such notice, and not thereafter, to have his damages assessed. Apparently the word "established," in section 671, and the words "laid out," in section 672, have the same meaning; that is, the laying out of a way under the order of the ordinary. The words "without moving for damages," used in section 672, are certainly not applicable to a private way claimed independently of any proceeding under the statute, and are clearly applicable to a way which has been laid out under the statute. The statute, in reference to the granting of private ways by the ordinary, provides that "if the person * * * over whose land the pass-way is, conceives that he will be damaged thereby, he may proceed to have the damages assessed in the same manner that damages are assessed in case of public roads, and the applicant therefor stands in the place of the county and road commissioners." Section 665. This, in the opinion of the writer, is the "moving for damages" to which section 672 refers. I am not unmindful of the fact that in several cases this court has seemed to construe the provisions of section 672 and of section 678 for the removal of obstructions from private ways together, and to read into the latter, from the former, the provision in reference to "six months' knowledge" on the part of the owner of the land over which the way is located. But after a careful consideration of these cases, I find nothing in either of them which required this construction of the law to be made in order for the court to reach the particular decision announced. In each case the decision was really based upon other grounds. But for the existence of these cases the writer would feel no hesitancy in ruling upon the two grounds mentioned of the original demurrer, in accordance with the views above expressed. But as we have said, in the present case we do not deem it necessary to rule upon any ground of the demurrer except the one which raised the question whether the petition, as amended, was sufficient to show a right of way by prescription, in the absence of an allegation that the land over which the way was claimed was improved land. In our opinion, a private way cannot be acquired over unimproved land by prescription alone, unless the way has been used uninterruptedly for 20 years. It is true that section 678 of the Political Code provides, "Whenever a private way has been in constant and uninterrupted use for seven years or more, and no legal steps have been taken to abolish the same, it shall not be lawful for any one to interfere with such private way." Hence, if this section stood alone, the time of user necessary to acquire

a private way over wild or unimproved lands, and the length of user necessary to acquire such a way over improved lands, would be the same, as this particular statute makes no distinction in this respect, but, upon its face, apparently applies to lands of either character. But section 3065 of the Civil Code of 1895, which is the general section in reference to the modes of acquiring the right of private way over the lands of another, provides that it "may arise from express grant; or from prescription by seven years' uninterrupted use through improved lands, or twenty years' use over wild lands; or by implication of law when such right is necessary to the enjoyment of lands granted by the same owner; or by compulsory purchase and sale through the ordinary, in the manner prescribed in this Code." Here the different modes by which a private way may be acquired are specified, and it is expressly provided that 20 years' uninterrupted use is necessary to acquire such a way over wild lands; and the descriptive words "wild lands" are evidently used in contradistinction to the descriptive words "improved lands." Seven years' uninterrupted use will acquire the right of way over improved lands, but 20 years of such use is necessary to establish such right over wild or unimproved lands. Section 678 cannot be construed to mean that 7 years' uninterrupted use of a way over wild or unimproved land will give title to the way by prescription, without bringing it into plain and irreconcilable conflict with section 3065. The provisions of these two sections can stand together by construing the 7 years in the first section to refer to improved lands. They cannot do so if these words are construed to apply also to the user of a way over unimproved lands. As the amended petition based the claim of the petitioner to have the obstructions removed upon 7 years' continuous and uninterrupted user of the way, without alleging that the land over which the way was so used was improved land, the demurrer was well taken, and properly sustained.

Judgment affirmed. All the Justices concurring, except LAMAR, J., disqualified.

(120 Ga. 23)

MAYOR, ETC., OF CHIPLEY v. LAYFIELD et al.

(Supreme Court of Georgia. May 12, 1904.)

MUNICIPAL CORPORATIONS—SPECIAL TAXES—IMPROVEMENT OF SCHOOL PROPERTY—SUBMISSION OF QUESTION TO VOTE—CONSTITUTIONAL LAW.

1. The act approved August 1, 1903 (Acts 1903, p. 489), purporting to amend the charter of the town of Chipley, in so far as it authorized the levy of an annual special tax "for the improvement of the school property of the town of Chipley" without submitting to the qualified voters of the municipality the question whether such a tax should be levied for the purpose mentioned, is contrary to Const. Ga. art. 8, § 4, par. 1 (Civ. Code 1895, § 5909), and is therefore void.

(Syllabus by the Court.)

Error from Superior Court, Harris County; W. B. Butt, Judge.

Action by U. H. Layfield and others against the mayor and council of Chipley to enjoin the collection of a tax. From a judgment for plaintiffs, defendants bring error. **Affirmed.**

W. R. Jones and McLaughlin & Jones, for plaintiffs in error. J. D. Kilpatrick, for defendants in error.

CANDLER, J. Layfield and others, as citizens and taxpayers, filed a petition against the mayor and council of Chipley, an incorporated town in Harris county, to enjoin the collection of a tax which had been levied by the defendant. At the hearing an injunction was granted as prayed, and the defendant excepted.

It appears that the town of Chipley was incorporated by an act of the General Assembly approved December 9, 1882 (Acts 1882-83, p. 285), and that the charter was amended by an act approved October 6, 1885 (Acts 1884-85, p. 387). In neither the original charter nor the amendment was any authority given for the establishment or maintenance of a public school system. In 1903 (Acts 1903, p. 489), the General Assembly passed an act the title of which was as follows: "An act to amend the charter of the town of Chipley, in Harris county, so as to allow the mayor and council to levy a special tax for school purposes, not to exceed one half of one per cent. per annum, the amount to be raised not to exceed twenty-five hundred dollars, and for other purposes." The body of the act purports to amend section 10 of the original charter, defining the powers of the mayor and council, so as to make that section read as follows: "Be it further enacted by the authority aforesaid, that said mayor and council shall have full power and authority to levy and collect a tax upon all and every species of property, real and personal, within the limits of said town (except school and church property), upon banking and insurance capital employed in said town; provided, nevertheless, said tax so levied shall not exceed the state tax on the same species of property or business, except that said mayor and council shall have power and authority, in addition thereto, to levy a special tax of not more than one half of one per cent. per annum upon all taxable property in said town, and all funds arising from said special tax shall be expended under the direction of said mayor and council for the improvement of the school property of the town of Chipley, but the total amount of money raised by said special tax shall not exceed twenty-five hundred dollars (\$2,500.00), and when this amount shall have been raised, then the tax levied by said mayor and council shall not exceed the rate levied by the state on the same kind of property, and shall cover the total expenses of the town,

both for running expenses and for school purposes." It was to enjoin the collection of a tax of one-half of 1 per cent. levied under the provisions of this amendatory act that the present petition was brought.

The Constitution of 1877, art. 8, § 4, par. 1 (Civ. Code 1895, § 5909), provides that authority may be granted to counties upon the recommendation of two grand juries, and to municipal corporations upon the recommendation of the corporate authority, to establish and maintain public schools in their respective limits by local taxation; "but no such laws shall take effect until the same shall have been submitted to a vote of the qualified voters in each county or municipal corporation, and approved by a two-thirds vote of persons qualified to vote at such election." It would seem that this language is so clear that there should be no trouble whatever in ascertaining its meaning; but, as was said by Mr. Justice Crawford in the case of Mayor, etc., of Rome v. McWilliams, 67 Ga. 119, "it is very doubtful whether human legislation can be so framed as to defy the ingenuity of man in reaching, by construction and implication, the right to collect and disburse the public revenues illegally." The title of this act provides for an amendment to the charter of the town of Chipley so as to allow the levy of a tax for school purposes. The body of the act authorizes the levy of this tax every year. Taking the caption of the act and its body, and considering the allegations of the petition and the averments of the answer, we think the court below was justified in finding, as a matter of fact, that this was an attempt on the part of the mayor and council to levy a tax for the support of a school without first submitting to the voters of the town the question whether or not they desired to establish such a school. All that is decided in this case is that there was no authority to levy the tax in question under the terms of an act authorizing such a levy every year. The purpose of the act was clearly to give to the mayor and council authority to raise \$2,500 per year for the purpose of supporting a school. The town having attempted to exercise the authority thus given it without the approval of two-thirds of the qualified voters of the municipality, the collection of the tax was unauthorized, for the act could not take effect until approved by the voters, in accordance with the plain provisions of the Constitution.

Nothing embodied in Pol. Code 1895, § 719 et seq., will authorize the levy of such a tax as is proposed in the present case, nor do the decisions of this court in the cases of Mayor, etc., of Rome v. McWilliams, 67 Ga. 106, Fleishel v. Hightower, 62 Ga. 324, and Mayor, etc., of Cartersville v. Baker, 73 Ga. 686, constitute any authority therefor. In their petition, which was under oath, the plaintiffs alleged that the scheme of the defendants was to establish a public school. The an-

answer averred that the school sought to be created was a private school. This question of fact was determined by the court in favor of the plaintiffs, and, that being so, there is nothing in any of the cases cited that would authorize a reversal of the judgment enjoining the collection of the tax. In the Cartersville Case it appeared that the charter of the city of Cartersville was amended in 1872, so as to authorize the levy of taxes to aid in building up of schools as the authorities might think proper. The Constitution of 1877 expressly excepted from its provisions all local school systems in existence at the time of its adoption. By that Constitution the right of the city of Cartersville to aid schools was recognized and guaranteed, such right having been granted previously to its adoption. Furthermore, the tax in that case had already been levied and collected. The money was in the treasury, and the purpose of the appropriation was to erect a school building. The case of *Rome v. McWilliams*, supra, was decided by a divided bench, and hence is not binding as authority on this court; but, even if that were not the case, the purpose of the tax there involved was to carry out the objects for which the city was incorporated—to provide offices for the mayor and councilmen, to build fire-engine houses, and to construct other improvements of a similar character. The case of *Fleishel v. Hightower*, supra, involved a question similar to that which was decided in *Cartersville v. Baker*, and for like reasons is to be distinguished from the case at bar. Neither section 719 nor section 720 of the Political Code of 1895 authorizes the levy of any such tax as the one attempted in this case. On the other hand, it would seem that these sections contain a limitation on the right to tax. But even if it could be held that they confer any such power, they are but a codification of the act of 1874, and, so far as they contravene the constitutional provision to which we have referred, they are, of course, of no effect. See, in this connection, *Bowen v. Greensboro*, 79 Ga. 710, 4 S. E. 159; *Mayor, etc., of Madison v. Wade*, 88 Ga. 699, 16 S. E. 21; *Howell v. Athens*, 91 Ga. 139, 16 S. E. 968; *Mayor, etc., of Decatur v. Wilson*, 96 Ga. 251, 23 S. E. 240; *Albany Bottling Co. v. Watson*, 103 Ga. 508, 30 S. E. 270; *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907.

Judgment affirmed. All the Justices concur.

(119 Ga. 996)

CHARLESTON & W. C. RY. CO. v. FLEMING.

(Supreme Court of Georgia. May 11, 1904.)

EASEMENTS—WAYS OF NECESSITY—INJUNCTION—PLEADING—NECESSARY ALLEGATIONS—LAW OF THE CASE.

1. This court reversed the granting of an interlocutory injunction in this case. 45 S. E. 664, 118 Ga. 699. It was there held that the

defendant in error had neither a grant nor prescriptive right to use the way threatened to be obstructed. That decision is conclusive as to the law of the case upon these matters.

2. Before one can assert a way of necessity over the land of another, every essential requisite to such a right must affirmatively appear. Not only the necessity of ingress to and egress from his own land must exist, but it must further be alleged that there is no other suitable outlet, and a compliance with the constitutional provision as to adequate compensation first having been paid or tendered to the owner of the land sought to be subjected to the burden of such easement.

3. The petition failing to contain these necessary averments, a demurrer specifically making the objections should have been sustained.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by J. L. Fleming to enjoin the Charleston & Western Carolina Railway Company from obstructing a private way. From a judgment for plaintiff, defendant brings error. Reversed.

W. K. Miller, for plaintiff in error. Wm. H. Fleming, for defendant in error.

EVANS, J. 1. James L. Fleming sought to enjoin the Charleston & Western Carolina Railway Company from obstructing a certain private way traversing its tracks. On the hearing of the interlocutory injunction, the court granted the same, and the railway company appealed said judgment to this court. A full synopsis of the pleadings and the evidence appears in the reported case. 118 Ga. 699, 45 S. E. 664. It was there decided that the plaintiff did not have a grant to the private way described in his petition; neither did he have a prescriptive right to use said private way. The legal principles therein announced must necessarily control in the present case, and only one question raised by the demurrer is left for determination, and that is, does the petition allege such facts as would entitle the plaintiff to the use of the private way as one of necessity?

2. The right of exclusive possession is one of the attributes of title to realty. This exclusiveness cannot be restricted except in those instances authorized by law. One exception to the general rule of exclusive possession is where the owner of land, having no means of ingress to or egress from his own premises except by going over the land of another, will be permitted to cross the abutting land of a third person under certain circumstances. To acquire such a right, the necessity must be shown not only to cross the land of the adjoining proprietor, but also that the selected place of crossing is the most suitable and accessible means of outlet, determined relatively to the servient as well as the dominant tenement. The owner of the servient tenement may assign a way reasonably convenient to both parties; and, if he fails to do so, the person entitled to the way may select it. The adjacent proprietor may not be responsible for the isolation and

Inconvenience resulting from ownership of land off a thoroughfare. Therefore the convenience of the owner of the abutting land should at least be equal, if not superior, to the convenience of his landlocked neighbor; and as one of the precedent conditions to a way of necessity at a particular place it should appear that the abutting landowner would at least suffer no more injury from its location at the designated place than at some other place. The assertion of the right of way from necessity is near akin to the assertion of the right of eminent domain. The Constitution of this state expressly recognizes the right of way from necessity, but with the limitation that adequate compensation shall first be made. If the parties cannot agree either as to the location or compensation, resort may be had to condemnation proceedings. Surely, no man has a right to impose a servitude upon his neighbor's land without just compensation.

3. In the case before us the defendant in error seeks to retain a private way over the land of the plaintiff in error. He has neither grant nor prescription to the particular crossing, but seeks to enjoin the railway company from closing up its own property because he would be hemmed in and cut off from any highway. He does not allege, however, that this is the most suitable way of ingress and egress, having due regard to the rights of the railway company. Neither does he allege a tender of adequate compensation or any attempt to condemn the land to this servitude. The petition lacking these essential allegations, the demurrer should have been sustained.

Accordingly, the judgment of the court overruling the demurrer is reversed. All the Justices concurring, except LAMAR, J., disqualified.

(120 Ga. 48)

SOUTHERN RY. CO. v. EMPIRE PRINTING & BOX CO.

(Supreme Court of Georgia. May 12, 1904.)

DISMISSAL OF ACTION—REINSTATEMENT—DISCRETION OF COURT.

1. Applications to reinstate cases that have been dismissed on motion of the opposite party are, even when made in due time, addressed to the sound discretion of the court.

2. Whether the case be considered upon the evidence admitted, or in the light of that evidence and the evidence rejected, no reason appears for reversing the judgment refusing to reinstate.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Empire Printing & Box Company against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. Brewster, Jr., for plaintiff in error.
J. E. & L. F. McClelland, for defendant in error.

COBB, J. The Empire Printing & Box Company sued the Southern Railway Company in a justice's court. The railway company entered an appeal to the superior court. When the case was called in that court the appeal was dismissed, on motion of the plaintiff's counsel, upon the ground that it did not affirmatively appear from the record that the appeal was entered within four days from the rendition of the judgment; the order of dismissal reciting that the bond given by the appellant was dated September 24, 1902, when the appeal appeared to have been entered on September 4th, and the record did not disclose the date of the judgment appealed from. During the term the railway company filed a motion to reinstate the case. At the hearing of this motion the railway company, besides introducing evidence tending to show that it had a meritorious defense, introduced a certified copy of the judgment in the justice's court, from which it appeared that the judgment was rendered on August 30, 1902, and there was an entry upon the justice's docket of "appealed to superior court and costs paid this September 4, 1902." The justice further certified that the appeal was entered within four days after the judgment, Sunday being excluded. The appeal bond was also introduced in evidence, dated September 24, 1902. On the back of this paper appeared the words: "Appeal filed September 4, 1902. Edgar H. Orr, J. P. All costs accrued paid. September 4, 1902. Edgar H. Orr, J. P." At the bottom of the paper was an entry of filing in the superior court, showing that it was filed on September 5, 1902. No other evidence being introduced, the court granted an order refusing to reinstate the case. The railway company assigns error upon this judgment, and upon the refusal of the court to admit in evidence an affidavit of counsel for the railway company to the effect that the bond was, as a matter of fact, dated September 4, 1902; that the date "24" was a clerical error; and that he filed the bond on the 4th day of September. In a note in the bill of exceptions, the judge certifies that this affidavit was not offered until the evidence had closed and the court was announcing its judgment, and, further, that no reason was given why evidence of the facts stated in the affidavit was not offered when the motion to dismiss was made.

It is clear from the facts recited that the appeal was properly dismissed. The record did not disclose the date of the judgment, nor did it appear that the appeal was entered within four days from the time the judgment was rendered. The recital in the appeal bond that it was tendered within the time prescribed by law for entering an appeal did not prevent the dismissal. HUSSE

v. Clark, 102 Ga. 579, 27 S. E. 677. See, also, Norrell v. Morrison, 99 Ga. 317, 25 S. E. 700. Even if it had appeared that September 4th was within four days after the rendition of the judgment, the bond purported to have been executed on September 24th, and an appeal not made in forma pauperis is not complete until a proper bond is filed.

The entry of filing by the clerk of the superior court showed prima facie that the bond was executed either on or prior to the date of filing. Chapple v. Tucker, 110 Ga. 468, 35 S. E. 643. But it did not show that the appeal was entered within four days from the date of the judgment, because, when the motion to dismiss was made, there was nothing to show when the judgment was rendered. The motion to reinstate was addressed to the discretion of the court. Harrison v. Tate, 100 Ga. 317, 27 S. E. 179; Bird v. Burgsteiner, 113 Ga. 1012, 39 S. E. 425. It was discretionary with the judge whether he would receive the affidavit of defendant's counsel at the time the same was offered, and whether, if received, he would regard the laches of counsel, in failing to offer the evidence when the motion to dismiss was made, a sufficient reason for refusing to reinstate.

Judgment affirmed. All the Justices concurring.

(120 Ga. 145)

BROWN v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW — CONTINUANCE — GROUNDS — DISCRETION OF TRIAL COURT.

1. While motions for continuance and postponement are addressed to the sound discretion of the trial court, that discretion should be exercised in a reasonable manner. Where, on the trial of a criminal case, it appeared that the accused had been arrested in another county, brought to the county where the accusation was sued out against him, and there lodged in jail on the night before his case was called for trial; that, on account of his inability to employ an attorney, counsel was appointed to defend him at the time when the case was so called; that the witnesses desired by him lived in another county, and no opportunity had been afforded him to have them subpoenaed; that the law under which he was accused was of recent enactment; and that the attorney appointed to represent the accused had had neither the time nor the opportunity to prepare for his defense or familiarize himself with the statute—a motion to postpone the hearing of the case for one day should have been granted.

(Syllabus by the Court.)

Error from City Court of Douglas; Levi Osteen, Judge.

S. L. Brown was convicted of cheating and swindling, and brings error. Reversed.

Lawson Keeley, C. A. Ward, and W. P. Ward, for plaintiff in error. M. D. Dickerson, Sol., for the State.

CANDLER, J. The accused was tried under an indictment for cheating and swindling, and was convicted. His motion for a new trial was overruled, and he excepted. In

the view that we take of the case, there is but one question made by the record which need be discussed here. From the motion for a new trial, it appears that the accused was arrested in Pierce county and brought to Coffee county, where he was confined in jail. He arrived in Coffee county at night, and on the following morning was brought into court for trial. He was unable, from poverty, to employ counsel, and the judge appointed an attorney of the Douglas bar to represent him. The attorney, after a consultation with the accused of not more than five minutes, reported to the court and stated in his place that the accused was not ready to go to trial; that counsel had had no opportunity to have witnesses subpoenaed, nor to examine the law under which the accusation was brought against the prisoner; and that no preparation whatever had been made for the defense. He further stated that if the court would pass the case until the following morning, in order that he might send for witnesses and prepare the defense, the accused would consent to go to trial before the court without a jury. The court then examined the accused under oath, and it is recited in the order passed on the motion "that the defendant stated under oath that he desired that the case be not tried then, but that it be continued, because he had witnesses absent; that said witnesses were nonresidents of the county of Coffee. Said defendant further stated what he expected to prove by the absent witnesses, if he could obtain them, which facts appeared to the court to be of no value in establishing the defense of the defendant." The motion to postpone the case until the following day was therefore denied and the accused was placed on trial, with the result already stated.

In passing upon motions to continue or postpone, the trial judge is necessarily vested with a large discretion, but a careful review of the facts of this case convinces us that the failure to at least postpone for one day was error. The particular acts of cheating and swindling with which the accused was charged have only very recently been made penal by the General Assembly; the act having been approved August 15, 1903 (Acts 1903, p. 90). Neither the bar nor the courts have as yet had an opportunity to become familiar with its provisions in actual practice. No opportunity was given the accused to subpoena his witnesses, or to confer with his counsel sufficiently to acquaint him with the real character of any defense that he might have been able to make; and, in the nature of things, an attorney cannot be expected to do justice either to himself or his client when he is forced to trial in a case of which he probably never heard more than five minutes before, when the law under which his client is accused is one of recent enactment, with which he is unfamiliar, and when he has had no opportunity to talk with the witnesses he might introduce, and acquaint

himself with the details of the case. The Constitution of this state provides that every person accused of crime shall have the privilege and benefit of counsel, and shall have compulsory process to compel the attendance of his own witnesses; but it is useless to appoint counsel to represent one so accused unless the attorney so appointed is given at least a reasonable opportunity to prepare the case entrusted to him. This case is essentially different from the case of *Hardy v. State*, 117 Ga. 40, 43 S. E. 718, and what we now hold is in no sense in conflict with what is there laid down. In the *Hardy* Case it appeared that, when the motion to continue was made, "the court announced to counsel that he would be furnished with bailiffs to get all witnesses whose names and addresses were known, and bring them into court, before the case would go on; that, as to one of the witnesses, his presence was waived; and that, as to the other witness, the witness was brought into court before the case was finally forced to a hearing." A very different state of facts is disclosed by the present record. While, as has been repeatedly ruled by this court, trial judges are invested with a broad discretion in the matter of continuances, that discretion is not arbitrary, but must be exercised in a reasonable manner. In this case we are of the opinion that the accused has not had the opportunities allowed by law for his defense, and for that reason the case is remanded for another hearing.

Judgment reversed. All the Justices concur.

(120 Ga. 175)

MCSEIN v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

BIGAMY—EVIDENCE OF PRIOR MARRIAGE—ADMISSIONS OF ACCUSED—SUFFICIENCY OF EVIDENCE—NEW TRIAL.

1. On a trial for bigamy the fact of the first marriage may be established by the admissions of the defendant.

2. In view of the law applicable to the case, the verdict was demanded by the evidence; the jury having evidently disregarded the statement of the defendant.

3. There was no charge or ruling of the court requiring the grant of a new trial, and the judgment is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

T. O. McSein was convicted of bigamy, and brings error. Affirmed.

W. F. Slater and Wm. D. Morgan, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

LAMAR, J. The defendant was tried for bigamy. The second marriage was proved by the testimony of eyewitnesses, and the first by the oral and written admissions of the defendant. While there is some conflict

on the subject, the great weight of authority is in favor of the proposition that the defendant's uncorroborated admissions are sufficient to establish the first marriage (*Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481); and such is the rule heretofore recognized in this state (*Cook v. State*, 11 Ga. 54, 56 Am. Dec. 410; *Arnold v. State*, 53 Ga. 574). It is evident that the jury believed the admissions, and disbelieved the statement. The evidence for the state demanded the verdict. There is no proper assignment of any error in admitting testimony, nor was there any error in the charge as to confessions and admissions requiring a new trial; and the judgment is affirmed. All the Justices concurring.

(120 Ga. 128)

CULPEPPER v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.

1. No error of law was committed, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Charlie Culpepper was convicted of crime, and brings error. Affirmed.

Park & Payton, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 970)

TOLBIRT v. STATE.

(Supreme Court of Georgia. May 11, 1904.)

HOMICIDE — VOLUNTARY MANSLAUGHTER—INSTRUCTIONS—EVIDENCE.

1. The theory of the state was that the accused was guilty of murder. His defense was that the homicide was justifiable. After a close study of the evidence, we find nothing tending to show, or from which the jury could legitimately infer, that the homicide was voluntary manslaughter. The record shows that the accused either was guilty of murder or else was justifiable. It was therefore error to give in charge the law relating to voluntary manslaughter, and a verdict finding the accused guilty of that offense was without evidence to support it, and a new trial should have been granted upon these grounds.

2. Other than as above noted, there was no material error in any of the rulings of which complaint was made.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

A. G. Tolbirt was convicted of voluntary manslaughter, and brings error. Reversed.

J. M. & H. J. McBride, S. L. Craven, and W. R. Hutcheson, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

SIMMONS, C. J. Judgment reversed. All the Justices concurring, except EVANS, J., who did not preside.

(120 Ga. 200)

OWENS v. STATE.

(Supreme Court of Georgia. May 11, 1904.)

CRIMINAL LAW—SECOND STATEMENT BY ACCUSED—MOTION FOR NEW TRIAL—GROUNDS—NECESSITY OF SPECIFIC ASSIGNMENTS OF ERROR—ARGUMENT OF COUNSEL—SUFFICIENCY OF EVIDENCE.

1. Whether a prisoner shall be allowed to make a second statement rests in the discretion of the trial judge.

2. Grounds of a motion for a new trial, which allege generally that extracts from a charge are erroneous, will be considered merely as alleging that the extracts do not set forth sound propositions of law, and, if they do, no inquiry will be made as to whether they are adjusted to the facts of the case, in the absence of a specific assignment of error setting forth that they are not.

3. While counsel should not be permitted in argument to state facts which are not in evidence, it is permissible to draw deductions from the evidence, and the fact that the deductions may be illogical, unreasonable, or even absurd, is matter for reply by adverse counsel, and not for rebuke by the court.

4. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; W. B. Butt, Judge.

Ryce Owens was convicted of murder, and brings error. Affirmed.

G. Y. Harrell and B. F. Harrell, for plaintiff in error. John C. Hart, Atty. Gen., and F. A. Hooper, Sol. Gen., for the State.

COBB, J. Ryce Owens was convicted of the murder of his father, and complains that the judge refused to grant him a new trial. Besides the general grounds, the motion contains eight special grounds. The rulings in the first three headnotes dispose of the points raised in six of these grounds. In another ground complaint is made that the court erred in admitting evidence which was irrelevant. The evidence was clearly relevant, and whether what the witness said was so unreasonable that it ought not to have been believed was a question for the jury. Another ground complains that while a witness was upon the stand testifying as to the reputation of the deceased for peace or violence, having said that the worst thing the witness knew about the deceased was that he "could never be seen without that old Winchester rifle," the judge remarked, "That don't amount to anything; that is one of the constitutional rights of the state and of the United States—to bear arms." The assignment of error upon this language is that it was an expression of an opinion by the court as to the weight to be given the evidence. One's character for peace or violence is established by general reputation, and a witness will not be permitted on direct examination to go further than state what was the general reputation of the person in question for peace or violence. The person

calling such witness will not be permitted to inquire into specific acts of violence or particular habits which might throw light upon this question. On cross-examination, however, the witness may be sifted, and inquiry may be made into the conduct of the person on different occasions, or as to his different habits. It does not appear from the motion for a new trial that the answer of the witness in the present case was on cross-examination. If it was not, the evidence should have been excluded, and the remark of the court may be treated as an effectual, though irregular, way of withdrawing from the consideration of the jury evidence which was not properly before them. The evidence authorized the verdict, and we see no reason for reversing the judgment refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(120 Ga. 194)

LEE v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

SWINDLING—SUFFICIENCY OF EVIDENCE.

1. The accused being charged with the offense of cheating and swindling, in that he procured credit by making false representations as to his ownership of certain property, and the evidence relied on by the state not showing that the representations made by the accused were in point of fact untrue, his conviction was unwarranted, and should have been set aside.

(Syllabus by the Court.)

Error from City Court of Washington; W. H. Toombs, Judge.

Frank Lee was convicted of cheating, and brings error. Reversed.

W. A. Slaton, for plaintiff in error. R. G. Norman, Sol., for the State.

EVANS, J. The accused was charged with the offense of cheating and swindling, and was tried by the judge without a jury. The false representation alleged in the accusation was that the accused was the owner of two cows, therein described; and it was charged that, upon his assertion of ownership of the cattle, he obtained from "J. L. Hill a credit in one brown mare, of the value of one hundred and ten dollars, to the injury and damage of said J. L. Hill." The only testimony on the subject of ownership of the cattle was that of the prosecutor, who testified: "About February 28, 1903, I sold [the accused] a horse. He represented to me that he was the owner of the stock described in this mortgage—two cows. I afterwards found out that he did not own them. I got the horse back. * * * I didn't know until just before I got the horse back that Frank Lee didn't own this stock. Mr. Ray went out for me to look after my securities, and told me he didn't have this stock, and the boy told me he didn't have it." From this testimony it is apparent that the prosecutor had no personal knowledge as to the ownership of the cattle, and based his assertion

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1538.

that he found out that the accused was not the owner of the cows upon what Ray told him, and the statement of the accused that he did not have the stock. It does not appear when this statement was made, nor whether the accused referred to his possession at the time of making the statement or at the time he got the credit. His bare statement that he "didn't have" the stock could not properly be treated as a confession that he did not own the property at the time he got the credit. It was incumbent on the state to show this fact beyond a reasonable doubt. Other than the testimony above quoted, there was no evidence relating to the ownership of the cattle by the defendant at the time he secured the credit or at any other time. In view of the failure on the part of the state to prove that the representations as to ownership made by the accused were false, his conviction was unauthorized by the evidence.

Judgment reversed. All the Justices concurring.

[120 Ga. 223]

PREY et al. v. OEMLER.

(Supreme Court of Georgia. May 12, 1904.)

INJUNCTION — PETITION — SUFFICIENCY—ASSIGNMENTS OF ERROR—INDEFINITENESS.

1. The petition was not subject to any of the objections raised in the demurrer which were insisted on in this court.

2. An assignment of error that an act of the General Assembly "is too vague and indefinite to be enforced, and also is contrary to natural law, and violative of natural rights to fish in the sea, and arms thereof," is itself too vague and indefinite to raise any question for decision.

3. The charge was full and fair. The extracts therefrom upon which error was assigned, even if erroneous at all, were not so for any reason assigned. The requests to charge were, so far as legal and pertinent, covered by the general charge. The evidence authorized the verdict, and no reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Action by Augustus Oemler against Emanuel Prey and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Geo. W. Beckett and N. J. Norman, for plaintiffs in error. Osborne & Lawrence, for defendant in error.

COBB, J. This was an action by Oemler to restrain Prey and others from committing a trespass. The defendants filed a demurrer, which was overruled, and at the final hearing the jury found that the plaintiff was entitled to a permanent injunction. The defendants bring their case here; assigning error upon the judgment overruling the demurrer, and upon the refusal of the judge to grant them a new trial.

1. The original demurrer contained eight grounds. The bill of exceptions pendente

lite mentions only six of these grounds, and counsel for the plaintiffs in error, in their brief, insist upon only five of the grounds. The grounds thus insisted upon simply raise the question as to whether the allegations of the petition were of such a nature as to show that the plaintiff had such an interest in the land upon which the trespass was alleged to have been committed as to authorize him to bring an action to restrain a trespass about to be committed thereon. In other words, the contention of the defendants, so far as these grounds of the demurrer are concerned, is that the acts which it is claimed would be acts of trespass upon private property of the plaintiff were simply acts which they had, a right to do as members of the public; the locus in quo not being the private property of the plaintiff, but being a public water, in which the defendants had a public right of fishery. We do not think the demurrer was well taken. The plaintiff alleged that George Parsons was the owner of Warsaw Island; that this island embraced Rhodes or Sandy Bottom creek, which was not a navigable stream; and that the defendants had combined to take oysters from such stream without warrant or authority from the plaintiff, who held the right to take oysters in such stream under a lease from Parsons, the owner. It will thus be seen that the petition alleges that the trespass was about to be committed in a stream which was not navigable, and under the law the owner of the adjacent land was the owner of the land under the stream; and if the allegations of the petition that Parsons was the owner of the adjacent land on both sides of the stream, and Oemler was the lessee under him for a term of years, were true, then Oemler had certainly a right to apply to a court of equity to restrain a trespass, as the owner of the land covered by the stream, and would be entitled to an injunction, if the other allegations of the petition were sufficient to authorize this character of relief. The other objections raised by the demurrer are not insisted on, and we have little difficulty in holding that the petition was not subject to the objections which are insisted on.

2. The court, in charging the jury, followed the provisions of the act of 1902 (Acts 1902, p. 108) as to what was a navigable stream, and the assignment of error upon these charges is that the act "is too vague and indefinite to be enforced, and also is contrary to natural law, and violative of natural rights to fish in the sea, and arms thereof." This assignment of error is too vague and indefinite to raise any question for decision. One ground alleges that the verdict and decree "is violative of the vested constitutional rights of the defendants" to the use and enjoyment of the property in dispute under leases from the state. This assignment of error is also too general to raise any question. Even if the other grounds of the mo-

tion which seek to raise constitutional questions are sufficient for this purpose, they are not insisted on in the brief of counsel, and will be treated as having been abandoned. We do not intend anything now said to be construed as holding that the act of 1902 is constitutional, or that it is unconstitutional, for any reason. We simply decline to pass on any constitutional question on the present record.

3. The motion for a new trial and its amendments contain numerous grounds, but, after a careful examination of the entire record, we have reached the conclusion that there was no error of law which required the granting of a new trial. The charge of the judge submitted the issues to the jury clearly, fully, and fairly, and no portions of the charge upon which error was assigned appear to be erroneous at all, and certainly they are not for any reason which was assigned in the motion. The requests to charge were, so far as legal and pertinent, covered by the general charge. The evidence was conflicting on some of the vital issues, but there was evidence authorizing the verdict, and the judgment refusing a new trial will not be disturbed.

Judgment affirmed. All the Justices concurring.

(120 Ga. 145)

WHITE v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

LARCENY—SUFFICIENCY OF EVIDENCE—PROOF OF VALUE—NEW TRIAL.

1. The accused having been charged with the larceny of two articles, and the evidence being insufficient to make out the offense as to one, and there being no proof of the value of the other, a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Jim White was convicted of larceny, and brings error. Reversed.

E. T. Moon, for plaintiff in error. Henry Reeves, for the State.

COBB, J. Judgment reversed. All the Justices concurring.

(120 Ga. 138)

HALE v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

FORGERY—CHECK—LEGAL EFFICACY.

1. A check drawn payable to "the order of cash" is payable to bearer. If such a check be forged, it is not so imperfect as that no one could be defrauded by it. See 1 Rand. Com. Paper, § 161.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

A. C. Hale was convicted of forgery, and brings error. Affirmed.

S. C. Crane, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 197)

HARMON v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

GAMING—CRIMINAL RESPONSIBILITY—SUFFICIENCY OF EVIDENCE.

1. Evidence that the defendant and three others were lying on the ground in a secluded spot with money before them, that each had cards in his hand, and that on being discovered all attempted to escape, was sufficient to sustain a verdict that the defendant was guilty of playing and betting at a game played with cards for money. *Pacetti v. State*, 7 S. E. 867, 82 Ga. 297; *Arnold v. State*, 45 S. E. 59, 117 Ga. 706.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Joe Harmon was convicted of crime, and brings error. Affirmed.

T. E. Patterson, for plaintiff in error. Jos. D. Boyd, Sol., for the State.

LAMAR, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 176)

HICKS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—ERROR WAIVED IN APPELLATE COURT—SUFFICIENCY OF EVIDENCE.

1. This case was argued by brief. Assignments of error set forth in an amendment to a motion for a new trial, but not insisted on in the brief filed by counsel for the plaintiff in error, will be treated as having been abandoned. *Moss v. Bohanon*, 36 S. E. 954, 111 Ga. 871.

2. There was ample evidence to warrant the verdict, and, no error of law appearing, and the finding of the jury having received the approval of the trial judge, the judgment overruling the motion for a new trial is affirmed.

(Syllabus by the Court.)

Error from City Court of Hall County; G. H. Prior, Judge.

Jess Hicks was convicted of a crime, and brings error. Affirmed.

Geo. K. Looper and Parks & Gaillard, for plaintiff in error. F. M. Johnson, Sol., for the State.

EVANS, J. Affirmed. All the Justices concurring.

(120 Ga. 49)

McDONALD v. SAVANNAH ELECTRIC CO.

(Supreme Court of Georgia. May 12, 1904.)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

1. The plaintiff testified that the conductor knew of his position, and that he did not know that the conductor intended to let the guard rail down. The case was proved as laid, and it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by A. F. McDonald, by next friend, against the Savannah Electric Company. Judgment for defendant, and plaintiff brings error. Reversed.

D. Edward McCuen and W. P. La Roche, for plaintiff in error. Osborne & Lawrence, for defendant in error.

LAMAR, J. The plaintiff was a passenger on a street car, and, owing to a breakdown, was invited to get upon another car; and, that being crowded, he was forced to sit between two seats, with his feet on the left-hand running board. He claims that the conductor knew that he was in that position, and that, when the car reached a point where there was a double track, the conductor, with such knowledge, dropped upon plaintiff's hand the heavy guard rail intended to prevent passengers from getting on or off the left-hand side, so as to avoid the danger of injury from cars on the parallel track. The defendant insisted that the plaintiff saw the conductor on the running board, knew that he was there for the purpose of lowering the rail, and, with such knowledge, remained where he was, with his hands between the standard and the brass rod forming the slot in which the rail worked up and down; that, if plaintiff was not negligent, the injury was an accident, or one that plaintiff could easily have avoided. These defenses must be passed on by a jury, and should not have been settled by an order of nonsuit. We have carefully examined the testimony, and find that, while the plaintiff testified that he knew the conductor was on the left-hand side, he also says that he did not know whether he was there for the purpose of collecting fares or not; that he had "no idea as to what his purpose was." He swears positively that he was not leaning forward, but was looking out, and did not know that the conductor was going to let down the rail. The plaintiff proved his case as laid, and it was therefore error to grant a nonsuit.

Judgment reversed. All the Justices concurring.

(120 Ga. 136)

MAY v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW — INSTRUCTIONS — REQUEST TO CHARGE — HARMLESS ERROR.

1. The request to charge, so far as legal and pertinent, was fully covered by the general charge.

2. Inasmuch as the accused was convicted of voluntary manslaughter, the charge on the subject of malice was harmless, even if erroneous.

3. The evidence warranted the verdict.

(Syllabus by the Court.)

¶ 2. See Homicide, vol. 26, Cent. Dig. § 720.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Garfield May was convicted of voluntary manslaughter, and brings error. Affirmed.

J. R. Williams, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 157)

KEMP v. STATE (two cases).

(Supreme Court of Georgia. May 10, 1904.)

INTOXICATING LIQUORS—ILLEGAL SALE—INDICTMENT—LOCAL LAW.

1. The special act for Screven county, approved March 2, 1874 (Acts 1874, p. 403), regulating the grant of licenses to sell liquor, does not contain two subjects, is supplementary to the general law, and does not abrogate the provisions as to registration or taking the oath required of those who obtain licenses.

2. The fact that there may be a local act regulating the grant of licenses in Screven county does not prevent an indictment for a sale of liquor therein, if in violation of the provisions of the general law contained in Pen. Code 1895, §§ 430-434.

3. An indictment for the sale of spirituous, vinous, and mixed liquors is not double, but charges a single offense, which may be sustained by proof of the sale of any one of the liquors named.

4. An indictment charging the sale of spirituous and vinous liquors is good, without alleging that the wine is not domestic wine.

5. A sale of intoxicating liquors to an agent may be alleged as a sale to the principal.

(Syllabus by the Court.)

Error from City Court of Sylvania; J. W. Overstreet, Judge.

Henry Kemp was convicted of illegally selling liquor, and brings error. Affirmed.

There were two cases against Kemp. In the first, the unlawful sale of liquor was alleged to have been made to Hub Bazemore, and the evidence showed that Braboy had acted as agent for him in making the purchase from the defendant. In the second case it appeared that Woodberry acted as agent in buying the liquor from Kemp for Hub Bazemore and R. H. Bazemore, to whom the indictment charged the sale had been made. The indictments in both cases were substantially the same, and similar demurrers were interposed to each. The motions for new trial raised the same legal questions, and both may properly be treated in one opinion. The facts hereinafter set out were those of the first case.

H. S. White, for plaintiff in error. H. A. Boykin, Sol., for the State.

LAMAR, J. The act of 1874 (Acts 1874, p. 403) did not contain two subjects, but provided a new method for obtaining licen-

¶ 3. See Indictment and Information, vol. 27, Cent. Dig. § 390.

ses to sell any sort of liquor in Screven county, and expressly repealed the prior and inconsistent act of 1873 (Acts 1873, p. 288), regulating the sale of spirituous liquors only. But whether one or the other of these two acts, or that approved August 11, 1881 (Acts 1880-81, p. 593), was of force, was immaterial, and afforded no support to the defendant's contention that he could not be indicted under the general law (Pen. Code 1895, § 431) if there was in existence a special law on the subject of licenses in Screven county. Such local act supplemented, but did not repeal, the general law as a whole. It did not prohibit the sale of liquor, nor prevent the grant of licenses, nor set aside the general requirements as to registration and taking the oath required of all liquor sellers. If one violated the provisions of the special act, he might be indicted therefor, or he might be indicted under the broader and more comprehensive provisions of the general law. *Wells v. State* (Ga.) 45 S. E. 443; *Blake v. State*, 118 Ga. 333, 45 S. E. 249.

The defendant was not charged with a violation of Pen. Code 1895, § 450, relating to the sale of domestic wines, but with selling brandy, whisky, gin, mixed drinks, and wine, "to wit, one pint of gin." The charge followed the language of Pen. Code 1895, § 431, and was not double. Proof of the sale of any of the liquors described would have been sufficient to sustain the indictment. Nor was it necessary to allege that the wine was not "domestic," that being matter for defense. *Hancock v. State*, 114 Ga. 439, 40 S. E. 317 (3, 4); *Wells v. State*, supra.

The indictment charged that Kemp sold the liquor to Bazemore. The testimony for the state tended to show that Braboy had acted as the agent of Bazemore in making the purchase, and the defendant contends that the evidence showing a delivery to Braboy did not sustain the charge of the sale to Bazemore, even if Braboy acted as agent of the latter. This contention seems to be answered by the ruling in *Hall v. State*, 87 Ga. 233, 13 S. E. 634, where it was said that an indictment charging a sale to A. will be supported by evidence that it was made to him through his servant or messenger, and the latter need not be mentioned by name or otherwise in the indictment. In *Com. v. McGuire*, 11 Gray, 460, it was held that a sale of intoxicating liquor to the agent of an undisclosed principal may be alleged as a sale to the principal; the court saying that, if the goods were sold on credit under similar circumstances, it would be optional with the vendor to treat the sale as having been made to the agent or principal, as he might elect, and that the state, in an indictment describing such sale, might allege it as a sale to the agent or to the afterwards disclosed principal. Compare Civ. Code 1895, § 3032. In *Hall v. State*,

87 Ga. 234, 13 S. E. 634 (2), there is a suggestion which appears to be opposed to the views expressed above, but it was a mere suggestion, and not an authoritative ruling.

Judgment in each case affirmed. All the Justices concurring.

(120 Ga. 1)

FRANCIS JONES & CO. v. VENABLE et al.
(Supreme Court of Georgia. May 11, 1904.)

EMINENT DOMAIN—CONDEMNATION OF LAND FOR PRIVATE RAILROAD—WAY OF NECESSITY.

1. A person or corporation actually engaged in the business of quarrying granite or other stone, who, for the successful prosecution of such business, needs a right of way for a private railroad across the lands of others, is, under the Constitution and laws of this state, in a case of necessity, authorized to obtain the same under condemnation proceedings.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by W. H. and S. H. Venable to enjoin Francis Jones & Co., a partnership, from proceedings to condemn certain property. Judgment for plaintiffs, and defendants bring error. Reversed.

Rucker & Rucker, for plaintiffs in error. J. D. Kilpatrick and J. W. Moore, for defendants in error.

FISH, P. J. Francis Jones & Co., a partnership, had served upon W. H. and S. H. Venable, of De Kalb county, a notice under Civ. Code 1895, § 4657 et seq., in which notice they stated that they had leased Rock Chapel Mountain, in that county, from its owners, for the term of five years, and were engaged in quarrying granite from said property, and desired to condemn for the period of five years, under the provisions of the Code, a right of way 15 feet in width for a railroad across a described strip of land owned by the Venables; the railroad to run from Rock Chapel Mountain, where the quarry was located, to a point on the Georgia Railroad at or near Lithonia, Ga. The notice designated the point at which and the manner in which the proposed railroad would cross the strip of land in question, named the person selected by the applicants to assess the damages for the right of way, and requested the Venables to select an assessor for such purpose. The Venables then brought a petition to enjoin the applicants from proceeding further in their efforts to condemn the property for the purpose described in the notice, and from entering upon or otherwise interfering with the property of the petitioners. The petition for injunction alleged that the condemnation sought to be made was contrary to law, for the following reasons: "(1) The enterprise of quarrying granite and

marketing the same is purely private, and is one in which the public has no interest. (2) The road sought to be built is not a private way within the meaning of the Constitution of this state. (3) It is not within the power of the General Assembly to enact a valid statute authorizing the condemnation of private property to the use of another for purely private purposes. Such an act would be null and void, would deny the owner the equal protection of the law, and would deprive him of his property without due process of law. (4) The General Assembly of Georgia has made no provisions for compensating the owner for the land condemned." The petition further alleged that the defendants threatened to enter, with their assessor, upon the land of the petitioners upon a given date, and, if no assessor should be appointed by the petitioners, to then apply to the ordinary of the county to appoint an assessor to act for the Venables, and to build the railroad in question over the land of the petitioners against their will. Upon this petition a temporary restraining order was granted, and at the interlocutory hearing the court granted the injunction prayed for, to which judgment the defendants excepted.

The question involved in the case is whether a person or corporation actually engaged in the business of quarrying granite or other stone, who needs, for the successful prosecution of such business, a right of way for a private railroad across the lands of others, may, in a case of necessity, acquire such right of way under condemnation proceedings. The Political Code, § 650, provides that a person or corporation actually engaged in such business, who may need, for the successful prosecution of the same, such a right of way, may obtain it "in the same manner that the right to convey water across the lands of others may be acquired by the owners of mines, as provided in the Code"; and that manner, as we shall see later, is by condemnation. The court below held that if, in the statute embodied in this section of the Political Code, "it was the intention of the General Assembly to grant to private persons the right to condemn the land of another for the purpose of building a private railroad for the hauling of granite from a private quarry," the act was unconstitutional, and so granted the injunction prayed for. After a careful consideration of the matter, we have reached the conclusion that our learned brother of the trial bench erred in this ruling. We grant the contention of the defendants in error that "the enterprise of quarrying stone and marketing the same is purely private, and one in which the public has no interest." This being granted, the statute in question, as applied to this case, cannot be held to be constitutional upon the idea that property condemned under its provisions will be condemned for a public use. Can property, under the Political Code, § 650 et seq., be condemned for a private use? The

Constitution of this state provides: "In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant." Civ. Code 1895, § 5729. If, then, the rights of way provided for in these sections of the Political Code are private ways, the power of the Legislature to authorize their establishment under condemnation proceedings in cases of necessity cannot be questioned. The Constitution does not undertake to define private ways, or to limit the purposes for which they may be granted. The only limitation upon the power of the Legislature to provide for the granting of private ways is that they can only be granted in cases of necessity. The defendants in error; however, contend that the rights of way provided for in the Political Code, § 650, are not private ways. Their position seems to be this: that the rights of way dealt with in this section are neither public nor private ways. It is necessary for them to take and maintain this position in order to sustain their contention; for, if the ways provided for are either public or private ways, then the power of the Legislature to provide for their establishment, in cases of necessity, under condemnation proceedings, is clear under the Constitution. If they are neither public nor private ways, what sort of ways are they? Ways they are, and they must be the one or the other; for, according to our understanding, all ways are either public or private. 1 Cooley's Blackstone (4th Ed.) 458, note 2; 12 Enc. Laws of Eng. 571; 29 Am. & Eng. Enc. L. 80. There are different kinds of public ways and different kinds of private ways, but all ways are included in the one or the other general classification, though some may partake of the nature of both, being maintained and operated for private gain and for use by the public. The common-law writers divided private ways into several classes, according to the purpose or purposes for which the right of way could be used. Thus Lord Coke, adopting the civil law, divided them into three kinds: A footway, called "iter"; a footway and horseway, called "actus"; and a cartway, which embraced the other two, called "via"; to which was added a driftway—a road over which cattle could be driven. Dyson v. Ballard, 1 Taunt. 279. Woolrych, in his work on the subject, also makes these four classes of ways: Footways; footways and horseways; foot, horse, and carriage ways; and driftways. Woolrych, Ways, 1. But these old classifications of private ways are not exhaustive of the subject, for, as a private way for any particular purpose could always be created by a grant, and in theory always rested upon a grant, actual or implied, it is evident that when one person granted to another a right of way extending from the land of the grantee over the land of the grantor, for the private use of the grantee, in any manner, and for any particular purpose, a private way was created. "These rights are in their ex-

rent susceptible of almost infinite variety. They may be limited both as to the intervals at which they may be used (as a way to church), and the actual extent of the user authorized (as a footway, horseway, or carriageway)." *Gale & Whatley on Easements*, *200. Thus, in *Senhouse v. Christian*, 1 T. R. 560—a case decided in 1787—it was held that under the grant of a way, in gross, for carrying coal and other articles, described as "a free and convenient way, as well an horseway as a footway, as also for carts, wagons, wains, and other carriages whatsoever," the grantee had the right to lay a "framed wagon-way." In a note to the case it is said: "Mr. Law [who appeared for the plaintiff] explained a framed wagon-way to be formed by laying pieces of wood along the road at some depth in the ground on each side, at the distance of the wheels of the carriage, which were joined and kept fast together by bars at equal distances, the interstices being filled up with sand and gravel, so as to render the surface flat. They are now used for carrying the coals from most of the collieries in the north of England." That was clearly a private way, and yet the method of its use was different from that of any of the classes of ways given by the common-law writers. Because the improved physical way used, and which the court held was authorized by the grant, was a kind of tramway, did not render the way any the less a private way. In *Dand v. Kingscote*, 6 Mees. & W. 174, a grant of land had been made, reserving the mines within it, with sufficient "wayleave" and "stayleave," with liberty of sinking and digging pits. *Parka, B.*, said: "There is no doubt that the object of the reservation is to get the coals beneficially to the owner of them, and therefore it should seem that there passes by it to such a description of wayleave, and in such direction, as will be reasonably sufficient to enable the coal owner to get, from time to time, all the seams of coal to a reasonable profit; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such direction as is then convenient." In that case the reservation of wayleave was contained in a deed executed in 1630, and the mine owner had constructed a railroad for the transportation of the coal from the mine across the lands of the plaintiff and others. *Washburn*, in his work on *Easements and Servitudes*, in discussing this case, says: "If, therefore, in the progress of improvement, better or more feasible ways are devised and applied to use than those known and used at the time when the grant was first made, the mine owner, under a reservation of this general form, might adopt the improved way; as, for instance, he might substitute a railway for a wagonway, by which to transport the coal from the pit across the granted premises, although the construction of such new way would subject the landowner to the incon-

venience of having it laid down in the place at the former one." *Wash. Easim. & Serv.* 291. Certainly the way reserved by the grant in that case was a private way, and it is equally clear that it did not cease to be such when the character of the physical way was changed to conform to the improved methods of transporting coal from the mines which had been devised long after the deed was executed. In 12 *Encyclopædia of Laws of England*, 575, it is said: "The term 'wayleave' means a right of way. * * * In considering the extent to which a wayleave may be used, the very object of the grant or reservation to which it is ancillary must be borne in mind, and this may involve a user of a different kind from that which was actually in contemplation at the time of the grant or reservation. Thus, in a grant of land, excepting the mines, etc., and reserving to the grantor a 'sufficient wayleave' or 'necessary wayleave' to them, the mine owner is not restricted to the precise description of way in use at the time of the grant, but may from time to time avail himself of new appliances in order to the more fully carry out and enjoy the object for which the wayleave was granted, e. g., the getting of the minerals. He may make wagon roads or tram roads on the site over which the wayleave extends, although such form of wayleave was unknown at the time when the reservation was made. See *Dand v. Kingscote*, 9 L. J. Ex. 279. The same principle would, it is submitted, apply to a wayleave for any particular purpose."

We have adduced and quoted from these authorities for the purpose of showing that even under the common law the contention, so earnestly pressed by the able counsel for the defendants in error, that such a right of way as the one involved in this case cannot be a private way, is not sustainable. But this court has already recognized that the term "private ways," as used in our state Constitution, is broad enough to include a way of this character. The decision in *Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. 882, treats and recognizes a tramway to be constructed by a lumber company for the transportation of its lumber, naval stores, and timber, and to run from its own land, across the lands of others, to the line of a railway, as a private way. In that case the ordinary of Dodge county granted an application of the lumber company for the construction of a tramway over certain lands belonging to other parties, over the objection of *Knight*, who claimed to be the owner of a lot of land over which the tramway was to run. On certiorari the judgment of the ordinary was reversed, and upon a review of the judgment of the superior court this court held: "Under the Constitution of this state, land can be taken for private ways only in 'cases of necessity.' The evidence failing to show that the present case is one of necessity,

the superior court did not err in sustaining the certiorari and reversing the judgment of the ordinary." If the court had been of opinion that the right of way applied for and granted by the ordinary in that case was not a private way within the meaning of the Constitution, it would not have put its decision upon the ground that a case of necessity for the way was not shown.

Counsel for the defendants in error contends that "the case of Garbutt Lumber Co. v. Georgia & Alabama R., 111 Ga. 714 et seq., 36 S. E. 942, settles the issue in favor of the defendants in error." The decision in that case in no way conflicts with the conclusion which we have reached in this. It is true that it was there held that "section 4657 et seq. of the Civil Code provide a method to be followed when private property is taken or damaged for public purposes, and the procedure therein prescribed cannot be adopted when private property is sought to be taken for a purely private purpose." This ruling, as applied to the case then under consideration, was strictly correct, but, considered as a general rule, it is subject to exception. The procedure prescribed in these sections of the Civil Code could not be adopted in that case for the simple reason that it is one which, in terms, is only applicable when property is to be condemned for public purposes, and had not been made by the Legislature applicable to the taking or damaging of private property for such a private purpose as the one involved in the case then before the court. The method which the law has provided for the taking or damaging of private property for public purposes cannot be adopted when such property is sought to be taken or damaged for a purely private purpose, unless the statute authorizing the taking or damaging for the particular private use has specially provided that the condemnation procedure shall be the same as that to be followed when the property is to be taken or damaged for public use. As the general method prescribed in sections 4657 et seq. of the Civil Code in terms applies only to cases in which the condemnation sought is for public purposes, when these sections alone are relied on as furnishing the condemnation procedure, it must appear that the condemnation is to be for a public purpose. But the Legislature has made the provisions of these sections applicable in certain cases where the condemnation sought is for purely private purposes, and of course in such cases the method of condemnation provided therein can be lawfully resorted to. In the case upon which counsel relies it was sought to condemn private property for a purely private purpose, when the Legislature had neither provided a special condemnation procedure applicable to such a case, nor made the general method for condemning private property for public purposes applicable thereto. Hence it was rightly held that, irrespective of the

question whether the Legislature could lawfully authorize private property to be taken or damaged for the particular purpose for which it was proposed to condemn such property in that case, there could be no condemnation of such property, for the very sufficient reason that there was no law of force in this state which provided a method of condemnation applicable to such a case; and that, until the Legislature provided a procedure for ascertaining and securing the payment of compensation for the taking or damaging of the property, the act under which the authority to condemn was claimed was inoperative. In the present case the statute authorizing the condemnation is not inoperative for the want of a method of condemnation. As we have seen, the Political Code, § 650, declares that the rights of way there provided for "may be obtained in the same manner that the right to convey water across the lands of others may be acquired by the owners of mines, as provided in the Code." Section 656, which provides how the owner of a mine may obtain the right to convey water across the lands of others, declares that he "shall make his application under and according to the provisions and requirements specified in this Code, and all the proceedings in relation thereto shall be had, and the damages shall be assessed and paid, according to the method of condemning land in this Code provided, all of which are extended to the owners of mines desiring to drain their mines and to carry off the water and tailings from their mines and mining operations through or over the lands of others." "The method of condemning land in this Code provided" is the general method for condemning land for public purposes embraced in the Civil Code, § 4657 et seq. As all the provisions of these sections are extended to the case of a mine owner who seeks to obtain the right to convey water across the lands of others, and the railroad rights of way provided for in section 650 of the Political Code may be obtained in the same manner that a mine owner may obtain a right of way for conveying water, it is perfectly clear that the condemnation procedure to be adopted in a case of this character has been provided by the Legislature. The notice served by the applicants for the right of way upon the owners of the land which they sought to condemn showed that they were proceeding under section 4657 et seq. of the Civil Code, and this they had the right to do. In the petition for injunction the question whether the right of way applied for was necessary was not made, nor was it passed upon by the trial judge, and hence this question is not before us. We may say, however, that the answer of the defendants seems to show a case of necessity.

Judgment reversed. All the Justices concurring, except COBB, J., disqualified, and EVANS, J., not presiding.

(119 Ga. 961)

DETWILER v. BAINBRIDGE GROCERY CO.

(Supreme Court of Georgia. May 11, 1904.)

BILLS AND NOTES—WRONGFUL TRANSFER—DAMAGES—INJUNCTION—ADEQUATE LEGAL REMEDY.

1. The wrongful transfer of a negotiable note to a bona fide purchaser, thereby cutting off the maker's valid defense, gives rise to a cause of action for the damages resulting therefrom.

2. There being no allegation that the payee of the notes was insolvent, and no other ground for interlocutory relief being alleged, the petitioner had an adequate remedy at law; and the chancellor did not err in refusing the injunction against the transfer of the notes not due, or the maintenance of its action on the notes then in suit.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by A. Detwiler against the Bainbridge Grocery Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. Detwiler brought her equitable petition against the Bainbridge Grocery Company, alleging that her husband, who was insolvent, was indebted to the defendant in an amount which he was unable to pay; that he and the company entered into an agreement by which he was to sell his stock of goods to the company for the amount of his indebtedness, and that the company should at once sell the property to her for the same amount, and take her notes therefor, secured by real estate belonging to her; that this was a colorable scheme and device to make her assume the debt of her husband, and to secure the same with her own property; that after the papers had been signed the husband remained in possession of the merchandise; that two of the purchase-money notes were paid by her husband; that four others were past due, and four more in the company's hands, not yet due; that an attachment has been issued by the company against her on the ground that she is a fraudulent debtor, and is threatening to convey the stock for the purpose of hindering and delaying her creditors, the truth of which she denies; that the company has caused the attachment to be levied upon the stock of goods, and also claims that she is indebted to it on the eight unpaid notes. There is no allegation that the company was insolvent. She prays that the alleged sale of merchandise to her be rescinded and declared null and void, and that the company be enjoined from negotiating her unpaid notes, and be required to surrender all of the notes for cancellation. At the hearing the material allegations in the petition were supported by affidavits of the plaintiff and her husband. The company answered, and, by affidavits of its representative, denied that there

was any fraudulent scheme or device, or any intent to have Mrs. Detwiler assume the debt of her husband, but averred, on the contrary, that she was anxious to purchase the stock, and requested the company to sell to her the merchandise formerly owned by her husband. The judge denied the injunction, and Mrs. Detwiler excepted.

Harrell & Hartsfield, for plaintiff in error. W. D. Sheffield and M. E. O'Neal, for defendant in error.

LAMAR, J. Where one has a perfect defense to a negotiable note, he does not owe the sum represented thereby. In spite of the written promise, it is the mere equivalent of a piece of blank paper. If it is fraudulently or improperly transferred to one who, because of a right granted to bona fide holders, may force the maker to pay what he does not owe, there is wrong followed by damage, which gives rise to a right of action. Compare Civ. Code 1895, §§ 3909, 3813, 4929. It has therefore been repeatedly recognized that if one wrongfully transfers a negotiable note, under circumstances which cut off the maker from his defense, the latter would have a cause of action, the form of which would vary according to the circumstances of each case. *Jones v. Crawford*, 107 Ga. 318, 33 S. E. 51, 45 L. R. A. 105. See note to 27 L. R. A. 523; *Wilcox v. Ryals*, 110 Ga. 287, 34 S. E. 575; *Zeigler v. Beasley*, 44 Ga. 56. If, therefore, the petitioner is correct in her statement of the facts, she has an adequate remedy at law against a solvent defendant. There is no allegation entitling her to the interposition of equity, and no facts charged or relief prayed based on the avoidance of a multiplicity of suits.

Judgment affirmed. All the Justices concurring.

(120 Ga. 195)

McARTHUR v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—DYING DECLARATIONS—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. In charging the jury in a criminal case upon the subject of dying declarations, it is not error to give the reasons why such declarations are admissible, to wit, that the theory of the law is "that a man would be just as sure to make a truthful statement when he is in the article of death, and when he knows he is soon to leave this world and enter upon the next world, as if he were under the sanctity of an oath." Nor was this, when considered in connection with the whole charge, an expression of opinion as to the weight and sufficiency of the testimony.

2. The evidence, though by no means clear, was sufficient to sustain the verdict.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Jim McArthur was convicted of a crime, and brings error. Affirmed.

¶ 1. See *Bills and Notes*, vol. 7, Cent. Dig. §§ 643, 644.

W. D. Sheffield, for plaintiff in error. John C. Hart, Atty. Gen., and W. E. Wooten, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 202)

SINDY v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—NEW TRIAL—AMENDMENT OF MOTION—SUFFICIENCY OF EVIDENCE—REVIEW.

1. Though the amendment to the motion for a new trial was "allowed," it does not appear that the trial judge approved or certified its grounds as true. The assignments of error therein cannot be considered.

2. A verdict approved by the trial judge will not be disturbed, notwithstanding it is only supported by the testimony of a single witness, who was confessedly guilty of a crime involving moral turpitude, and there is evidence tending to show the witness had made a contradictory statement, and that his general character was bad. The jury had the right to believe the witness in spite of the attack made on his credibility.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

John Sindy was convicted of playing and betting for money at a game played with dice, and brings error. Affirmed.

H. F. Sharp and W. J. Neel, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

EVANS, J. 1. John Sindy was tried and convicted in the city court of Floyd county of the offense of playing and betting for money at a game played with dice. He filed a motion for a new trial on the general grounds, which motion was amended at the hearing and overruled. There is nothing in the bill of exceptions or the record to show any approval of the grounds in the amended motion. The indorsement on the amendment to the motion is: "Amended motion allowed. Mch. 22nd, 1904," signed by the judge. The bill of exceptions recites that the amendment was allowed, but is absolutely silent as to any approval of the recitals of fact therein contained. Unless the grounds are approved or certified as true, this court is without jurisdiction to consider them. Jackson v. State, 116 Ga. 834, 48 S. E. 255, and cases cited.

2. Only the grounds of the original motion, that the verdict is contrary to law and the evidence, can be considered. The indictment was against the defendant and three others. One witness testified positively that defendant played and bet for money at a game played with dice. He admitted on the cross-examination that he was serving a sentence in the chain gang for gaming and carrying a concealed pistol, that he was 27 years old, and had lived in Floyd county 7 years, and

was serving his sixth sentence in the chain gang, one of which was for stealing chickens. He denied having said that he prosecuted the defendant, and others named in the indictment, in order to get a light sentence for himself. Four witnesses testified that they never saw defendant play and bet at a dice game, and one of the codefendants denied any knowledge of gaming as charged in the indictment, and testified that the state's witness told him, while both were in the chain gang serving sentences for gaming, that he prosecuted the defendant and others to get off lighter. Three witnesses testified to the bad character of the state's witness, and that they would not believe him on oath. Defendant denied his guilt. Under this evidence the jury convicted the defendant, and the trial judge approved their finding. Our system of judicial procedure vests the jury with exclusive power to decide the facts. They are of the vicinage, observe the witnesses while testifying, and have the best opportunity for applying the legal tests as to the credibility of a witness. They believed the sole witness for the state, as they had a right to do, and their verdict, approved by the judge, will not be disturbed. Davis v. State, 94 Ga. 399, 19 S. E. 243.

Judgment affirmed. All the Justices concurring.

(120 Ga. 22)

REPPARD, SNEDEKER & CO. v. MORRISON.

(Supreme Court of Georgia. May 11, 1904.)

BUILDING CONTRACT—LIEN FOR MATERIALS FURNISHED—CONSENT OF OWNER—CONTRACT WITH TENANT.

1. The title of the true owner of land cannot be subjected to a lien for material, unless he expressly or impliedly consents to the contract under which the improvements are made.

2. Where the owner did not consent to the alteration or improvement of the building, the land could not be subjected to a lien for material furnished under a contract made by the tenant with the contractor.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Reppard, Snedeker & Co. against D. J. Morrison to foreclose a mechanic's lien. Judgment for defendant, and plaintiff brings error. Affirmed.

Reppard, Snedeker & Co. brought an action against Brackett & Campbell, contractors, and Morrison, as owner of a house and lot in Savannah, for the foreclosure of a lien for material furnished by the plaintiff on the order of the contractors, and alleged to have been used in improving the real estate then owned by Daniels, but sold to Morrison after the lien was recorded. The contractors made no defense, but Morrison alleged that the improvements had been placed thereon at the instance of a tenant in possession of

¶ 2. See Mechanics' Liens, vol. 34, Cent. Dig. § 71.

the property, without the knowledge or consent of Daniels, the then owner, and that neither before nor since the furnishing of the material had the owner ratified the action of the tenant in having the improvements made. The evidence was conflicting as to whether Daniels had notice of the fact that the contract had been made, or that the work was being done, until after the improvements had been completed. The tenant testified that the owner came to the place while the work was being done, knew that it was going on, and made no objection. Daniels testified that the first he knew of the work was when he received notice from plaintiff's attorney of the claim for a lien; that he went at once and examined the place, and returned and notified plaintiff's counsel that he had nothing to do with it; that the tenant was fixing the place for his own accommodation in extending a partition through the building; that the tenant showed him a receipt and said the work was all done; that the improvements were of no value to the property, and would have to be torn down; that two windows had been torn out, and it would cost about \$300 to put the building back as it was when the tenant had gone into it; that he told the tenant that he expected him to do that; that there was no necessity to repair the store, from the standpoint of repairing; that the tenant divided the storeroom so as to make two stores, and thereby enable him to subrent one of them. Other witnesses testified that the work done had not increased the value of the property, but was rather an expense, as the partition would have to be torn down, and it would be expensive to replace the show window which was destroyed in carrying out the alterations made by the tenant. The judge charged the jury that, if the owner did not actually or impliedly consent to the making of the improvements, the plaintiff would be entitled to a judgment against the contractors, but not to a judgment establishing a lien on the property good as against the owner. The jury found a verdict in accordance with this instruction, and against the lien, and the plaintiff assigns error on the court's refusal to grant a new trial.

W. B. Stubbs, for plaintiff in error. W. P. La Roche, for defendant in error.

LAMAR, J. The verdict settles the conflict in the evidence, and, under the charge of the court, is to be construed as a finding that the owner did not expressly or impliedly consent to the tenant's making the contract under which the material was furnished by the plaintiff for the improvement of the real estate. Under the Code of 1868 (section 1959), a mechanic under such circumstances might have been entitled to a lien, not against the real estate, but against the improvement itself, "without regard to the title." *Gaskill v. Davis*, 63 Ga. 645; *Cooper v. Jack-*

son, 107 Ga. 256, 33 S. E. 60. But that provision was omitted from the lien act of 1873 (Civ. Code 1895, § 2801); and, while one having an interest in land may subject such interest to a lien for improvements placed thereon at his request, there is nothing in our statute which modifies the general principle that the title of the true owner cannot be incumbered by a lien without some act on his part signifying his assent. *Harman v. Allen*, 11 Ga. 45; *Callaway v. Freeman*, 29 Ga. 408; *Walker v. Burt*, 57 Ga. 21 (2); *Powers v. Armstrong*, 19 Ga. 427; *Rice v. Warren*, 91 Ga. 759, 17 S. E. 1032 (2). This case illustrates the inherent justice of such a rule. Repairs or additions might be made at the direction of a disseisor, trespasser, or tenant, but, while costly, instead of being improvements, they might, as here, positively detract from the value of the estate. Or they might even be improvements and add to the value of the property, and yet might not be of a character which the owner desired placed on his land. If the real estate could be subjected to a lien under such circumstances, he might be called upon to pay for that which the next week he would cause to be torn down and removed. It frequently happens that the lot and the new house sell for less than the cost of the building, and it is unfortunately true that one is often improved out of his estate. But, before this can be done, he must at least consent to the making of the disastrous improvement. In view of the finding of the jury, we are not called upon to decide how far knowledge of the making of the contract before the work began, or knowledge acquired during the progress of the work, could amount to that consent authorizing the foreclosure of a lien against the true owner.

Judgment affirmed. All the Justices concurring.

(120 Ga. 304)

YOTHER v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

INCEST—SUFFICIENCY OF EVIDENCE—TESTIMONY OF FEMALE—CORROBORATION.

1. A man accused of incestuous adultery cannot be convicted upon the uncorroborated testimony of the woman with whom he is alleged to have committed the offense.

(Syllabus by the Court.)

Error from Superior Court, Murray County; A. W. Fite, Judge.

Jeff Yother was convicted of crime, and brings error. Reversed.

H. A. Longston, Jesse S. Glenn, and Geo. G. Glenn, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

SIMMONS, C. J. The accused was charged with having committed acts of incestuous adultery with his own daughter. She swore positively to his guilt. There was

absolutely nothing to corroborate her testimony. "A woman who knowingly and willfully consents to an act of sexual intercourse which is incestuous is an accomplice of the man, and her uncorroborated testimony is not sufficient to sustain a verdict convicting him of incestuous adultery." *Solomon v. State*, 113 Ga. 192, 38 S. E. 332. It was argued that in this case the woman did not knowingly and willfully consent, and was therefore not an accomplice. Under the rulings in *Raiford v. State*, 68 Ga. 672, and *Taylor v. State*, 110 Ga. 151, 35 S. E. 161 (6), we think her evidence showed that the offense was incestuous adultery, though her consent may have been reluctantly given, and that she was an accomplice, whose testimony was insufficient to convict without corroboration. If this is not true, then the accused was guilty of rape, and the verdict finding him guilty of incestuous adultery was illegal. Thus, in either view of the case, the verdict should have been set aside, and a new trial ordered.

Judgment reversed. All the Justices concurring.

(120 Ga. 25)

YOUNG v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. May 11, 1904.)

CARRIERS—EJECTION OF PASSENGER—MUTILATED TICKET.

1. To "mutilate" a railroad ticket, within the reasonable meaning of a stipulation on its face that it shall not be good for passage if mutilated in any way, it must be deprived of some essential or material part; and such a ticket is valid, although torn in two pieces, when both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, that together they form the entire ticket, and that no fraud has been perpetrated upon the railroad company.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Mamie Young against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Travis & Edwards, for plaintiff in error. Lawton & Cunningham, for defendant in error.

CANDLER, J. This was an action for damages for the alleged tortious eviction of the plaintiff from the defendant's train. The jury found for the defendant, and the plaintiff excepts to the overruling of her motion for a new trial.

It appears that the plaintiff purchased in Augusta, at a greatly reduced price, a ticket, over the defendant's line of railroad, from Augusta to Savannah and return. This ticket contained a printed stipulation to the effect that if it should become mutilated in any way it should not be good for passage. On the return trip, when the plaintiff ten-

dered the ticket to the conductor, it was torn into two parts. The evidence for the plaintiff was to the effect that she presented both pieces of the ticket, and that they corresponded in such a way, as to the numbering and other physical characteristics of each, that there could be no doubt that they were parts of the same ticket, and that together they formed the entire return ticket. Witnesses for the defendant, on the other hand, testified that the plaintiff tendered the conductor only a part of the torn ticket. Be that as it may, the conductor demanded the payment of fare by the plaintiff, which was refused, and she was evicted from the train. The court charged the jury as a matter of law that the ticket was mutilated and by its terms invalid, and restricted their consideration of the case to the question whether the plaintiff was evicted from the train at a proper place.

This was error. Only by the most narrow and literal construction of the word "mutilated," as contained in the stipulations on the face of the ticket, could the charge be justified. The writer has never favored laxity in the enforcement of agreements between railroad companies and those to whom special rates or gratuities are granted (*Central R. Co. v. Glascock*, 117 Ga. 938, 43 S. E. 981; *Gilleland v. Louisville R. Co.*, 119 Ga. 789, 47 S. E. 336; *Holly v. Southern R. Co.*, 119 Ga. 767, 47 S. E. 188), but he is equally opposed to a construction so strict as to do violence to the obvious intention of the agreement and work a hardship on the party sought to be bound. The definition given by the *Standard Dictionary* of the word "mutilate" is as follows: "To cut off or deprive of a limb or essential part of, as an animal body; maim; cut or break off, or otherwise remove any part of, as a statue; disfigure. To retrench, remove, expunge, or delete an essential or material part of, so as to render incomplete or imperfect, as a literary composition; as, to mutilate a speech." The main idea of this definition is the removal of an essential part, so that the whole is rendered imperfect. It is plain that if a ticket has been torn in two, and the two parts, preserved, fit exactly together in such a way as to make it indisputable that they are parts of the same ticket and together form the entire ticket, there has been no mutilation, except in a purely physical sense. Nothing essential to a valid ticket has been removed; only its physical symmetry has been marred. The only reasonable object to be accomplished by a regulation like the one now under consideration is to prevent fraud. It would, of course, be grossly unfair to the railroad company to require it to honor only a part of a ticket, for in that case two or more persons, only one of whom had paid any consideration to the company, might be enabled to ride on the same ticket. But if the plaintiff's evidence is to be believed,

she furnished to the conductor of the train conclusive evidence that a fraud had not, and could not have been, perpetrated by her. As to this point there was, as stated before, a conflict in the evidence; but the jury should have been allowed to pass upon the contested issue, and to say whether the plaintiff presented to the conductor in good faith an entire ticket which had, as she claimed, been accidentally torn in two, or only a part of a mutilated ticket.

In the case of *Wightman v. Chicago R. Co.* (Wis.) 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778, it was held: "A round-trip ticket having the words 'Not good for passage' on the going part of the ticket, and the words 'if detached' on the returning part, is valid when both parts are presented together at the same time to the same conductor on the going trip, although the parts have become separated by inadvertence." It is contended, however, by counsel for the defendant in error that this case turned on a special statute, and is therefore not applicable to the case at bar. While it is true that in the opinion reference is had to a Wisconsin statute, and it is held that the company is not authorized, "under the guise of regulations, to abridge or impair a passenger's statutory or legal rights," it does not appear that the statute in question related in any way to the question of the mutilation or detachment or tearing of tickets or parts of tickets. On the contrary, it affirmatively appears in the opinion of Casoday, J., that the statute referred to "required the defendant, upon application 'at its ticket station,' * * * and payment of the price, to sell to the plaintiff 'round trip tickets, good for first class passengers'" between certain points mentioned. There is certainly nothing in such a statute that would alter the general rule involved, or render any the less applicable to the case now under consideration the principles announced in the case cited. Under the rule laid down by the court in the case of *Georgia R. Co. v. Clarke*, 97 Ga. 706, 25 S. E. 368, a stipulation in a special contract embodied in a railroad ticket should, in a case of uncertainty, be construed most strongly against the railroad company. In the present case the court gave the most rigid construction possible in the company's favor. The case, we think, was tried on the wrong theory, and we are therefore constrained to send it back for another hearing.

Judgment reversed. All the Justices concur.

(120 Ga. 173)

TOMPKINS v. CITY OF NEWNAN.

(Supreme Court of Georgia. May 10, 1904.)

CERTIORARI—REFUSAL—PETITION—INCORPORATING IN BILL OF EXCEPTIONS—REVIEW.

1. Where a judge of the superior court refuses to sanction a petition for certiorari, such petition is no part of the records of the court, although the order refusing to sanction it be

entered upon it in writing. Such petition cannot be sent up by the clerk as part of the record, but must, in order for this court to review the refusal to sanction, be incorporated in the bill of exceptions or otherwise verified by the judge. *Wood v. County of Tattnall*, 42 S. E. 408, 115 Ga. 1000.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Petition by Lee Tompkins against the city of Newnan for certiorari to review a judgment. Petition denied, and petitioner brings error. Dismissed.

W. L. Stallings, for plaintiff in error. A. H. Freeman, for defendant in error.

SIMMONS, C. J. Writ of error dismissed. All the Justices concurring.

(120 Ga. 192)

ROGERS v. CITY OF SANDERSVILLE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—POSTING BILLS WITHOUT A LICENSE—AGENT—LIABILITY.

1. One is "engaged in the business of posting bills and distributing advertisements" who performs these services for others and for hire.

2. But one who has been employed as a salesman cannot be said to be engaged in the "business" of posting bills and distributing advertisements, who does so solely as an incident to the selling for which he has been employed, and only for the purpose of advertising the wares of his principal.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. D. Evans, Judge.

R. E. Rogers was convicted of violating an ordinance. A writ of certiorari to review the judgment was overruled, and defendant brings error. Reversed.

Rogers was the agent of the Church & Dwight Company, of New York, and represented them in selling their cooking soda. He sold to merchants throughout the different states, and the goods were shipped from the New York house. In connection with selling soda, he distributed the advertising matter of the Church & Dwight Company, and posted their signs, but he did not distribute advertising matter for any other person. He was a resident of Virginia. He had no place of business in Sandersville. The marshal of that city testified that he first saw Rogers on January 2, 1904, and found him engaged in the business of tacking up signs. He was then posting bills and distributing advertisements for Church & Dwight's sodas, but not distributing any other advertising of any other firm. He failed to show the license required by the ordinances, and was thereupon arrested. The city clerk testified that no license had ever been issued to Rogers. He was charged with the offense of "engaging in the business of bill-poster and distributor of bills and advertisements without first obtaining license and registering his name and business" as required

by the charter and ordinances of Sandersville. The defendant was found guilty by the mayor, and, by certiorari, assigned as error that the judgment was contrary to law and contrary to evidence; that the conviction was further erroneous, in that, if in the transaction complained of he was "engaged in the business of posting bills," it was interstate business, so as to relieve him from the operation of the ordinance; that the ordinance was also void, in that it attempted to impose a tax and require a license of traveling salesmen, contrary to the act approved December 4, 1896 (Acts 1896, p. 86). The judge of the superior court overruled the certiorari and sustained the conviction, whereupon Rogers excepted.

W. E. Armistead, for plaintiff in error. James K. Hines and J. E. Heyman, for defendant in error.

LAMAR, J. It is well known that in many cities there are persons who are engaged in the business of posting bills and distributing other advertising matter. They hold themselves out as ready to perform this service for the public generally. They engage in it for profit. It is their occupation. By it they undertake to advertise the wares of others. They receive pay for their work in giving publicity to what others wish made known. To those thus engaged in Sandersville the tax ordinance will apply. But one may post bills and distribute advertisements without engaging in it as a business. It may be only casually or occasionally that he does so. He may do this gratuitously, and to give notice of meetings, public events, or matters in which there is no element of trade or gain. Again, he may post or distribute bills, not as a business in itself, but only as an incident to his real business of selling his own goods. If a merchant should post bills in his store window or on his neighbor's fence, or should distribute circulars to advertise his own wares, it could not be claimed that in doing so he had engaged in this as a business. Nor would the legal character of the transaction be changed if he sent out one of his regular employes to do the same work. In both cases the advertisement of his goods would be an incident to the real business of selling merchandise, rather than an engagement in the new and independent business of posting bills and distributing advertising matter. A man may have more than one business, and be taxed for each; but, where he has only one, he cannot be said to engage in others merely because transactions incidental to his business were of a character which could be so conducted as to amount to an independent occupation. In the case at bar the defendant was a traveling salesman. He did not undertake to post bills for the public, or to advertise the goods sold by others. What he did was for the purpose of making or increasing sales, and the various steps

leading to that end were part and parcel of the business of selling. There was nothing in the evidence to show that he had engaged in the business of posting bills and distributing advertisements in the sense prohibited by the ordinance. *Gunn v. Macon*, 84 Ga. 365, 10 S. E. 972; *Mayor of Savannah v. Dehoney*, 55 Ga. 33. Compare *Fish v. Chapman*, 2 Ga. 354, 46 Am. Dec. 393.

Judgment reversed. All the Justices concurring, except EVANS, J., disqualified.

(120 Ga. 128)

BALDWIN v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—ADMISSIBILITY OF EVIDENCE—DISQUALIFICATION OF JUROR.

1. In a case of assault with intent to murder, the intention of the accused is always a matter for determination by the jury; and where the evidence is such as to authorize a finding that the accused, while not entirely justifiable, was not guilty as charged in the indictment, it is not error for the judge to give in charge to the jury the law as to the statutory offense of shooting at another.

2. A juror is not disqualified by reason of the fact that his wife is a second cousin of the wife of one of the parties at interest.

3. On the trial of an indictment for assault with intent to murder, where it appears that at a certain stage of the difficulty between the accused and the prosecutor the accused lowered his gun from his shoulder, and rested it on his hip, it is not permissible, to prove that he intended to shoot from the latter position, to show by a witness that "a lot of good shots shoot their guns from their hips. I shoot doves and quail myself, and know a lot of good shots shoot that way." The admission of such evidence is error requiring the grant of a new trial.

4. In such a case it is error to unduly stress the contentions of the state, at the same time ignoring the contentions of the accused.

(Syllabus by the Court.)

Error from Superior Court, Randolph County; H. C. Sheffield, Judge.

M. A. Baldwin was convicted of shooting at another, and brings error. Reversed.

Rosser & Brandon, A. M. Raines, and M. J. Yeomans, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

CANDLER, J. The accused was tried under an indictment for assault with intent to murder, and was found guilty of shooting at another. In the bill of exceptions he complains of the overruling of his motion for a new trial. There was some conflict in the evidence as to the events immediately preceding the occurrence under investigation. It seems, however, that a state of bad feeling existed between the accused, Baldwin, and the prosecutor, Blackburn, and that a difficulty between them was not unexpected. About all that is certain from the evidence is that on the day when the difficulty took place Blackburn was standing at a designated point on the public square in the town of

Cuthbert, when Baldwin drove by him in a buggy, carrying a double-barreled shotgun loaded with buckshot; that, after passing Blackburn, Baldwin drove a short distance, and got out of his buggy; and that almost immediately both Baldwin and Blackburn began firing at each other. The witnesses for the state make it appear that Baldwin was the aggressor, and fired first; while those for the accused testified that the accused endeavored to avoid a difficulty, that he was pursued by Blackburn, and that he fired only after Blackburn had opened fire on him.

1. It is contended by counsel for the accused that the court erred in giving to the jury a charge which would authorize them to find a verdict of guilty of shooting at another, as, under no view of the evidence, was such a finding warranted. This contention is without merit. The several eyewitnesses to the affair who were introduced gave accounts which varied in many essential details. In a case of this sort the intent of the accused is always of primary importance, and is a question for the jury under the evidence. The jury in the present case had ample evidence before them upon which to base a finding that the accused, while not wholly justifiable in firing at the prosecutor, was not guilty to the full extent charged in the indictment. The charges on this subject were therefore not erroneous.

2. The motion for a new trial also seeks to set up the disqualification of one of the jurors before whom the case was tried on the ground of relationship to the prosecutor. 'It appears, however, from the affidavits in support of this ground, that the relationship relied on consisted in the fact that the prosecutor and the juror had married second cousins. Each would have been disqualified to act as juror in a case in which the other's wife was interested, but as to each other there was no disqualification whatever. An easy way out of difficulties of this sort may be had by reference to the rule laid down in rhyme by Mr. Chief Justice Bleckley in *Central R. & Banking Co. v. Roberts*, 91 Ga. 517, 18 S. E. 315:

The groom and bride each comes within
The circle of the other's kin;
But kin and kin are still no more
Related than they were before.

It is apparent, therefore, that in the present case there was no disqualification, and that the ground of the motion referred to presented no reason for the grant of a new trial.

3. A witness for the accused, who saw the shooting, testified that before Baldwin fired at Blackburn he raised the gun to his shoulder, and then lowered it to his hip, afterwards raising it to his shoulder again, when he shot. On cross-examination he was allowed, over the objection of counsel for the accused, to testify: "A lot of good shots shoot their guns from their hips. I shoot doves and quail myself, and know a lot of good shots shoot that way." There can be

no doubt that the admission of this evidence was error. The defense of the accused was that he fired at the prosecutor in self-defense, or under the fears of a reasonable man that his life was in danger. The testimony of the witness on direct examination tended to show that he was acting in self-defense; that, after raising his gun the first time, he came to the conclusion that it would not be necessary for him to shoot, and lowered it to his hip. It was, of course, permissible for the state to rebut this evidence by showing that the accused was in the habit of firing from the hip; but, clearly, this could not be done by showing that "a lot of good shots" are in the habit of firing in that manner.

4. The following charge of the court is assigned as error on the ground that it was unfair and argumentative: "For instance, you can see if Baldwin was mad with Blackburn; for, if he was not, he would not be likely to shoot at him. See if Dr. Baldwin had a gun. Was he carrying it in his buggy? If so, what for? Was he accustomed to carrying it? What effect does that have on your minds in settling the matter? If he had a gun then, and it was not his custom to carry it about with him in his buggy, why did he have it that particular day? Was it loaded? And if it was loaded, what was it loaded with? Was it loaded with buckshot, or with something else? If it was loaded with buckshot, why, and what for? Was it to shoot some person, or to shoot something else? Was he driving through the square, and did he come in contact with Blackburn? Did he see him? Did he have any business up there on the square? Was it business that caused him to stop upon the square? What did he stop for? Did he get out of his buggy? If so, what for? Did he turn towards where Blackburn was? If so, why? Did he take his gun from the buggy when he got out? If so, what for? Did he raise it, and, if so, what for? And in what direction was it pointed? Did he lower it after raising it, and then raise it again? If so, for what purpose? And did it fire off when he raised it the second time, if he raised it the second time? If so, in what direction? Was the firing off of the gun accidental or intentional?" While we are satisfied that the able and learned trial judge had no intention to do other than the most exact and impartial justice between the state and the accused, we are constrained to hold that the charge quoted is fairly open to the criticism made against it. As before stated, Baldwin's defense was that he shot at the prosecutor in self-defense, and there was evidence before the jury in support of that theory. It could not, therefore, have been otherwise than extremely prejudicial to the accused to instruct the jury that, if he was not mad with Blackburn at the time of the difficulty, he would not have been likely to shoot at him. The charge also goes into

minute detail as to conduct of the accused, which he did not deny, and its tendency was to lead the jury to believe that, if these admitted details of the difficulty were true, the accused was guilty as charged. It is also noteworthy that nowhere in his charge did the judge go with like minuteness into the conduct of the prosecutor as contended by the accused. The result was that, as to the circumstances immediately connected with the difficulty, the contentions of the state were given undue stress, while those of the accused were almost entirely ignored. The decision on this point is clearly governed by the ruling of this court in *Brantley v. State*, 115 Ga. 230 (3), 41 S. E. 695, where it was held error for the court in a criminal case to unduly impress upon the jury circumstances tending to implicate the accused, with no corresponding statement of the points insisted upon in his defense. See, also, *Thomas v. State*, 95 Ga. 485, 22 S. E. 315; *Moody v. State*, 114 Ga. 449, 40 S. E. 242. On account of this error, and of the erroneous admission of evidence before referred to, the case should go back for another trial.

Judgment reversed. All the Justices concur.

(119 Ga. 981)

CAMP v. YOUNG.

(Supreme Court of Georgia. May 11, 1904.)

BANKRUPTCY—EFFECT OF DISCHARGE—MORTGAGE LIEN—JUDGMENT LIEN—EXEMPTIONS OF BANKRUPT—ACTION ON NOTE—SUFFICIENCY OF ANSWER.

1. A discharge in bankruptcy is no defense to the foreclosure of a mortgage executed more than four months prior to the filing of the petition in bankruptcy, when the debt secured by the mortgage has not been proved in the bankrupt court. *Evans v. Rounsaville*, 42 S. E. 100, 115 Ga. 684.

2. The lien of a judgment rendered more than four months before the filing of a petition in bankruptcy is not affected by a discharge in bankruptcy, when the holder of such judgment has not proved his debt in the bankrupt court. *Dozier v. McWhorter*, 39 S. E. 108, 113 Ga. 584; *Smith v. Zachry*, 42 S. E. 102, 115 Ga. 722.

3. An exemption in bankruptcy is not good against a mortgage or judgment for the purchase money of the property set aside as exempt, when the holder of such mortgage or judgment has not proved his debt in the bankrupt court. See *McKenney v. Cheney*, 45 S. E. 433, 118 Ga. 387, and citations.

4. The general allegations, in an answer, that the copy note attached to the petition is not an exact copy of the note defendant gave the plaintiff, and that defendant denies he is indebted to the plaintiff, present no valid defense to the note sued upon.

5. The answer in this case was properly stricken.

(Syllabus by the Court.)

Error from Superior Court, Putnam County; B. D. Evans, Judge.

Action by Robert Young against Mrs. S. J. Camp. Judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Davidson, for plaintiff in error. W. F. Jenkins & Son and Z. D. Harrison, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except EVANS, J., disqualified.

(120 Ga. 205)

COURSEY v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—NEW TRIAL.

1. No attack was made upon the legal sufficiency of the accusation, nor upon the accuracy or correctness of the charge of the court. The motion for a new trial was based only on the general grounds that the verdict was contrary to law and the evidence. There was sufficient evidence to sustain the charge contained in the accusation. The trial judge approved the verdict finding the accused guilty, and this court will not set it aside.

(Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

Perry Coursey was convicted of crime, and brings error. Affirmed.

J. L. Kent, for plaintiff in error. B. B. Blount, for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(120 Ga. 198)

REESE v. CITY OF NEWNAN.

COOK v. SAME.

(Supreme Court of Georgia. May 10, 1904.)

INTOXICATING LIQUORS—KEEPING FOR ILLEGAL SALE—EVIDENCE.

1. Under the "general welfare clause" in its charter, a municipal corporation has authority to make penal the keeping of intoxicating liquors for the purpose of illegal sale. *Paulk v. Sycamore*, 30 S. E. 417, 104 Ga. 728, 41 L. R. A. 772, 69 Am. St. Rep. 128.

2. One who receives money, and delivers whisky in exchange therefor, may be treated as the seller, when no other person is shown to have filled that capacity. *Mack v. State*, 42 S. E. 776, 116 Ga. 546. Proof, on the trial of one accused of keeping liquor for illegal sale, that the accused made an illegal sale of liquor, is sufficient to show that the liquor sold was kept on the particular occasion for the purpose of illegal sale. *Rooney v. Augusta*, 45 S. E. 72, 117 Ga. 709.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Fed Reese and Ruic Cook were convicted of violating the liquor laws, and bring error. Affirmed.

W. L. Stallings, for plaintiffs in error. A. H. Freeman, for defendant in error.

SIMMONS, C. J. Judgment in each case affirmed. All the Justices concurring.

(120 Ga. 126)

JONES v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

KEEPING GAMING HOUSE—PLACE OF BET.

1. J. kept a house for the daily congregation of a large number of people to make bets on horse races run in other states. The system was that the person desiring to bet made application for a bet on a certain horse at the posted odds, handing his application and the money to be bet to J. or his agent. This application was then telegraphed to R. in a foreign state for acceptance or rejection. If the bet was lost, the money was deposited by J. to the credit of R.; while, if it was won, J. paid the winnings (less 10 cents commission) to the bettor out of funds kept with him for that purpose by R. *Held*, (1) that J. was guilty, under Pen. Code 1895, § 398, of keeping and maintaining a gaming house; and (2) that, even if the bets were accepted and consummated in another state, the money was hazarded in the house kept by J.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Charles Jones was convicted of keeping and maintaining a gaming house, and brings error. Affirmed.

Arnold & Arnold and Rucker & Rucker, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

SIMMONS, C. J. Under the facts, we are clearly of the opinion that the court below committed no error in holding the accused guilty. The first proposition announced in the syllabus is fully sustained by the reasoning in the case of *Thrower v. State*, 117 Ga. 753, 45 S. E. 126. The opinion in that case shows what a gaming house is, and what is necessary to constitute the offense of keeping and maintaining one. Learned counsel for the plaintiff in error did not combat the soundness of the decision in *Thrower's Case*, but undertook to show that it did not control the present case, because the indictment in the present case alleged that the money was hazarded in the house, while the evidence showed that, inasmuch as the offer to bet had to be telegraphed to New Orleans and accepted there before it became a bet, there was no hazarding of money in this state, but the hazarding, if any, was in New Orleans. While the authorities generally hold that, if an offer to bet is made in one state to a person residing in another state, the bet is consummated in the state where accepted and not in the state in which the offer is made, we think that this rule is not applicable under the statute under which this indictment was found. The decisions cited by counsel for the plaintiff in error are upon statutes which forbid betting, and under which it is held that an offer to bet made in one state and acceptance by a person in another state is not a violation of the betting laws of the state in which the offer is made. The accused in the present case was not in-

dicted for betting or for keeping a place in which bets were made, but for keeping and maintaining a gaming house. The distinction between betting and keeping a gaming house is pointed out in the able opinion of Lamar, J., in *Thrower's Case*, supra. The offense of keeping a gaming house may be committed where a person keeps a house in which people congregate for the purpose of betting, even if the betting done is not itself a violation of law. In this state it is not a penal offense to bet on a horse race; but if a man keeps a house in which persons congregate for this purpose, he is guilty of maintaining a gaming house.

Coming to the facts of this particular case as to the hazarding of money, while we think it was unnecessary to make this allegation in the indictment, still, in our opinion, the facts fully sustain it. When a man desired to make a bet, he filled out an application to be telegraphed to Roots in New Orleans, and at the same time handed in the amount of money he wished to risk on the horse selected. This money was received by Jones or one of his agents. So far as appears from the record, the applicant never received any notice, before the race was run, as to whether his bet was accepted or rejected. After the race was over, the result of the race was announced, and another agent of Jones, in the same house, paid the winnings to those who had won. Where the bet was lost, the money which had accompanied the application was deposited by Jones to the credit of Roots. Under this state of facts we think that the money was hazarded in the house in question. The bettor deposited it there, and lost it if he failed to win, or regained it if he did win. The whole transaction as to the money took place in this house. This was the very object for which the house was kept. It was of itself an invitation to the people to go to that place and make their offers to bet, depositing their money with the proprietor of the house. While there is no law in this state to punish the bettors, there is a law for the punishment of the proprietor of such a house in which people can meet daily to bet on horse races and hazard their money thereon. The money was not sent to New Orleans. It was placed in the keeping of this accused, and he kept it if the bettor lost, or repaid it, together with the winnings, if the bettor won. It is clear to our minds that the money was hazarded in the house kept by Jones. The fact that Roots had the right to reject or accept an offer to bet makes no difference. The proof shows that he did accept bets from several of the witnesses, or, at least, that they were paid, or not, according to the result of the race. It seems to us that the whole system was a mere device or sham to evade the criminal law upon this subject, an effort to evade based upon a technical definition of the word "betting," and an artificial distinction as to where the bet was

¶ 1. See *Gaming*, vol. 24, Cent. Dig. § 122.

consummated. As was once said by Judge Bleckley: "It is something easier for an offender to baffle the dictionary than the Penal Code; for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men."

Judgment affirmed. All the Justices concurring.

(120 Ga. 127)

COOK v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

APPEAL AND ERROR—BILL OF EXCEPTIONS—TIME FOR FILING—STATUTES—AMENDMENT—DISMISSAL OF WRIT OF ERROR.

1. A bill of exceptions must be filed within 15 days from the date of the certificate of the judge in the clerk's office of the court whose judgment is sought to be reviewed. Section 1075 of the Penal Code, providing for fast bill of exceptions in criminal cases, while making no reference to the filing, does not alter or amend the general law (Civ. Code 1895, § 5554) as to the filing and time of filing of the bill of exceptions. It appearing that the bill of exceptions in this case was not filed within 15 days from the date of the certificate of the judge, a motion to dismiss the writ of error on this ground must be granted. Greer v. Prator, 59 Ga. 881; Vickers v. Sanders, 32 S. E. 102, 106 Ga. 265; Miller v. Blitch, 74 Ga. 361.

(Syllabus by the Court.)

Error from Superior Court, Butts County; H. M. Holden, Judge.

Dude Cook was convicted of a crime, and brings error. Writ dismissed.

C. L. Redman, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

EVANS, J. Writ of error dismissed. All the Justices concurring.

(120 Ga. 198)

BURDEN v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

INTOXICATING LIQUOR—ILLEGAL SALE—EVIDENCE—SUFFICIENCY—MOTION FOR NEW TRIAL—GROUNDS.

1. The special assignment of error that the evidence showed that the accused merely acted as the agent of the buyer in getting the whisky he was charged with unlawfully selling, and did not make a sale thereof or have any interest whatever in it, is embraced in the general grounds of the motion for a new trial, wherein complaint is made that there was not sufficient evidence to warrant a conviction.

2. The conviction cannot be held to be contrary to the evidence, it appearing that a witness for the state testified that he gave to the accused a certain sum of money, and a short while thereafter the accused delivered to him a quart of whisky, and it further appearing from the testimony of another witness that the accused, when asked "what he sold that liquor for," replied that he was drinking too much of it himself, and let the person to whom he was charged with selling it "have it to get rid of it." Though the accused, in his statement, undertook to explain that he acted merely as the agent of the purchaser, and bought the whisky from a named person who had the reputation of running a "blind tiger," the judge who tried the case was warranted in reaching the conclusion

that the explanation offered by the accused was a mere subterfuge to cover up an illegal sale really made by himself. Mack v. State, 42 S. E. 776, 116 Ga. 548.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Lem Burden was convicted of unlawfully selling liquor, and brings error. Affirmed.

H. J. Brewer, for plaintiff in error. T. J. Brown, Sol., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 176)

RAMFOS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—FURNISHING CIGARETTES TO MINORS—INSTRUCTIONS—NECESSITY OF REQUEST TO CHARGE—SUFFICIENCY OF EVIDENCE.

1. The charge of the court of which complaint is made stated accurately the law contained in section 497 of the Penal Code, prohibiting the furnishing of cigarettes to minors, with which offense the accused was charged. It does not appear that a request was made to charge on any special defense of the accused. The charge complained of was therefore not open to the objection that it eliminated the defense of the accused that the cigarettes were sold to the minor in his absence by one of his employees, against his positive instructions that no cigarettes should be sold to minors.

2. There was sufficient evidence to sustain the verdict finding the accused guilty, which was approved by the trial judge, and this court will not interfere with the judgment overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Oatham County; P. E. Seabrook, Judge.

John Ramfos was convicted of furnishing cigarettes to minors, and brings error. Affirmed.

R. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(120 Ga. 161)

SMITH v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL TRIAL—ARGUMENT OF COUNSEL—READING PORTIONS OF BOOK TO JURY—ASSIGNMENT OF ERROR—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. This court cannot say that it was error to refuse to allow counsel to read certain portions of a named book to the jury as part of his argument, when the assignment of error does not show, literally or in substance, what counsel desired to read. Cook v. Coffey, 30 S. E. 27, 103 Ga. 388.

2. Taken in connection with the entire charge, there was no error in any of the charges of which complaint was made. The verdict, if not demanded, was certainly authorized by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Robert Smith was convicted of a crime, and brings error. Affirmed.

W. D. Hamrick, S. J. Boykin, James Beall, R. D. Jackson, and W. F. Brown, for plaintiff in error. John C. Hart, Atty. Gen., and H. A. Hall, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 181)

POWELL v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—PREPONDERANCE OF EVIDENCE—CREDIBILITY OF WITNESSES.

1. The motion for a new trial does not complain that the court committed any error of law on the trial before the jury. There was a decided conflict in the evidence. The jury believed the testimony of a single witness offered by the state in preference to the statement of the accused and the evidence of two witnesses introduced in his behalf. This was their privilege under the law. The verdict was approved by the trial judge, and no legal reason appears why this court should set it aside.

2. If the witness for the state was to be believed, the profane language testified to have been used in her presence was entirely without provocation.

(Syllabus by the Court.)

Error from City Court of Americus; O. R. Crisp, Judge.

Tom Powell was convicted of a crime, and brings error. Affirmed.

Blalock & Cobb, for plaintiff in error. J. A. Ansley, Jr., Sol., and F. A. Hooper, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 973)

HATHCOCK v. McGOUIRK.

(Supreme Court of Georgia. May 11, 1904.)

QUO WARRANTO—TRIAL OF RIGHT TO OFFICE—APPLICATION—TRIAL—CONTINUANCE—SELECTION OF JURORS—REVIEW OF EVIDENCE—NECESSITY OF BRIEFING EVIDENCE.

1. It was not error to refuse a continuance because of the absence of a nonresident witness; nor because of the illness of the respondent's brother, the court assuring the respondent that, should he receive information that his brother's condition demanded his presence, the trial of the case would be suspended.

2. An application for leave to file a quo warranto, reciting that at an election for sheriff of a named county, held on a given day, the applicant received a majority of the votes cast, which fact was duly certified by the proper authorities; that, notwithstanding, his opponent was given a commission by the Governor of the state, under which he took possession of the office, and was exercising the privileges and receiving the emoluments thereof, without lawful authority and in utter disregard of the rights of the applicant; and that the term of office for which applicant was elected has not expired, etc.—is not demurrable on the ground that the application does not set forth a cause of action,

or on the ground that the superior court of that county is without jurisdiction to entertain the same, or on the ground that the applicant's remedy was to have contested the election, and the commission issued by the Governor to the respondent was conclusive as to his right to hold the office.

(a) The motion to dismiss the proceeding and the motion to vacate the order directing the writ to issue embraced substantially the same matters set up by way of demurrer, and were properly overruled by the court.

3. The jury provided for in section 4880 of the Civil Code of 1895 may be selected by drawing a panel of 36 jurors from the box, purging the panel, and reducing it to 24, and selecting the jury therefrom in the usual way; each party being allowed 6 peremptory challenges.

4. This court will not review the evidence in a case when it is apparent that there has been no bona fide effort to brief the evidence as required by law; nor will it undertake to pass upon assignments of error requiring a consideration of the evidence.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Application by C. W. McGouirk for writ of quo warranto against M. L. Hathcock to try title to the office of sheriff. Judgment for plaintiff, and defendant brings error. Affirmed.

B. G. Griggs and J. S. James, for plaintiff in error. J. H. Hall, J. H. McLarty, W. A. James, and W. K. Fielder, Sol. Gen., for defendant in error.

EVANS, J. C. W. McGouirk presented to the superior court of Douglas county an application for a writ of quo warranto to inquire into the right of M. L. Hathcock to the office of sheriff of that county, to which office the applicant claimed he had been duly elected on the first Wednesday in October, 1902. The court passed an order calling on Hathcock to show cause on the 11th day of April, 1903, why the writ should not issue, and service was perfected on Hathcock on April 6, 1903. On April 11, 1903, he appeared and filed both a demurrer and an answer. On the same day the applicant offered an amendment to his application, which was allowed over the defendant's objection. The hearing was then postponed until May 4, 1903, when the case was taken up in connection with other cases of like character, in one of which (that of Harding against Sayer) the court directed that an order be taken granting leave to file an information, "and also announced that similar judgment would be signed in this case." The order in the case of Harding against Sayer was accordingly prepared and signed, but no order in this case was signed until December 5, 1903, the court "anticipating the Sayer case would settle all the questions of law in this case," and nothing further was done until the day last named. On that day a hearing was had on the defendant's demurrer and answer, and the court passed an order overruling the demurrer on all the grounds therein contained, and adjudging and directing that the appli-

cant "have leave to file said information in the nature of the writ of quo warranto to inquire into the right and title of the said M. L. Hathcock to the office of sheriff of Douglas county for the term of two years from the 1st day of January, 1903." The court further adjudged that a question of fact was made by the pleadings, and directed that a jury be drawn as provided by law for the trial of said issue of fact, and that the clerk of the superior court of Douglas county, upon the filing of the information, issue a writ of quo warranto, to be directed to the respondent, requiring him to appear at a special court to be held on the 21st day of December, 1903, and file his answer to said information, and to try the issues of fact as provided by law. The order of the court further directed that Hathcock be served with a copy of the writ of quo warranto and information 10 days before the time set for the hearing. On December 21, 1903, he appeared and filed a motion to vacate and set aside the order passed on December 5th, and also filed a demurrer and answer to the information brought in pursuance of that order, as well as a motion to dismiss the proceeding. The hearing was, by order of the court, continued until January 14, 1904, when the motion to vacate, the demurrer, and the motion to dismiss were heard and overruled. On January 15th, when the case was called for trial, the defendant moved for a continuance, which was refused, and the case proceeded to a trial on its merits. The jury returned a verdict in favor of McGouirk. The defendant, Hathcock, thereupon made a motion for a new trial, to which an amendment was subsequently offered and allowed. This motion came on to be heard on January 25, 1904, and on that day the court passed an order overruling the same. On the last-named day Hathcock presented his bill of exceptions, which was duly signed by the judge, and therein assigned error on all the rulings above referred to which were adverse to him. The questions presented by his demurrers and the several motions made by him, including the motion for a new trial, will appear from the discussion of the case which follows, and it is needless to set forth at length the various grounds of these demurrers and motions. The issues raised by the pleadings of the plaintiff and the answers of the defendant will be likewise made to sufficiently appear.

1. Complaint is made by the plaintiff in error that the trial judge improperly refused to grant a continuance because of the absence of a witness. It appears from the record that the absent witness did not reside in the county. So there is no merit in this complaint. A continuance was also asked because of the illness of the respondent's brother. The court assured respondent that, should he receive information that his brother's condition demanded his presence, he would suspend the case. The court did not abuse

his discretion in refusing to grant a continuance on this ground.

2. It was insisted by the defendant below that the application for leave to file an information in the nature of a quo warranto set forth facts disclosing that the court was without jurisdiction in the premises, inasmuch as the action of the Governor in issuing a commission to Hathcock was conclusive, and could not be inquired into by the courts; that the statutory remedy of contest was exclusive; and that the facts alleged were insufficient to authorize the granting of the applicant's prayer that a writ of quo warranto issue. In brief, the application alleged that at an election for the office of sheriff held in the county of Douglas on the first Wednesday in October, 1902, applicant received 862 votes, and M. L. Hathcock received 755 votes; that after the election the votes were consolidated by the managers thereof, in accordance with the statutes made and provided in such cases, and it appeared from the consolidated returns made by the managers who held the election at the various voting precincts in the county that the applicant had received the votes of 862 legally qualified voters of the county, whereas the said Hathcock had received the votes of only 755 voters of the county; that, from the consolidated returns made by the managers of the election in the manner prescribed by law, the applicant had a majority of 107 votes of the legal voters of said county, and was duly elected sheriff of the county for a term of two years from the 1st day of January, 1903, but notwithstanding his opponent, Hathcock, failed to receive a majority of the votes cast at the election, he was, without legal warrant or authority, commissioned as sheriff of said county for a term of two years from the 1st day of January, 1903, and the said Hathcock now holds the commission issued to him, and is in possession of the office of sheriff, discharging the duties thereof, and enjoying all the emoluments, profits, and honors of that office, despite the fact that applicant was legally elected to said office in the manner provided for by the laws of this state, and has a full and complete title thereto; that he has been illegally and wrongfully ejected from said office by the said Hathcock, who illegally and fraudulently obtained the commission thereto which authorizes him to discharge the duties of the same, and to receive the profits, emoluments, and honors thereof; that the said Hathcock is usurping, by virtue of said commission, the said office, together with all of its privileges, honors, and profits; that said office is one of profit, and the term for which applicant was elected thereto has not yet expired; that he has a property right therein, and is being deprived of his property right in said office by the illegal acts and usurpations of the said Hathcock, as aforesaid. Attached to this application was a copy of the consolidated returns of the election, show-

ing the number of votes cast, respectively, for the applicant and his defeated opponent. The application closed with a prayer that a rule nisi be directed to M. L. Hathcock, requiring him to show cause, at such time and place as the court might fix, why an information should not be filed against him, and the state's writ of quo warranto issue to determine what right and title he has to the office of sheriff, as aforesaid, and by what authority he is exercising the rights of said office. In an amendment to his application, which was allowed, the applicant alleged that notwithstanding the fact that he received the majority of the votes of the lawful voters cast at said election, and notwithstanding the returns of said election, regularly made as required by law by the duly constituted officers to hold the election, on their face showed that he had received a majority of the votes of the duly qualified voters which had been cast at said election, and notwithstanding a true copy of said returns had been, previously to the issuing of said commission to Hathcock, filed with the Governor of the state, the said Governor, contrary to law and in utter disregard of the rights of applicant, illegally and wrongfully issued to Hathcock the commission of sheriff of said county of Douglas.

Substantially the same objections raised by the demurrers were asserted in the motion to dismiss and the motion to vacate the order overruling the first demurrer. Both the application for leave to file and the information distinctly allege that applicant received a majority of the legal votes cast in the election, and no hint from the pleadings of applicant would suggest the slightest color of authority for respondent to hold the office. In all of the reported cases in this state the defeated candidate was attempting by quo warranto to either declare the office vacant, or sustain his right to the same because of certain alleged matters debors the certificate of the consolidating board declaring the election of his opponent. The case at bar, on the pleadings of applicant, is that of a successful candidate receiving a majority of the votes cast in the election; his election legally declared by the board of consolidation, and duly certified to the Governor; and the issuance of a commission to his defeated adversary by the Governor without authority of law, and in utter disregard of his right to the office. It needs no argument to sustain the contention that in such a case the appropriate remedy is by quo warranto proceedings. Civ. Code 1895, § 4878; High's Ex. L. Rem. § 639a. The issuance by the Governor of a commission, since the act of 1893, providing that in contested election cases the issues shall be adjudicated by the judge of the superior court, is a ministerial act. His duty is to issue the commission to the person whose election is certified by the proper authorities, in cases where there is no contest, and, where there has been a

contest, to the person adjudged by the special tribunal to determine the result by contest proceedings as entitled to the commission. Even when the Governor was the official to pass on the issues made in a proceeding of contest, it was held that a commission was not conclusive as to matters not passed upon by the Governor. *Corbitt v. McDaniel*, 77 Ga. 544, 2 S. E. 692. But where every right to the commission was in the applicant, and respondent was a usurper, according to the pleadings of applicant, it cannot be said that the illegal issuance of the commission would deprive applicant from appealing to the court to prevent a usurpation of office. It may be that the Governor was fully justified in issuing the commission to Hathcock, but this could be urged as matter of defense. The demurrer admits all facts well pleaded, and the allegations of both the application and the information clearly show the election of McGouirk, and the improper issuance of commission to Hathcock. It is only in cases where the election board, or the tribunal to try contest proceedings, certifies that a named person has received a majority of the votes cast at an election, and the Governor issues a commission on such certificate, that it has been held that a commission thus regularly issued is final.

Another objection urged in the demurrer was that the exclusive remedy of applicant was to have contested the election. It would seem absurd to say to a successful candidate for office, who has received a majority of the votes, and who has been declared entitled to the office by the board of managers consolidating the election returns, that before he is entitled to the office he must file contest proceedings against his defeated adversary. The successful candidate is never the contestant. The certificate of the board of consolidation gives him a prima facie right to the office. But the defeated candidate may contest, and the result of such a proceeding is conclusive as to the person elected and entitled to the office. However, this is not the case raised in the pleadings by demurrer.

Where the purpose is to declare the office vacant, any citizen and taxpayer may file a proceeding in the nature of quo warranto. If the relator happens to be the defeated candidate, his right to file the information is in his capacity as an interested citizen, and not in his capacity of a defeated candidate. In the character of defeated candidate, he can claim no more than the right to have the opportunity to institute quo warranto proceedings against his opponent, who was illegally installed in office, for the purpose of ousting him. *Howell v. Pate*, 119 Ga. 537, 46 S. E. 667; *Davis v. City Council*, 90 Ga. 824, 17 S. E. 110.

When a defeated candidate wishes to assert his claim that he received a majority of the legal votes cast at an election, he

must avail himself of his statutory remedy of contest. His right to the office must appear from the judgment or order of the proper tribunal vested by law with the authority of going behind the return of the election managers, and declaring the true result of the election to be that he had received a majority of the legal votes cast. Until the defeated candidate has in this way established his right to the office, he cannot by quo warranto seek the ouster of his opponent and his own induction into office. From what has been said, we conclude that the court was right in overruling the various demurrers and motions.

3. When the judge determined that the answer to the information raised an issue of fact, he passed an order for a special term of court to try the same, and in this order directed that a jury be drawn as provided by law. Pursuant thereto, 36 jurors were drawn from the box, from which number a panel of 24 was made up, and the jury was selected from this panel in the usual way. Plaintiff in error contends that the judge did not have the authority to draw more than 12 names from the box, under Civ. Code 1895, § 4880, and the drawing of a larger number denied him the right of a trial by the jury provided for by the statute. Prior to the act of 1868, which is codified in section 4880, the practice in mandamus, prohibition, and quo warranto was uniform, and all issues of fact were tried in term time. The act of 1868 made an exception of quo warranto, and provided for a more speedy trial at a special term of court, to be called not less than 10 nor longer than 30 days after the judge had determined that the information and answer made an issue of fact. The evident purpose of the Legislature was to provide a more speedy trial in this kind of cases, and the machinery devised was to effectuate such purpose. To some extent there was a variance from the general procedure—notably in the provision for trial at a special term, and the abolition of all distinction between appearance and trial terms. *W. & A. R. R. v. State*, 69 Ga. 531. Except as otherwise provided, the general law of practice and procedure was applicable. It will be observed that no provision was made for supplying this panel to the number of 12 in case of its depletion from any cause, nor was either party given the right of peremptory challenge. The act of 1878, codified in Pen. Code 1895, § 854, broadly gives to each litigant in every civil case the right to demand a full panel of 24 competent and impartial jurors from which to strike a jury. While the section just cited says that each party may demand a full panel of 24, the act from which the section is codified distinctly states that in all civil cases any party shall have the right to demand a full panel of 24 competent and impartial jurors from which to strike a jury. This section is applicable to all civil cases,

and embraces in its broad provisions the practice in the trial of quo warranto proceedings. Therefore, construing these sections together, as well as all other kindred sections, we hold that the judge is not limited to the drawing of 12 men by Civ. Code 1895, § 4880, but, in his discretion, may draw 36, so as to allow the selection of a jury as in ordinary cases. This construction gives effect to the wise policy of uniformity of procedure, accords to each party six peremptory challenges, and does not withdraw any right or privilege from the litigants.

4. None of the other assignments of error can be intelligently passed on without reference to the evidence adduced on the hearing below. No bona fide effort to comply with the statute as to making a brief of the evidence appears to have been made in this case. "This court will not review the evidence in a case when it is apparent that there has been no bona fide effort to brief the evidence as required by law, and when the document purporting to be a brief of the evidence is extensively interspersed with objections to testimony, statements and arguments of counsel, and evidence to which objections were sustained, and also with colloquies between counsel and court, none of which should properly find place in a brief of evidence." *Culver v. Silver*, 113 Ga. 1142, 39 S. E. 472. Nor, in such a case as the present, can this court undertake to "pass upon assignments of error requiring a consideration of evidence." *Carmichael v. State*, 111 Ga. 653, 36 S. E. 872.

Judgment affirmed. All the Justices concurring.

(129 Ga. 132)

THOMPSON v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

PERJURY—FALSE SCHOOL REPORT—CRIMINAL TRIAL—PAROL EVIDENCE—INSTRUCTIONS—NEW TRIAL—SUFFICIENCY OF EVIDENCE.

1. In an indictment for false swearing it is not necessary to allege expressly that the oath was taken not in a judicial proceeding, when the facts set out in the indictment show this unequivocally.

2. Where, on the trial of one accused of false swearing, it appears that he had sworn to a report of several pages, one of such pages is not inadmissible in evidence because the accused had previously sworn to it before another attesting officer. The first oath did not affect the falsity of the second, nor render the page inadmissible. Nor was it error to admit parol evidence to the effect that the oath of the accused, subscribed to the report, was to the entire report, including the page just referred to.

3. One indicted for false swearing may be convicted although it appear that the officer who administered the oath knew at the time that it was false, and made to obtain funds to which the affiant was not entitled, and such officer administered the oath for the purpose of instituting criminal proceedings.

4. Where a school-teacher is indicted for swearing to a false school report, and such report is lost, upon the trial of the teacher under

another indictment for the same offense the first indictment is admissible in evidence to show the contents of the lost report, when there is evidence that certain names in the report and in the first indictment were identical.

5. A new trial will not be ordered because of the failure of the trial judge to instruct the jury as to the form of their verdict, when it appears that in concluding his charge he stated that, in the event the jury entertained a reasonable doubt as to any material issue in the case, they should return a verdict of acquittal; but that, if they had no such doubt, they should find the accused guilty.

6. There was no error in the rulings of which complaint was made, and the evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

B. W. Thompson was convicted of false swearing, and brings error. Affirmed.

S. M. Varnadoe and Wilcox & Johnson, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 188)

LITTLE v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—NEW TRIAL—DISCRETION OF COURT.

1. There was no error of law complained of. The evidence was sufficient to warrant the verdict, and the discretion of the trial judge in refusing to grant a new trial will not be controlled.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

John Little was convicted of crime, and brings error. Affirmed.

S. C. Crane, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 190)

THOMPKINS v. CITY OF NEWMAN.

(Supreme Court of Georgia. May 10, 1904.)

EVIDENCE—SUFFICIENCY.

1. The evidence authorized the judgment, and there was no error in overruling the certiorari. (Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Lee Thompkins brings certiorari to review a judgment convicting him of an offense, and on overruling of the certiorari brings error. Affirmed.

A. H. Freeman, for plaintiff in error. W. M. Glass, for defendant in error.

COBB, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 964)

MORGAN v. STATE.

(Supreme Court of Georgia. May 11, 1904.)

CRIMINAL LAW—FORMER JEOPARDY—CARRYING CONCEALED WEAPON—NATURE OF OFFENSE—INDICTMENT.

1. Where two indictments were found against the accused at the same term of the court, one charging him with carrying a concealed pistol on a given date in the presence of A., and the other charging him with carrying a concealed pistol on a different date in the presence of B., prima facie each indictment charged a separate and distinct offense from the one charged in the other.

2. Therefore a conviction under the one charging the offense to have been committed in the presence of A. was no bar to a prosecution under the one charging such an offense to have been committed in the presence of B., unless it appeared from the evidence that the charges referred to the same transaction, or that A. was present during the same carrying of the pistol concealed which occurred in the presence of B.

3. A person may commit but one offense of carrying a weapon concealed upon his person, although he carries it thus concealed from place to place in the presence of different people at the different places; but, whenever the continuity of the act constituting the offense is broken, that particular offense is at an end, and another like offense is committed when the weapon is again concealed by him upon his person.

4. The evidence submitted failed to sustain the plea of former conviction, and there was therefore no error in finding against such plea.

Simmons, C. J., and Candler, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

W. M. F. Morgan was convicted of carrying a concealed weapon, and brings error. Affirmed.

W. E. Mann and R. J. & J. McCamy, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

FISH, P. J. At the April term, 1902, of the superior court of Whitfield county, two indictments were returned against W. M. F. Morgan. In one he was charged with having and carrying about his person a concealed pistol, in said county, on December 25, 1901, "in the presence of Deering Hughes." The other indictment charged that on December 26, 1901, he carried about his person a concealed pistol "in the presence of T. L. Ballinger, Louis Roy, E. E. Whittle, Charlie Roberts, and Bob King." At the October term, 1902, the accused was tried and convicted under the last-mentioned indictment. On the call of the case based on the first-mentioned indictment, at the October term, 1903, the accused filed a plea of former conviction, with the usual allegations, and having attached thereto a copy of the record in the case in which he had been convicted. By consent the issue made by this plea was submitted to the court for trial upon the following agreed statement of facts: "The defendant had a pistol concealed in his pocket on the day charged in the indictment in the presence of the person named in the present

bill of indictment, when the pistol fell out of his pocket, and he picked it up and put it back in his pocket. A short while thereafter he left and went to his home in the little town of Cohutta, where he is charged in both indictments with carrying a pistol. On the trial of the case pleaded in bar, it was shown that defendant, after coming into his house, took the pistol out of his pocket after he arrived at home, and laid it up on the mantel in the presence of other witnesses, sat by the fire and talked with those present, including the state's witnesses, put the pistol in his pocket, and went out with it. All of this was done in the same day, and within an hour or two of the same time." It was further agreed that, should the plea be sustained by the court, the case then on trial should be dismissed, and, if the judgment of the court should be against the plea, then the accused might take the case to the Supreme Court. The court found against the plea, and the accused excepted.

1. An indictment for carrying a concealed pistol may charge the commission of the offense in general terms, and be good. In such a case the state may prove the commission of the offense at any time within two years next preceding the finding of the indictment, but the accused will be protected from any other prosecution for having carried a pistol concealed about his person within that period. *McWilliams v. State*, 110 Ga. 290, 34 S. E. 1016, and cases cited. If, however, in an indictment for carrying a concealed pistol, the descriptive averments are so specific as to charge a distinct carrying of a concealed pistol on a particular occasion, then the state is confined to proof of the specific offense therein charged, and in such a case the accused would not be put in jeopardy of being convicted for having carried a pistol concealed, at another time and under different circumstances, within two years prior to the finding of the indictment. The main question in this case is whether the descriptive averments in each of these indictments were sufficiently specific to charge a separate and distinct offense from that charged in the other. We think they were. It has been several times held by this court that an indictment for the unlawful sale of spirituous liquor need not allege the name of the person to whom the liquor is charged to have been sold. *Newman v. State*, 101 Ga. 534, 28 S. E. 1005, and cases cited. Where one is tried on an indictment "not charging any particular person to whom such sale was made, or specifying any particular occasion on which it took place," the accused is thereby placed in jeopardy for unlawfully selling such liquor to any person within the period of the statute of limitation. *Craig v. State*, 108 Ga. 776, 33 S. E. 653. Even where an indictment for such an offense charges the sale to have been made to a named person on a given day, the state may prove a sale to such person at any time within the period of limitation. *Reyn-*

olds v. State, 114 Ga. 265, 40 S. E. 234. There is a clear intimation in the last two cases cited that, if an indictment for the unlawful sale of intoxicating liquors charged that the sale was made to a named person, the state would be limited to proof of a sale to such person. So, where the place where the offense is alleged to have been committed is stated in the indictment as matter of local description, or, as Blackstone puts it, "part of the description of the fact" (4 Bl. Com. 306), and not as venue, it is necessary to prove it as laid, though such averment might not have been necessary. See *Minter v. State*, 104 Ga. 753, 30 S. E. 980. We are of opinion that, by analogy, an averment in an indictment for carrying a concealed weapon that the offense was committed in the presence of a named person or named persons is a part of the description of the act charged, and is sufficiently specific to charge a particular and distinct offense.

2-4. Although each of the indictments charged a separate and distinct offense from the one charged in the other, yet, if the accused, under his plea of former conviction, had shown that the same transaction was referred to in both indictments, or that the persons in whose presence the indictment under which he had been convicted alleged that the pistol was carried concealed were present on both occasions, his plea should have been sustained. Did the agreed statement of facts show either that the transactions alleged in the two indictments were the same, or that the persons alleged in the indictment under which he was convicted to have been present when the offense was committed were present during the commission of the offense committed in the presence of Hughes? We are clearly of opinion that it did not. From this statement of facts, it appears that the accused at one place had a pistol concealed on his person in the presence of Deering Hughes, "when the pistol fell out of his pocket, and he picked it up and put it back in his pocket." From so much of this agreed statement, we think it is evident that the accused, in the presence of Hughes, committed two offenses of carrying a pistol concealed, the first of which terminated when the pistol fell from the pocket of the accused, and was exposed to view elsewhere than on his person. The second offense was committed when the accused picked the pistol up from the place where it had fallen and put it back in his pocket. A person may commit but one offense of carrying a weapon concealed upon his person, although he carries it thus concealed for many hours, because the nature of the offense is such that it may be continuously committed; but, whenever the continuity of the act constituting the offense is broken, that particular offense is at an end, and another like offense is committed when the weapon is again concealed by him on his person. So, from the agreed facts, it appears that the accused, at another

place—his home—in the presence of Ballinger and the other person mentioned in the indictment under which he was convicted, committed two separate and distinct offenses of carrying a pistol concealed upon his person. He committed one offense in the presence of these persons when he came into his house, and into their presence, with the pistol concealed upon his person, and this offense was terminated when he took the pistol from his pocket and placed it upon the mantel. He committed another like offense in their presence when he subsequently took the pistol from the mantel, and again concealed it upon his person and went out of the house. Carrying a concealed weapon is not only an offense which may be continuously committed, but it is also transitory in its nature, so that the same act of carrying the weapon unlawfully may be continuously performed from place to place and in the presence of different people at the different places. It does not, however, appear from the agreed statement of facts that Ballinger and the other persons mentioned as being present at the commission of the offense charged in the indictment upon which the conviction was had were present on the occasion when, in the presence of Hughes, the pistol fell out of the pocket of the accused, and he picked it up and put it back therein. Nor does it appear that the second act of carrying the pistol concealed, committed by the accused in the presence of Hughes, was continued or prolonged until it was terminated in the presence of Ballinger and others. It may be that Hughes witnessed the beginning, and these other persons the termination, of one of the offenses of carrying a concealed pistol, committed by the accused. If this is true, then the accused, under the agreed facts, when tried under the indictment describing the offense to have been committed in the presence of Ballinger and others, was placed in jeopardy of being convicted of an offense described in the other indictment. But we think, in order for the accused to establish that he was placed in such jeopardy, it was incumbent on him to show that from the time he, in the presence of Hughes, picked the pistol up and put it back into his pocket, he continuously carried it concealed on his person, until he took it out of his pocket in the presence of Ballinger and others; and the agreed statement of facts does not show this. Even if the agreed statement of facts did show that the last offense committed in the presence of Hughes and the first offense committed in the presence of Ballinger and others were the same, still the state would not be prevented from prosecuting the accused for the first offense committed in the presence of Hughes, for that offense was clearly terminated before the accused went to his home and there took the pistol from his pocket in the presence of Ballinger and the other persons mentioned in the indictment under which the conviction was had; but,

in such event the state would be confined to evidence showing this first offense committed in the presence of Hughes. Under the evidence submitted, the court did not err in finding against the plea of former conviction.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., and CANDLER, J., dissenting, and EVANS, J., not presiding.

CANDLER, J. An indictment which charges the accused with having and carrying about his person, not in an open manner and fully exposed to view, a certain pistol, in the presence of a named person, is in effect a general indictment for carrying concealed weapons on the day set out. The presence of a witness to the offense is in no sense necessary to the commission of the crime, and an allegation that a named witness was present does not serve to fix the time, place, or circumstances of the transaction. Such an allegation in an indictment should therefore be treated as surplusage. 10 Enc. Pl. & Pr. 530. And where the indictment contains nothing further to fix with particularity the offense charged, it is, as before stated, general in its nature, and a conviction under it will bar a subsequent conviction under another indictment for carrying concealed weapons; it appearing from the agreed statement of facts on the second trial that the offense therein charged was committed on the same day as the one of which the accused had formerly been convicted. *Bryant v. State*, 97 Ga. 105, 25 S. E. 450; *McWilliams v. State*, 110 Ga. 290, 34 S. E. 1016.

SIMMONS, C. J. I agree with the views as expressed above by Mr. Justice CANDLER.

(120 Ga. 228)

SEABOARD AIR LINE RY. v. BLUE.

(Supreme Court of Georgia. May 12, 1904.)

CERTIORARI—REVIEW OF JUDGMENT.

1. "When the only error alleged in a petition for certiorari is that the verdict therein complained of is contrary to law and to the evidence, and it appears that the evidence demanded a verdict for the plaintiff in certiorari, the superior court should, of course, sustain the certiorari; but it would be erroneous in such a case, though there be no conflict in the evidence, to render a final judgment in his favor. This is so for the reason that in such a case the error complained of is not 'an error in law which must finally govern the case,' and, further, because it could not be known with certainty that the evidence on another trial would be the same." *Holmes v. Pye & Co.*, 33 S. E. 816, 107 Ga. 784. See, also, *Ala. Great Southern R. R. Co. v. Austin*, 37 S. E. 91, 112 Ga. 61; *Williams v. Bradfield*, 43 S. E. 57, 116 Ga. 705. The court below properly declined to render a final judgment in the present case.

(Syllabus by the Court.)

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action between the Seaboard Air Line Railway and Phyllis Blue. A writ of certio-

rari was sustained by the superior court, and the railway company brings error. Affirmed.

J. Randolph Anderson, for plaintiff in error. A. S. Way, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 25)

RAY v. RAY.

(Supreme Court of Georgia. May 11, 1904.)

DIVORCE—TEMPORARY ALIMONY—ATTORNEY'S FEES—DISCRETION OF COURT.

1. While there was strong circumstantial evidence to the effect that subsequently to the separation of the parties the wife had been guilty of adultery, there was also evidence to contradict this contention; and it cannot be said that the court abused its discretion in awarding the plaintiff temporary alimony and attorney's fees.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. T. Gary, Judge.

Action by Wilhelmina Ray against J. H. Ray. Judgment for plaintiff, and defendant brings error. Affirmed.

Sam F. Garlington, for plaintiff in error. Johnson & Young and C. E. Dunbar, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 225)

SIMMONS v. SEABOARD AIR LINE RY.

(Supreme Court of Georgia. May 12, 1904.)

CARRIERS—INJURY TO PASSENGER—ALIGHTING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

1. If, with a clear chance to avoid the consequences of defendant's negligence or breach of duty, the plaintiff voluntarily assumes the risk occasioned thereby, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating the right to recover.

2. The fact that in stepping from a moving train the plaintiff may not have been guilty of negligence defeating his right to recover, does not entitle him to a verdict, unless it also appears that the carrier was at the time guilty of negligence which was the proximate cause of the plaintiff's injury.

3. The court below did not err in sustaining the demurrer, it appearing from the allegations in the petition that the plaintiff was not injured as the result of any negligence or breach of duty on the part of the carrier, but with full opportunity to escape the consequences of any prior acts complained of, and with a clear chance to avoid the danger, he voluntarily assumed the risk attendant upon leaving a moving car at night beyond the station, at a point where there was no implied invitation to alight.

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by W. S. Simmons against the Seaboard Air Line Railway. A demurrer to the complaint was sustained, and plaintiff brings error. Affirmed.

The plaintiff sued for injuries received while alighting from a moving train. He alleges that he notified the conductor of his desire to get off at Meldrim; that he reached there at night; that the conductor, contrary to his duty and the custom of the company, failed to announce the station; that, after the train had stopped at Meldrim, it started, and moved slowly forward, when petitioner, happening to look out of the widow of the coach, discovered that the train was moving from the station, when he immediately proceeded to the platform and down the steps, and while in the act of stepping off discovered baggage and other obstructions; that the conductor, who was a few feet away, with a lantern in his hand, "in clear view of petitioner," signaled the train to go forward, which it did; that as soon as the step cleared the obstruction petitioner proceeded to step to the ground, and while so doing the engine jerked the train forward, throwing petitioner on the rocks beneath, inflicting the injuries sued for. The court sustained the demurrer, and the plaintiff excepted.

R. W. Sheppard and D. H. Clark, for plaintiff in error. J. Randolph Anderson, for defendant in error.

LAMAR, J. In numerous cases cited by the plaintiff it has been held by this and other courts that it is ordinarily a question for the jury to determine whether it is negligence, barring a recovery, for a passenger to step from a moving train. In several instances such conduct was held not to prevent a recovery where the passenger was injured as the result of a sudden or negligent jerk given the train while he was in the act of alighting. *Atlanta Railway Co. v. Randall*, 117 Ga. 166, 43 S. E. 412; *Central Railroad v. Whitehead*, 74 Ga. 453; *Walters v. Collins Park R. Co.*, 95 Ga. 519, 20 S. E. 497; *Poole v. Georgia R. Co.*, 89 Ga. 320, 15 S. E. 321; *Central R. Co. v. McKinney*, 118 Ga. 537, 45 S. E. 430; *Suber v. Georgia, C. & N. R. Co.*, 96 Ga. 43, 23 S. E. 387; *Augusta Sou. Ry. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005. But in all these cases it will be seen that the mere fact that the passenger may not have been guilty of negligence was not the basis of his right to recover. Even if he was free from fault in stepping from the moving train, that did not make the company liable. It had also to appear that the carrier was guilty of negligence, and that negligence must have been shown to be the cause—the proximate cause—of the injury. *Hardwick v. Georgia R. Co.*, 85 Ga. 509, 11 S. E. 832. Here the company was bound to announce the station. Its failure so to do might have given rise to a cause of action in favor of the plaintiff for the loss of time, inconvenience, labor of traveling back, expenses, and all proximate damages consequent on his being carried past his destination. *Watson v. Georgia Pacific Ry. Co.*, 81 Ga. 476, 7 S. E. 854. If the petition is

construed most favorably for the pleader, and to mean, not that the plaintiff saw the conductor, but that the conductor saw the passenger attempting to alight from the moving train, it was an act of negligence to signal the engineer forward. The conductor had no right to add to the danger, or to increase the peril of one leaving a train under the circumstances alleged in the petition. And if the plaintiff had been injured as a result of a jerk so caused, and the plaintiff then or thereafter had no opportunity to avoid the consequences of the alleged negligent signaling, the company would have been liable, in view of the other facts stated.

But the petition claims no damages and sets out no cause of action by reason of the failure to announce the station, nor on account of the signal to go forward. Neither of these acts caused any personal injury to the plaintiff. After he saw the signal given, he remained unharmed on the lower step, waiting for the car to pass the obstruction on the station platform. If it was negligence for the train to proceed, the plaintiff had full notice that there was no intention to stop. He was bound to know that, in ordinary course, the speed would increase, and that the jars and jolts incident to railroad transportation might be expected. With such knowledge he chose to remain on the bottom step until the car passed the obstruction on the platform, and reached a point where, because of the rocks, there was evidently no implied invitation to alight. He was beyond the station, attempting to get off, when the jerk, not alleged to be negligent, and to be expected as usual, precipitated him upon the ground to his injury. Howsoever negligent the defendant may have been in failing to announce the station, in failing to stop the train, in failing to afford the plaintiff a reasonable opportunity to alight, or in signaling the engineer forward, such conduct was not the proximate cause of plaintiff's hurt. The plaintiff had a full opportunity to escape the consequences of all the prior acts of negligence alleged. He had a "clear chance" to return to the car after he knew that the train had been signaled not to stop. He had a "clear chance" to avoid the danger of remaining on the lower steps of a train in motion, the speed of which he knew would increase with the consequent jars and jolts incident to travel by rail. With such clear chance, he chose not to avoid, but to risk, the danger. See note to 55 L. R. A. 418; 1 Shear. & Redf. Neg. § 99, p. 154. This was not contributory negligence lessening the damages, but the failure to avoid a known danger, which defeats his right to recover. Civ. Code 1895, § 3830; *Mansfield v. Richardson*, 118 Ga. 251, 45 S. E. 269. He stepped in the dark from a moving train, when there was no urgent necessity. The carrier did not cause the injury, and is therefore not liable in damages. Jar-

rett v. Atlanta & West Point R. Co., 83 Ga. 247, 9 S. E. 681; *Western & A. R. Co. v. Goodwin*, 105 Ga. 237, 31 S. E. 157. The judge of the superior court did not err in sustaining the demurrer.

Judgment affirmed. All the Justices concurring.

GAINES v. STATE.

(120 Ga. 172)

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—REVIEW—OBJECTIONS NOT RAISED ON TRIAL.

1. The alleged newly discovered evidence related to facts which were necessarily within the knowledge of the accused at the time of the trial. Besides, there was a want of the showing required by Civ. Code 1895, § 5481.

2. At the time of its introduction the defendant made no objection to the evidence alleged in the motion for a new trial to have been illegally admitted. Such an issue cannot be first raised on review.

3. The evidence as to the age of the defendant and his capacity to commit the crime charged was sufficient to sustain the verdict.

4. The trial judge approved the finding of the jury, the evidence being sufficient to warrant the verdict of guilty, and, there being no assignment of error as to the charge or any ruling of the court, the judgment is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Dock Gaines was convicted of a crime, and brings error. Affirmed.

A. R. Logan, for plaintiff in error. John O. Hart, Atty. Gen., and F. A. Hooper, Sol. Gen., for the State.

LAMAR, J. Affirmed. All the Justices concurring.

COLLIER v. STATE.

(120 Ga. 127)

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—CORPUS DELICTI—EVIDENCE—REFUSAL OF NEW TRIAL—DISCRETION OF COURT—REVIEW.

1. There was no complaint of any ruling or charge. The corpus delicti was established. The evidence, while conflicting, was sufficient to warrant the verdict; and, the same having been approved by the trial judge, this court will not interfere with his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

London Collier was convicted of a crime, and brings error. Affirmed.

W. M. Harper and J. A. Hixon, for plaintiff in error. F. A. Hooper, Sol. Gen., and J. A. Ansley, Jr., Sol., for the State.

LAMAR, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 139)

LEPS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

**LICENSE TAX—AGENT OF PACKING HOUSE—
FAILURE TO PAY TAX—CONSTITUTIONAL LAW
—CRIMINAL RESPONSIBILITY—INDICTMENT—
ADMISSIBILITY OF EVIDENCE.**

1. An indictment which charges that the accused conducted the business of agent of "the Armour Packing Company, a packing house," without having registered with the ordinary and paid the tax required by the statute, is not defective in failing to allege that the Armour Packing Company is a corporation.

2. On the trial of such an indictment it is not error to admit in evidence waybills of cars loaded with packing house products consigned to the packing company, the effect of this evidence, in connection with other evidence introduced by the state, being to show that the accused paid the freight on the goods loaded in the cars, had them stored in a warehouse of the packing company, and otherwise acted as its agent.

3. The evidence fully warranted the verdict, and the constitutionality of the law under which the accused was tried is conclusively settled by the decision of this court in the case of *Kehrer v. Stewart*, 44 S. E. 854, 117 Ga. 969.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

J. E. Leps was convicted for failure to pay a special tax, and brings error. Affirmed.

A. S. J. Hall and Felder & Rountree, for plaintiff in error. B. F. Simpson, Sol. Gen., for the State.

CANDLER, J. Leps was indicted, as the agent of a packing house, for failing to register with the ordinary and pay the special tax of \$200 required by the general tax act of 1900, § 2, par. 19 (Acts 1900, pp. 25, 26). He demurred to the indictment, his demurrer was overruled, and he excepted *pendente lite*. At the term at which his demurrer was filed he was tried and found guilty. He made a motion for a new trial, which was granted, and at the fall term, 1903, of Fannin superior court, he was again tried and again convicted. His second motion for a new trial was overruled, and this, as well as the overruling of his demurrer to the indictment, is assigned as error in the bill of exceptions brought to this court.

1. In passing upon the points raised by the demurrer, it will not be necessary to set out either the charge made by the indictment nor all the grounds of the demurrer. At the time the demurrer was filed this court had not decided the case of *Kehrer v. Stewart*, 117 Ga. 969, 44 S. E. 854, which is controlling of the principal questions thereby made, and on the argument in this court those questions were abandoned. The indictment alleges that the accused was "the individual agent of the Armour Packing Company, a packing house," and one ground of the demurrer attacks the indictment as being defective, in that it contained no allegation that

the Armour Packing Company was a corporation. This question is settled adversely to the contentions of the accused by the decision of this court in *Mattox v. State*, 115 Ga. 219, 41 S. E. 709. There the accused was charged with simple larceny, the indictment alleging that the property stolen was "the personal goods of the Acme Brewing Company." A demurrer to the indictment was filed, on the ground that "it did not set forth the ownership of the property alleged to have been stolen, that the term 'Acme Brewing Company' was not the name of an individual, and that it did not import either a partnership or a corporation." This court held that the demurrer was without merit, and in the opinion Mr. Justice Cobb said: "The indictment does not show by allegation whether [the Acme Brewing Company] is a corporation or partnership. The name is of a character which is more appropriate to a corporation than a partnership, though partnerships are sometimes formed under names which would be appropriate to corporations. The name being one more peculiarly suited to a corporation than a partnership, the presumption would be that it was the name of a corporation. The name itself imports a business corporation. When the name of a party to a suit is such as to import that the party is a corporation, there is a presumption to this effect, and this presumption prevails until the contrary is made to appear." See, also, the authorities cited to sustain the decision there made. Following this case, we hold that the ground of the demurrer noted presented no valid objection to the legal sufficiency of the indictment.

We are equally clear that there is no merit in the other grounds of the demurrer, which set up in a general way that the allegations of the indictment are insufficient in law and do not charge any offense against the laws of Georgia. The act of the General Assembly on which the indictment was based makes it a misdemeanor for any person acting as the agent of a packing house doing business in this state to fail to register with the ordinary, or, having registered, to fail to pay the tax therein prescribed. The indictment charges that the accused, on the 15th day of January, 1902, "did unlawfully, then and there being the * * * agent of the Armour Packing Company, a packing house, open up, carry on, and do business as such agent for said Armour Packing Company * * * by receiving shipments of meats and lard from said packing house," etc., "without first going before the ordinary of said county and registering his name as such agent, and without registering the business in which he proposed to engage, and without registering the place where such business was to be conducted, * * * and without paying to the tax collector of said county the taxes required by law of him * * * as such agent, said taxes being due for the year 1902." The charge was clear and ex-

plait, and gave the accused all the information to which he was entitled to enable him to make his defense or to protect him in the exercise of his rights under the law.

2. The motion for a new trial contained the general grounds that the verdict was contrary to law and the evidence, and also complained that the court erred in admitting in evidence certain waybills offered by the state, which were identified by the agent of the railroad company at Blue Ridge, in Fannin county, as waybills upon which cars loaded with packing house products had been delivered to the accused. The motion sets forth at considerable length the objections made to this evidence, including an argument made to the court giving reasons why it should have been rejected. At first glance it would appear that there was some force in this argument, but taking this evidence in connection with the other evidence offered by the state, we think it was admissible. These waybills showed that the cars for which they were issued were consigned to the Armour Packing Company at Blue Ridge, Ga., and that they contained packing house products. According to the testimony of the agent of the railroad company, the contents of these cars were delivered at a warehouse in Blue Ridge of the Armour Packing Company. When the goods contained in the cars were delivered at the warehouse mentioned, the accused paid the freight charges thereon and received the goods. These waybills, with the entries thereon, were admissible for the purpose of explaining and throwing light on the act of the accused in receiving the goods, and to establish the contention that in so doing he was acting as the agent of the Armour Packing Company. It was in the nature of evidence of an admission of a fact which tended to show the agency of the accused. The fact that the paper was made out by the agent of the railroad company, and that it contained some immaterial statements, was no reason for excluding it in its entirety. The recital in the waybill as to the lines of railroad over which the goods came could not, of course, bind the accused; but the fact that cars loaded with packing house products and consigned to the Armour Packing Company were received by him, that he paid the freight thereon, unloaded the cars, and placed their contents in a warehouse of the Armour Packing Company, were inculpatory circumstances, which were properly submitted to the consideration of the jury. To the same effect evidence was admitted, without objection, showing that attached to a tub of lard bought from Leps was a tag containing the words: "From Armour Packing Company, Kansas City. Dressed beef, sausage," etc. A number of bills for packing house products made out to various persons and presented by Leps were also introduced, without objection, and the recitals in these bills also tended to show that Leps was the agent of the Armour Packing Company. We

are clear that the railroad waybills were admissible for the same purpose.

3. It will have been gathered from the foregoing that there was before the jury ample evidence to sustain their finding that in the performance of the acts disclosed by the evidence the accused was merely discharging his duties as the agent of the Armour Packing Company. That he failed to register with the ordinary and to pay the tax required by the statute was admitted. For an exhaustive discussion as to the constitutionality of that statute, see the able opinion of Chief Justice Simmons in *Kehrer v. Stewart*, supra.

Judgment affirmed. All the Justices concur.

(120 Ga. 196.)

HARRIS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW — NEW TRIAL — GROUNDS — APPROVAL BY TRIAL COURT — NECESSITY.

1. What are commonly called the "general grounds" of a motion for a new trial—that is, those complaining that the verdict is contrary to the evidence, without evidence to support it, etc.—contain no recital of fact which requires a verification by the trial judge in order to authorize such grounds to be entertained. It therefore follows that it is error to dismiss a motion for a new trial based upon such grounds solely for the reason that they have not been approved by the trial judge.

(Syllabus by the Court.)

Error from City Court of Albany; R. Hobbs, Judge.

E. E. Harris was convicted of pointing a weapon at another, and brings error. Reversed.

S. J. Jones, for plaintiff in error. John D. Pope, Sol., for the State.

COBB, J. The accused was convicted in the city court of Albany of the offense of pointing a weapon at another. He filed a motion for a new trial in due time during the term at which the verdict was rendered. The motion contained three grounds, as follows: (1) Because the verdict is contrary to evidence and without evidence to support it; (2) because the verdict is decidedly and strongly against the weight of evidence; (3) because the verdict is contrary to law and the principles of justice and equity. The motion was not heard during the term, but by order was set down for a hearing in vacation on a given day, and at the time fixed for the hearing, the court, upon motion of counsel for the state, dismissed the motion for a new trial upon the sole ground that it had not been approved by the court during the term at which the motion was filed. This ruling is assigned as error.

A ground of a motion for a new trial which contains a statement of fact should not be considered unless that statement is shown to be true by a certificate of the trial judge. Hence the general rule is that, be-

fore grounds of a motion for a new trial can be considered, they must be approved by the trial judge. But this rule does not apply to any ground which does not contain an affirmative statement of fact which is material to the determination of the error assigned in the ground. None of the grounds above set forth contain any statement of fact at all. They merely set forth reasons addressed to the discretion of the trial judge why the verdict should be set aside. There is nothing in any of these grounds which requires the approval of the trial judge. Therefore such approval was not necessary, and it was error to dismiss the motion because it did not appear that the judge had approved the grounds.

In reference to the third ground, it is not considered inopportune to state that the first part, which alleges that the verdict is contrary to law, does not contain any assignment of error which can be properly considered (*Kelly v. Strouse*, 116 Ga. 896, 43 S. E. 280, and cases cited); and the second part—that the verdict is contrary to the principles of justice and equity—has no appropriate place in a motion for a new trial in a criminal case.

Judgment reversed. All the Justices concurring.

(120 Ga. 201)

BRYAN v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

KEEPING GAMING HOUSE—CRIMINAL LAW—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. An indictment for keeping and maintaining a gaming house is sustained by evidence that the defendant was guilty of either of the prohibited acts. *Thomas v. State*, 45 S. E. 622, 118 Ga. 774.

2. There was no error in charging that: "The law does not say that he must keep or maintain the gaming house for a year or a week or a month. If it appears that he kept and maintained it at any time within the statute of limitations, he would be guilty."

3. Nor was there error in charging that: "If the work of keeping and maintaining was subdivided into many duties in order to carry on such a place, each person participating therein would be guilty of the offense."

4. Nor was it error to charge that: "It would make no difference if the defendant rented out the house, and, as the proprietor of a game played therein, afterwards carried on the business of gambling therein, he would, for the time being, have possession of the house, and would be guilty of keeping it. *Scott v. State*, 29 Ga. 265; *Stevenson v. State*, 83 Ga. 575, 10 S. E. 234.

5. The verdict was demanded by the evidence. (Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

J. D. Bryan was convicted of keeping and maintaining a gaming house, and brings error. Affirmed.

Bryan was indicted for keeping and maintaining a gaming house. From the evidence

offered by the state it appeared that Bryan had a saloon and restaurant. Upstairs there was a room in which was a faro bank, roulette wheel, and crap table. Bryan's name was on the door and place of business as proprietor of the bar and restaurant. There was evidence that Bryan had charge of the room upstairs, and several witnesses played at games therein; Bryan dealing and otherwise managing the game. The defendant, in his statement, claimed to have rented "the upstairs of my place to a party for a very good rental. While I did deal faro bank on this occasion, I did so to accommodate the man who rented the place—the party that rented the place from me." The defendant was found guilty, and made a motion for a new trial, assigning error on the charge of the court as to reasonable doubt, on instructions which he claimed warranted the jury in finding him guilty if he kept or maintained under an indictment alleging that he kept and maintained, on instructions that it was not necessary to show numerous transactions, and also that he might be convicted if he was in charge of the room which had been previously rented to another.

David C. Barrow and Edward H. Abrahams, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

LAMAR, J. The words "keep" and "maintain" are frequently used as synonymous, but if, under Pen. Code, § 898, the offense may be committed by keeping or maintaining or by keeping and maintaining, proof that he had been guilty of either of the prohibited acts would sustain a charge that he had kept and maintained. *Thomas v. State*, 118 Ga. 774, 45 S. E. 622. The other points are sufficiently dealt with in the headnotes. The verdict was demanded by the evidence, and the judgment is affirmed. All the Justices concurring.

(120 Ga. 144)

MONTS v. STATE.

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. The evidence authorized the verdict. It was not made to appear that the alleged newly discovered evidence could not, by the exercise of proper diligence, have been obtained before the trial, and such evidence was, moreover, merely impeaching in its character.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

George Monts was convicted of crime, and brings error. Affirmed.

A. R. Logan, for plaintiff in error. J. A. Ansley, Jr., Sol., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

¶ 2. See *Gaming*, vol. 24, Cent. Dig. § 201.

¶ 1. See *Criminal Law*, vol. 15, Cent. Dig. § 2231.

(120 Ga. 213)

CONNOLLY v. ATLANTIC CONTRACTING CO. et al.

(Supreme Court of Georgia. May 11, 1904.)

ATTACHMENT—DISMISSAL AS TO PART OF DEFENDANTS—AMENDMENT OF LEVY—PRESUMPTIONS—REGULARITY OF OFFICIAL ACTS—RETURN ON ATTACHMENT.

1. Where an attachment was sued out against four defendants, and the return of the levying officer showed that the property seized was levied on as the property of only one of them, the levy was properly dismissed as to the other three.

2. In the absence of evidence to the contrary, it will be presumed that an officer did his duty, and did not exceed his authority; and, when the return of an officer on the levy of an attachment fails to show in what county the levy was made, but the levy is in other respects legal and regular, the failure to set out where the levy was made is no ground for dismissal.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by M. A. Connolly against the Atlantic Contracting Company and others. Judgment for defendants, and plaintiff brings error. Affirmed in part, and reversed in part.

David C. Barrow, for plaintiff in error.
Walter G. Charlton, for defendants in error.

CANDLER, J. On August 24, 1900, Connolly sued out an attachment in Chatham county against the Atlantic Contracting Company, a West Virginia corporation, and B. D. Greene, J. F. Gaynor, and E. F. Gaynor; the grounds of attachment being the nonresidence of the defendants. The return of the officer on this attachment was as follows: "I have this day levied the within attachment upon one tugboat Wm. O. Turner, one tugboat Harold, both steamers, three wooden barges not named, one large yawlboat, one small yawlboat, one boiler and pumps, one wheel of iron, the said tugs and barges now lying in the river in Savannah harbor opposite East Broad, except the yawls, which with the boiler and pumps and wheel are in the storehouse on the island across the river. Levied on as the property of the Atlantic Contracting Company. Levied on this Aug. 24, at 5:45 p. m., 1900. [Signed] M. L. Lilienthal, C. C. Co., Ga." On September 8, 1900, counsel for the plaintiff filed an application for a speedy sale of the property levied on, upon the ground that to keep the same pending the litigation would be expensive and burdensome. Service of notice of the applicant's intention to apply for the order to sell was acknowledged by Walter G. Charlton, Esq., as attorney for the defendants. On the hearing of the application the property in question was by the court ordered to be sold. The declaration in attachment, which was made returnable to the November term, 1900, of the city court of Savannah, was served upon the firm of Charlton & Charlton, as attorneys for the Atlantic Contracting Company, by serving R. M. Charlton, a member

of said firm. The return of service was traversed, and it being made to appear that the defendants were represented by Walter G. Charlton, and not by the firm of Charlton & Charlton, the return was stricken and the traverse sustained. The answer of the defendants denied all the material allegations of the declaration. At the trial the levy was dismissed, as to Greene and the Gaynors, on the ground that the property seized was not levied on as their property; and, as to the Atlantic Contracting Company, it was dismissed because the levy did not show where the property was seized. Before the levy was dismissed as to the Atlantic Contracting Company, counsel for the plaintiff asked the court to consider the papers of record in the case, and to permit the introduction of oral evidence in aid of the levy, to show that the locality named therein at which the property was seized was in Chatham county. This motion the court overruled. It was further moved that, in view of the fact that the officer who made the levy was dead, the court, after hearing evidence on the subject, should amend the return by adding the words "Georgia, Chatham county," but this motion was likewise refused. To the judgment dismissing the levy as to the four defendants, and refusing to consider the record or hear allunde evidence as to the locality of the property at the time of the levy, the plaintiff excepted. The record contains a brief of the evidence introduced on the trial, but, inasmuch as the questions set out in the foregoing statement are the only ones for decision by this court, a more detailed statement of the evidence is unnecessary.

1. There was no error in dismissing the levy and attachment as to Greene and the two Gaynors. The property seized was levied upon as the property alone of the Atlantic Contracting Company, and this is distinctly shown by the levy itself. In *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455, it was held that, "it is essential to the validity of the levy of an attachment issued against a non-resident that the entry of levy should show that the property was levied on as that of the defendant in attachment, and this is so whether the property be realty or personalty." In the opinion of Mr. Justice Cobb in that case the question now under consideration was fully discussed, and further discussion of it now would be useless. See, also, *New England Mortgage Co. v. Watson*, 99 Ga. 735, 27 S. E. 160. In order for the levy to have been good as against all four of the defendants, it must have appeared in the return that there was a valid seizure of property belonging to each and all of them; and, the levy failing to show that any of the property levied on belonged to Greene or the Gaynors, it was properly dismissed as to them.

2. The court erred in dismissing the levy and attachment as to the Atlantic Contracting Company, and in refusing to consider

the papers of record, and other evidence in aid of the levy. All the property levied on was personalty, and was accurately described in the levy. It was seized as the property of the Atlantic Contracting Company, and the levy complied fully with all the requirements of the Code. Attachments returnable to the superior, city, or county courts are, under section 4519 of the Civil Code, directed to "all and singular the sheriffs and constables of this state"; and under section 4580 it is provided that "it shall be the duty of any one of the officers to whom an attachment may be directed, to levy the same upon the property of the defendant that may be found in the county of which he is sheriff, or constable, and when any attachment shall come into the hands of any officer of the county in which such attachment is returnable, and the defendant shall have removed his property beyond the limits of said county before such an attachment is executed, it shall be the duty of the officer having such attachment to follow such property into any county in the state and levy the same, and bring the property back into the county where the attachment is returnable." It is a well-settled principle of law that, in the absence of proof to the contrary, courts will always presume that an officer has done his duty. It will not be assumed that he has exceeded his authority or violated the law. In this case the officer was authorized to levy the attachment on any property of either of the four defendants to be found anywhere in Chatham county, or to follow such property beyond the limits of the county if it should have been removed therefrom before the attachment was executed. In the absence of any evidence on the subject, it must be taken for granted that he complied with the statute. The return shows that certain personalty was attached. Presumably, absolute dominion was taken over it by the officer making the levy. It appears from his return that at the time of the seizure it was in part lying in the river in Savannah harbor, and in part was in a storehouse on an island "across the river." The answer of the defendants admitted that the officer was a lawful constable of Chatham county, and that he made the levy as shown by his return. In *Cohen v. Broughton*, 54 Ga. 296, it was held that where personal property is claimed by a third person, and the claim affidavit and bond recite that it has been levied on, the claimant is estopped to deny the completeness of the levy. To the same effect, see *Scolly v. Butler*, 59 Ga. 850. In the case at bar the Atlantic Contracting Company, together with the other defendants, admitted the levy, and in its answer made no question as to the authority of the officer to make it. In view of the presumption before alluded to in favor of the validity of the acts of an officer, the burden of showing that he acted without authority, or that his act was otherwise illegal, would

certainly seem to be on the party attacking the levy. The court would have been justified in admitting evidence to show where the levy was made, or in looking to the record, with the entries thereon, to ascertain the truth in regard to the matter. We know of no statute or decision in this state which requires that the return of a levying officer shall show where the levy is made. The officer could not legally make the levy outside the state of Georgia, nor, unless the property had been removed therefrom, outside of Chatham county; but, in the absence of proof on the subject, it will not be presumed that he did do so. The law only requires that the officer making the levy shall enter the same on the process by virtue of which the levy is made, and that the levy shall plainly describe the property levied on, and state the amount of the interest of the defendant therein. Here the levy accurately described the property, and stated that it was the property of the Atlantic Contracting Company. In the case of *Hiles Co. v. King*, 109 Ga. 180, 34 S. E. 353, it was held that, when a sheriff's entry upon an attachment recites that he levied it upon a certain tract of land, *prima facie* there was a lawful seizure, and consequently, where an execution issued upon a judgment rendered in an attachment case was subsequently levied on the same land, and met by a claim, it was error to dismiss the latter levy on the ground that the entry upon the attachment did not recite that the sheriff had actually seized the property, or had given written notice to the tenant in possession. The attachment in the present case, with the entry of levy by the officer thereon, was, as to the Atlantic Contracting Company, *prima facie* regular and valid. The defendant had the right, if it could do so, to show that such was not the case. Having neither alleged nor proven that the property was illegally seized, we think the court erred in dismissing the levy as to it. See, in this connection, *Greer v. Ferguson*, 104 Ga. 555, 30 S. E. 943; *Griffin v. Wise*, 115 Ga. 610, 41 S. E. 1003.

It is, of course, necessary that the officer making the levy should sign the return, yet it has been held that the omission of such signature is a defect which may be cured by amendment. *Wilkins v. Tourtellott*, 28 Kan. 825; *Childs v. Barrows*, 9 Metc. (Mass.) 413. It has also been held that, where the return clearly shows that certain property was attached, the performance by the officer of certain acts in connection therewith may be shown by parol evidence, or by facts appearing elsewhere in the proceeding. 4 Cyc. 615. In the case of *Boyd v. King*, 36 N. J. Law, 134, it was held that to render the return of the attachment fatally defective, when there has been, in substance, an execution of the process, it must be made to appear affirmatively that an essential act has been omitted, and that when there is no

clear exhibition of such omission it cannot be inferred.

In view of what is here held, we deem it unnecessary to pass upon the point raised by counsel for the plaintiffs in error to the effect that the court erred in refusing to hear evidence upon which to base an amendment of the levy by adding thereto the words "Georgia, Chatham County."

In the argument in this court it was insisted that, in view of the evidence brought up in the record, the plaintiff's case was not entitled to any consideration in a court of justice, and that this court should of its own motion order it dismissed. It does not appear, however, that the court below has ever passed upon this question; and we will, of course, not undertake to pass upon it now for the first time.

From what has been said, it is apparent that the judgment as to Greene and the two Gaynors must stand, while as to the Atlantic Contracting Company the case must be heard again.

Judgment affirmed in part, and in part reversed. All the Justices concur.

(119 Ga. 960)

TUGGLE v. STATE.

(Supreme Court of Georgia. May 11, 1904.)

HOMICIDE—INSTRUCTIONS—HARMLESS ERROR—VOLUNTARY MANSLAUGHTER—REQUESTS TO CHARGE—INSTRUCTIONS ALREADY GIVEN—ARGUMENT OF COUNSEL—SUFFICIENCY OF EVIDENCE.

1. On the trial of one accused of murder, a charge that, "in a case of homicide, whenever the state submits to you evidence of the killing, and that it was done by the defendant in the manner charged in the indictment (that is, by a pistol), then the presumption of innocence no longer rests with him in the case, and the burden of proof is shifted to the defendant to establish his defense, to show to the jury that the killing was * * * justifiable homicide, and not murder or any other grade of homicide," while not accurate, will not cause a reversal of the judgment when it appears that there was nothing in the evidence of the state which would mitigate the killing, or reduce the crime from murder to manslaughter.

2. There was enough in the statement of the accused to authorize a charge upon the subject of voluntary manslaughter.

3. The requests to charge were fully covered by the general charge, and the charges complained of in the motion for new trial were not erroneous for any of the reasons assigned.

4. Even if the portions of the argument for the state of which complaint was made were not within the legitimate scope of such argument, it does not appear that any ruling of the trial judge was invoked thereon.

5. The verdict was authorized by the evidence and the statement of the accused, and was as favorable to the accused as he had any right to expect.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; W. N. Spence, Judge.

Lee Tuggle was convicted of crime, and brings error. Affirmed.

F. Jordan & Son, W. B. Wingfield, W. S. Florence, and B. F. Leverett, for plaintiff in error. J. E. Pottle, Sol. Gen., F. C. Foster, Greene F. Johnson, and A. S. Thurman, for the State.

SIMMONS, O. J. Judgment affirmed. All the Justices concurring, except EVANS, J., who did not preside.

O'DELL v. STATE.

(120 Ga. 152)

(Supreme Court of Georgia. May 10, 1904.)

CRIMINAL LAW—TRIAL—INSTRUCTIONS—MISCONDUCT OF COUNSEL—IMPEACHMENT—LEADING QUESTIONS.

1. A charge that a reasonable doubt is one that is based "upon some ground in the testimony or the want of testimony," and that, if the jury have not "a doubt of that gravity," they should convict, is not erroneous.

2. While the charges on the subject of impeachment may have been in some respects inaccurate, they furnish no reason for reversing the judgment refusing a new trial.

3. The allowance of leading questions is within the discretion of the court.

4. The public is interested in having all trials conducted in an orderly and proper manner, and the presiding judge, as the representative of the public and the exponent of the law, has conferred upon him the high privilege to act of his own motion at any time it may be necessary to preserve the dignity of the court and the rights of the parties.

5. The failure of the court to interpose of its own motion in case of impropriety in its presence will not generally be a sufficient reason to set aside a verdict at the instance of a party, when no objection to the impropriety was made pending the trial, and no ruling in reference thereto was invoked from the court.

6. A new trial will not be granted because of improper remarks made by counsel when it does not distinctly appear from the record that the remarks were heard by the court, and when no objection was made by the opposite party, and no action of the court invoked in reference to the remarks.

7. The evidence warranted the verdict, and no reason appears for reversing the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

O. J. O'Dell was convicted of operating a public lottery, and brings error. Affirmed.

Garrard & Meldrim and R. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

COBB, J. The accused was convicted of operating what is known as a "policy lottery." His motion for a new trial was overruled, and he excepted.

1. Exception is taken to the following charge: "A reasonable doubt is not any doubt which may visit the mind of a juror during the investigation of a case, and in making up his verdict. A mere passing hesitation of the mind, if it is not of such gravity [as] to amount to a reasonable doubt, will not justify a juror in finding the defendant not guilty. If the testimony satisfies

him of the guilt of the defendant beyond a reasonable doubt, he should [find] the defendant guilty. A reasonable doubt is one that is based upon some ground in the testimony or the want of testimony in the case. When a juror has that sort of a doubt, he ought to acquit. But if he has not a doubt of that gravity, he ought to convict, if the testimony satisfies him of his guilt beyond a reasonable doubt." The complaint is that the judge restricted the source from which a reasonable doubt may arise to "some ground in the testimony or the want of testimony," and error is also assigned upon the use of the words "a doubt of that gravity." Charges that reasonable doubt should arise from the testimony or from the lack of testimony have been often approved. *Long v. State*, 38 Ga. 492 (8); *Butler v. State*, 92 Ga. 601, 19 S. E. 51 (2); *O'Dell v. State*, 95 Ga. 335, 22 S. E. 548 (4). It is not even necessary to state that a reasonable doubt may arise from the prisoner's statement, when the jury are instructed generally as to the weight to be given to that statement. *Walker v. State*, 118 Ga. 34, 44 S. E. 850 (1). The expression "doubt of that gravity," when construed in connection with the other portion of the charge, evidently means the kind of a doubt previously defined; that is, a reasonable doubt growing out of the testimony or want of testimony. The weakness, uncertainty, and general unreliability of the evidence, and the manner, appearance, demeanor, and interest of a witness, may engender a doubt as to whether he ought to be believed; but, if the jury determine that he is worthy of credit, they should convict, if satisfied, beyond a reasonable doubt, from such evidence as has been introduced before them, that the prisoner is guilty. Taking the charge as a whole, we see no error in it.

2. Complaint is also made of charges on the subject of impeachment. The judge charged that, if a witness had been shown to have made before the grand jury statements which were "inconsistent with and contradictory to" the statements made on the trial, it would be for the jury to say whether or not his credibility had been destroyed. The assignment of error is upon the use of the words "inconsistent with." As these words were connected with the words "contradictory to" by the conjunction "and," it is evident that the judge used them in the sense of "opposed to" or "contradictory to," and did not intend to say that mere inconsistency would be a sufficient reason for rejecting the testimony. Another charge on this subject, after giving the different modes of impeachment, was that, if a witness "has not been impeached when attacked in either one of those modes or more, his testimony ought not to be disregarded capriciously." It is contended that this charge gave the jury too much latitude, and that there was no evidence to warrant a

charge on the subject of impeachment in modes other than the three statutory methods which had been previously adverted to by the judge. It is so apparent that what the judge intended to say was, in one or more of those modes, that it is hard to conceive how an intelligent juror could have been misled by the transposition of the words. Error is further assigned upon a charge to the effect that the jury should not impute perjury to an unimpeached witness; the complaint being that this was, in effect, an instruction that the jury should impute perjury to an impeached witness. This, of course, is not true, because, as counsel state, a witness may be absolutely impeached by proof of general bad character, and yet his testimony be entirely true. If, however, this court should reverse the judgments of trial judges not only for what they say, but also on account of every negative pregnant involved in their statements, scarcely any judgment could be affirmed. It is sufficient to say that this assignment of error is wholly without merit.

3. One ground of the motion complains of the allowance of certain leading questions. This was in the discretion of the court. *Cochran v. State*, 118 Ga. 737, 39 S. E. 337 (9); *Ga. R. Co. v. Churchill*, 113 Ga. 14, 33 S. E. 336 (2), and citations; *Rusk v. Hill*, 117 Ga. 723, 45 S. E. 42 (7).

4-6. Complaint is made that the Solicitor General made the following remarks to the jury: "As he does not deny it, I will submit the case to you without argument." The reference was to the fact that the prisoner had made no statement. The Solicitor General, in his argument here candidly admitted that this remark was improper and should not have been made. See *Bird v. State*, 50 Ga. 585 (7); *Robinson v. State*, 82 Ga. 535, 9 S. E. 528 (9). It is, however, due to the Solicitor General to state, although it does not appear in the record, that he stated in his argument here that he intended the first portion of the remark to be addressed to counsel for the accused, who was immediately behind him, and did not intend the jury to hear it. It does not appear from the record that the judge heard the remark, nor does it appear that any objection was made by counsel for the accused, or that any ruling or action by the court in reference to the remark was invoked. Under such circumstances, the remark does not constitute sufficient reason for reversing the judgment refusing to grant a new trial. The public interest demands that all trials shall be conducted with absolute freedom from impropriety and disorder on the part of those engaged therein, as well as those who may be present merely as spectators. Nothing is more conducive to respect for the law and its administration than orderly and proper conduct of court and counsel during the progress of a trial. The judge, as the representative of the public and the exponent of the law, has conferred upon him

the high privilege to interpose at any time to preserve the dignity of the court over which he is presiding, or to protect the rights of parties whose interests may be imperiled by any occurrence in his presence; and he is not bound to, and should not, await the action of party, counsel, or any one else, when an act of disorder or impropriety occurs. See *Patton v. State*, 117 Ga. 238, 43 S. E. 533. How far the mere failure of the judge to interpose of his own motion can be taken advantage of by parties as a reason for setting aside a verdict or reversing a judgment is, however, an entirely different question. The rule in reference to the duty of the court in regard to improper statements by counsel is contained in Civ. Code 1895, § 4419, which is as follows: "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion he may order a mistrial if plaintiff's attorney is the offender." It is to be noted that this section is a codification of rulings contained in four cases—two criminal cases and two civil cases. See *Augusta R. Co. v. Randall*, 85 Ga. 298, 11 S. E. 706 (6); *Croom v. State*, 90 Ga. 430, 17 S. E. 1008 (4); *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 501, 18 S. E. 49 (6); *Farmer v. State*, 91 Ga. 720, 18 S. E. 987 (2). In the two criminal cases and in one of the civil cases it was distinctly ruled that improper remarks by counsel would not be sufficient reason for reversing a judgment refusing a new trial, when no objection was made to the same, and no ruling from the court invoked; while in the other case (*Augusta R. Co. v. Randall*) the judgment was reversed, although it does not appear that any ruling was invoked in reference to the improper remarks. The facts of this case are, however, unusual, and it, like the *Woolfolk Case*, 81 Ga. 551, 8 S. E. 724, and some few others, must be allowed to stand upon its own peculiar facts. The general rule is undoubtedly the one laid down in the three cases above referred to. A number of the more recent decisions dealing with this subject will be found collected in *Bowens v. State*, 106 Ga. 764, 32 S. E. 666. See, also, *Turner v. State*, 70 Ga. 778, and citations; *Ivey v. State*, 113 Ga. 1062, 39 S. E. 423, 54 L. R. A. 959, and citations; *Western & Atlantic R. Co. v. Cox*, 115 Ga. 720, 42 S. E. 74; *Tuggle v. State* (decided May 10, 1904) 47 S. E. 577; and cases cited in 1 Enc. Dig. Ga. Reps. 516, 519, et seq.

The jurisdiction of this court is limited to the correction of errors of the superior courts and city courts of a given class, and the errors which can be made the subject-matter of complaint are those which arise out of the decisions, orders, decrees, and rulings of the trial courts, or out of the omission or failure

on the part of those courts to discharge some duty incumbent upon them under the law, which, in the opinion of this court, is of such a character, under the particular circumstances, as to constitute an error of law, and require a reversal of the judgment. The rule that generally this court will not reverse a judgment for a failure on the part of the trial judge to rebuke disorder when no objection is made thereto, and no ruling invoked, is not, as is supposed by some, a rule of recent origin. It has been applied more often in recent years, but the rule is almost as old as this court. As early as 1852, in *Mitchum's Case*, 11 Ga. 616 (7), it was laid down that it was error in the court, when requested to prevent it, to permit counsel to comment on facts not in evidence. In the opinion, Judge Nisbet says: "It is the duty of the court to prevent such comments, and, in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial." Page 629. See *Van Epps' Annotations* on this case in the footnotes, beginning on page 617. This is the first authoritative ruling by this court on the subject, and it will thus be seen that the rule now in force was recognized even at that early date. In *Berry's Case*, 10 Ga. 522, while the practice of counsel commenting upon facts not in evidence was severely condemned, the judgment was affirmed notwithstanding the alleged improper remarks, as it appeared that the argument escaped the attention of the judge, and that in his general charge to the jury he expressly directed them to disregard all statements of counsel not supported by the evidence. In *Grady's Case*, 11 Ga. 253, it was held that it was not only the privilege of the judge, but his solemn duty, to interrupt counsel when misstating the testimony to the jury, and that therefore it was not error for the judge to exercise this privilege and restrain counsel, who were engaged in such improper conduct. A similar ruling was made in *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153. In *Long's Case*, 12 Ga. 381, Judge Nisbet says: "We have held it error for counsel, when objected to, to be allowed to comment upon facts not proven;" citing *Mitchum's Case*, 11 Ga. 616. In *Bullock v. Smith*, 15 Ga. 396 (5), while it is stated that the judge should interfere and prevent counsel from arguing upon facts not in evidence, it does not appear whether any objection was made, but it distinctly appears that the judgment of reversal was not put upon this ground. See page 399. The same is true as to *Archer's Case*, 35 Ga. 7. We have called attention to some of the earlier cases simply for the reason that the able counsel for the plaintiff in error so earnestly argued before us that the rules invoked against him were not only of recent origin, but were in conflict with the former rulings of the court. We have been unable to find any ruling which appears to us to be in conflict with the rule we

now apply. On the contrary, the impression received by us from an investigation of the earlier rulings is that they are in thorough accord with the modern cases.

7. The state sought to impeach one of its own witnesses without first showing to the court that it had been entrapped by the witness. But as it appears that the accused made no objection, the grounds of the motion for a new trial complaining of this furnish no reason for a reversal. The evidence warranted the verdict, and no sufficient reason appears for reversing the judgment.

Judgment affirmed. All the Justices concurring.

(120 Ga. 30)

BARBER et al. v. ALEXANDER et al.

(Supreme Court of Georgia. May 12, 1904.)

SCHOOL DISTRICTS — UNIFORMITY — EXTENT — CONSTITUTIONAL LAW.

1. The Constitution preserves local school systems as they existed in 1877, and permits municipal corporations and counties to establish and maintain public schools in their respective limits. Civ. Code 1895, § 5910.

2. These provisions form necessary exceptions to the uniformity otherwise required by the Constitution (Civ. Code 1895, § 5906), but do not apply to schools in rural districts.

3. Whatever may be the right of towns and counties to establish and maintain public schools, the Constitution requires that in other respects the public school system shall be as nearly uniform as practicable. Civ. Code 1895, § 5906.

4. The general law declares that each county shall compose one school district. The act incorporating the Olive Springs school district, approved August 18, 1903 (Acts 1903, p. 273), creates a district within a district, destroys territorial uniformity, and sets apart one locality in the state in which an existing general law is not longer to be of force. Civ. Code 1895, § 5782; Pol. Code 1895, § 1353.

5. This special act interferes with the general school law contained in Pol. Code 1895, §§ 1338-1408, and is violative of that provision of the Constitution (Civ. Code 1895, § 5782) which provides that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law."

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Jeo. F. Gober, Judge.

Suit for injunction by T. T. Alexander and others against J. W. Barber and others. There was a decree for plaintiffs, and defendants bring error. Affirmed.

By a special act approved August 18, 1903 (Acts 1903, p. 273), the General Assembly incorporated the Olive Springs school district in Cobb county, providing that the schools therein should not be under the control of the county board of education, but "shall be controlled by the trustees of said district, who shall report direct to the state school commissioner." These trustees were to be elected by the voters of the district, and were to have control of the schools therein, employ teachers, fix their compensation and

duties, cause a school census to be taken, and to receive their pro rata of the school fund direct from the state. Alexander and others, alleging themselves to be taxpayers, freeholders, and patrons of Douglas Chapel School, filed an equitable petition against the Olive Springs trustees, alleging that Douglas Chapel Academy was in the new district; that the trustees proposed to abandon it, and establish another school far less convenient for the attendance of petitioners' children. They prayed for an injunction restraining the new trustees from enforcing the provisions of the new act, and also for a decree declaring the Olive Springs act unconstitutional and void, as being a special law, enacted in a case for which provision has been made by an existing general law (Civ. Code 1895, § 5732); and, further, because it was in violation of the uniformity in the public school system required by the Constitution (Civ. Code 1895, § 5906). The chancellor granted the injunction, and the defendants excepted.

N. A. Morris and Z. D. Harrison, for plaintiffs in error. W. E. Tally, for defendants in error.

LAMAR, J. The general law contained in Pol. Code 1895, § 1353, provides that each county in the state shall compose one school district. The special act approved August 18, 1903 (Acts 1903, p. 273), creates a district within a district, destroys territorial uniformity, and sets apart one locality of the state in which the general law is not longer to be of force. If there can be one such independent school district in Cobb county, there may be a dozen. If one or more in Cobb, then so likewise in every county in the state. Each special act might differ in its terms, with the result of variety, where the Constitution requires uniformity. Civ. Code 1895, § 5906. The Olive Springs school act not only creates a district different from all others existing under the general law, but it abrogates all of the provisions of the act regulating public schools, codified in Pol. Code 1895, §§ 1354-1408. It takes from the present county board of education control of the schools in existence in the newly created district, and allows them to be managed by local trustees, under new terms, and without the supervision to which all other public schools in the state are subject, contrary to the prohibition contained in the Constitution against special legislation. Civ. Code 1895, § 5782. Nor is the act saved by the provisions of Civ. Code 1895, § 5910. *Smith v. Bohler*, 72 Ga. 548. The Constitution preserved the local systems as they existed in 1877. It also permitted municipal corporations and counties to establish and maintain public schools in their respective limits. Civ. Code 1895, § 5909; Pol. Code 1895, § 1394; *Irvin v. Gregory*, 86 Ga. 605, 18 S. E. 120; *Brand v. Lawrenceville*, 104 Ga. 498, 30 S. E.

954. These provisions form necessary exceptions to the uniform system of public schools otherwise required by the Constitution. Civ. Code 1895, § 5606. And, whatever may be the right of a county, city, or town to establish special or local systems, the Constitution (Civ. Code 1895, § 5910) grants no power to the General Assembly to authorize the establishment and maintenance of a special or local school system in a rural district. On that subject the Constitution is not silent. It declares that "there shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided by taxation or otherwise." Civ. Code 1895, § 5906. This uniformity has been provided for in the act of 1887. Pol. Code 1895, § 1354 et seq. The Constitution prohibits the destruction of this uniformity, and the chancellor properly held that the Olive Springs school act was void.

Judgment affirmed. All the Justices concurring, except CANDLER, J., disqualified.

(120 Ga. 74)

ROWLAND v. TOWNS.

(Supreme Court of Georgia. May 13, 1904.)

PROCESS—NEW PROCESS—POWER OF CLERK TO ISSUE—AUTHORITY OF JUDGE—DISMISSAL—WANT OF SERVICE.

1. "There being but one suit, one petition, one defendant, the clerk has no power, without some direct and express order of the court, to issue more than one process." *Peck v. LaRoche*, 12 S. E. 638, 86 Ga. 314 (1).

2. It is within the power of the judge at the appearance term, or at a subsequent term where due diligence is shown, to grant an order authorizing a new process to issue. *Allen v. Mutual Loan Co.*, 12 S. E. 235, 86 Ga. 74; *Lassiter v. Carroll*, 13 S. E. 825, 87 Ga. 731.

3. But where no service of the petition was made on the defendant, and at the appearance term an order was granted directing "that service be perfected, and that said case stand for announcement at the October term, 1902, of said court," which order was not served on the defendant, nor any new process attached to the petition, the judge properly sustained the motion of defendant made at the April term, 1903, to dismiss the case because of such lack of service. The service of the petition by the sheriff, where neither the order of the judge authorizing the service nor a new process was attached to the same, was a mere nullity.

(Syllabus by the Court.)

Error from Superior Court, Telfair County; D. M. Roberts, Judge.

Action by J. T. R. Rowland against D. R. Towns. Judgment for defendant, and plaintiff brings error. Affirmed.

F. H. Saffold and A. C. Saffold, for plaintiff in error. Eschol Graham and E. D. Graham, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concurring.

¶ 1. See *Process*, vol. 40, Cent. Dig. § 42.

(120 Ga. 230)

SEABOARD AIR LINE RY. v. PIERCE.

(Supreme Court of Georgia. May 13, 1904.)

INJURY TO SERVANT—RAILROADS—DERAILMENT OF ENGINE—ACTION FOR DAMAGES—SUFFICIENCY OF PETITION—GENERAL AND SPECIAL DEMURRERS.

1. A petition in a suit against a railroad company, alleging that the plaintiff's husband was an engineer of the company, and was killed by the derailment of the engine which he was running on the defendant's road, without fault on his part, and averring that such killing was "negligent, wrongful, and inexcusable," was not open to general demurrer.

2. But a petition containing only such general allegations of negligence was not sufficient to withstand a special demurrer setting up that it failed to set forth any specific acts of negligence.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Mary Pierce against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

J. Randolph Anderson, for plaintiff in error. Twiggs & Oliver, for defendant in error.

FISH, P. J. Mary Pierce sued the Seaboard Air Line Railway for damages for the homicide of her husband. The allegations of her petition material to the questions made by the record now before us were, in brief, that her husband, while in the employment of the defendant as a locomotive engineer, was on a given date running an engine of a passenger train over the defendant's road at the rapid rate of speed demanded by the schedule of such train; that the engine, when it reached a switch at a designated place on the road, became derailed and was overturned, and petitioner's husband was pinned beneath the cab of the engine and his skull crushed, from which injuries he died two days thereafter; that he was entirely free from fault at the time; and that, "By reason of the negligent, wrongful, and inexcusable killing of * * * petitioner's * * * husband as aforesaid, * * * petitioner" was entitled to recover a designated sum as damages for his homicide. The defendant duly filed a demurrer to the petition on the grounds that it failed to allege any act of negligence on the part of the defendant showing a cause of action, and failed "to apprise * * * defendant of the specific grounds by reason of which it [was] contended that * * * defendant [could] be held liable in the * * * suit, so as to enable [the] defendant to make proper or intelligent answer, * * * and to prepare for trial in said case." The demurrer went over until the trial term, and on the day it was passed on the defendant made a motion to dismiss the case on the ground

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. § 312.

that the petition did not set out a cause of action. The court overruled the demurrer and the motion on the same day, and on that day the defendant excepted to both of said rulings.

1. Was the petition sufficient to withstand the motion, in the nature of a general demurrer, to dismiss it? This depended on whether the defendant could have admitted all the allegations of the petition and escaped liability. Pullman Palace Car Co. v. Martin, 92 Ga. 161-164, 18 S. E. 364; Georgia Railroad Co. v. Rayford, 115 Ga. 937, 42 S. E. 234. From the allegations of the petition, it appeared that petitioner's husband was an employé of the defendant; that, while in the discharge of his duty as such, he was killed by the running of defendant's locomotive; and that he was at the time wholly without fault; and it was averred that such killing was "negligent, wrongful, and inexcusable." The defendant could not admit these allegations and escape liability. As the petition was, in substance, sufficient, the overruling of the motion to dismiss it was not erroneous. See Georgia Railroad Co. v. Rayford, supra, and citations.

2. Under the rulings made in Blackstone v. Central Railway Co., 105 Ga. 380, 31 S. E. 90, and Russell v. Central Railway Co., 119 Ga. 705, 46 S. E. 838, the ground of special demurrer to the effect that the petition failed to allege any specific act of negligence on the part of the defendant company was meritorious, and the court erred in not dismissing the petition on this ground. In Russell's Case, supra, it was held: "A count in a petition against a railway company, claiming damages for negligence, which alleges in general terms that the defendant was guilty of negligence, should be stricken on special demurrer setting up that the petition fails to set forth the particulars in which the defendant was negligent, unless the defect in the petition is cured by amendment." See, also, Louisville R. Co. v. Cody, 119 Ga. 789, 46 S. E. 429; Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329.

Judgment reversed. All the Justices concurring.

(119 Ga. 982)

WAYCROSS AIR-LINE R. CO. v. OFFERMAN & WESTERN R. CO.

(Supreme Court of Georgia. May 11, 1904.)

AUDITOR'S REPORT—EXCEPTIONS OF LAW—VERIFICATION—APPEAL—SUPREDEAS BOND—DAMAGES.

1. In passing upon exceptions of law to rulings alleged to have been made by an auditor, the court cannot look to the exceptions alone to ascertain what those rulings were. The grounds upon which the exceptions are based must be verified by reference to the auditor's report; and, if the report affords no means of verification, the exceptions cannot be considered, unless otherwise certified by the auditor.

2. The damages found by the auditor were such as were within the contemplation of the parties to the bond sued on at the time it was executed, and were covered by such bond.

3. In a suit upon a supersedeas bond, the question as to what damages were within the contemplation of the parties at the time the bond was executed is one of law, to be determined by the court from the bond itself and the circumstances under which it was given. The testimony of persons who signed the bond as sureties, as to the nature of the damages which they understood the bond would cover, is irrelevant, and, even though admitted, cannot legally affect the construction to be given to the contract by the court.

4. The evidence demanded a finding by the auditor in favor of the plaintiff, and upon the trial in the superior court the judge did not err in directing the jury to find against exceptions of fact which alleged that the evidence was not sufficient to support such a finding.

(Syllabus by the Court.)

Error from Superior Court, Ware County: T. A. Parker, Judge.

Action by the Offerman & Western Railroad Company against the Waycross Air-Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Sweat and Leon A. Wilson, for plaintiff in error. W. E. Kay and Jno. C. McDonald, for defendant in error.

FISH, P. J. The Waycross Air-Line Railroad Company brought a petition for injunction against the Offerman & Western Railroad Company to prevent the defendant company from constructing its road across the right of way and tracks of the petitioner near Nicholls, Ga., under condemnation proceedings or otherwise, for the purpose of reaching a depot site at or near Nicholls. The injunction prayed for was, at an interlocutory hearing, refused, and the petitioner sued out a writ of error to this court, and, to obtain a restraining order preserving the status until the judgment refusing the injunction could be reviewed, gave a supersedeas bond, with sureties, conditioned to pay, in the event the judgment should be affirmed by the Supreme Court, the Offerman & Western Railroad Company all damages resulting from the supersedeas of the judgment and the delay occasioned by bringing the case to this court. The judgment of the lower court was affirmed by this court. Waycross R. Co. v. Offerman R. Co., 109 Ga. 827, 35 S. E. 275. Subsequently the Offerman & Western Railroad Company brought suit upon this bond against the principal and sureties thereon for damages which it alleged it had sustained in consequence of the supersedeas and the delay occasioned by suing out the writ of error from the Supreme Court. The defendants demurred to the petition in the damage suit, the demurrer was overruled, and the judgment overruling the demurrer, upon a review thereof, was affirmed by the Supreme Court. Waycross R. Co. v. Offerman R. Co., 114 Ga. 727, 40 S. E. 738. The case was referred to an auditor in the superior court, who found in favor

of the plaintiff for a designated amount. The defendants filed certain exceptions of law and certain exceptions of fact to the auditor's report. The case came on for trial in the superior court upon the report of the auditor and these exceptions. A jury was impaneled to try the issues of fact, and, after the evidence was all in and both sides had announced closed, the judge passed an order overruling the exceptions of law. "Counsel for defendants thereupon stated to the court, in open court, that no objection was urged to the correctness of the amount found by the auditor, in the event the plaintiff was entitled to recover at all; and thereupon the court directed the jury to find verdicts in favor of the plaintiff and against the defendants upon their five grounds of exception of fact, and a verdict for the plaintiff and against the defendants [for the amount found by the auditor] with interest and costs;" and when this was done judgment in accordance therewith was rendered by the court. The defendants excepted *pendente lite* to the overruling of the exceptions of law and to the direction of the verdicts upon the exceptions of fact, and subsequently made a motion for a new trial, which was overruled, and they excepted.

1. Some of the exceptions of law alleged that the auditor erred in overruling designated objections of the defendants to certain portions of the testimony of a witness named Stillwell; another that he erred in overruling an objection to the testimony of a witness named Gray; and another that he erred in sustaining the objections of the plaintiff to the testimony of a witness named Bonnyman. While it does not seem to us that either of these exceptions was meritorious, we cannot rule upon either of the questions raised by them, because, as the record comes before us, there is no way of ascertaining by the report of the auditor whether he made the rulings complained of or not. In the report the auditor says: "I overrule the objections pages 2, 3, 4, 5, 10, and 11 of the brief of evidence by defendant's counsel, to the testimony of the witness W. B. Stillwell, upon all the grounds of objections thereto." He also states: "I overrule the objection offered by defendant's counsel to the testimony of J. F. Gray, on page 12 of the brief of evidence," and "I sustain the objection upon the grounds therein stated of counsel for plaintiff to the testimony of Alex. Bonnyman, on pages 31 and 38, brief of evidence in this case." In the brief of evidence contained in the record there is not a single objection stated or noted to any portion of the testimony of either of these witnesses, nor the slightest indication that any objection was made, nor is this brief of evidence itself verified by the auditor as the evidence which was introduced before him. Presuming that this is the brief of evidence to which the auditor refers in the above quotations from his report, there is

nothing in it, or accompanying it, which shows to this court what any objection to the testimony of either of these witnesses which he overruled or sustained was. It is manifest that neither the superior court nor this court, in passing upon exceptions to alleged rulings made by an auditor, can look to the exceptions themselves to ascertain what those rulings were. The grounds upon which the exceptions are based must be verified by reference to the auditor's report, and, if the report affords no means of verification, the exceptions cannot be considered. If a party excepts to alleged rulings made by an auditor, and the report fails to show whether such rulings were made, the excepting party, if he desires to save his exceptions, should take steps to have them certified as provided in Civ. Code 1895, § 4590 et seq. As these exceptions of law come before us, they are like a motion for a new trial, none of the grounds of which are verified by the trial judge; and it is well settled that an unverified ground cannot be considered by a reviewing court.

2. One of the exceptions of law was: "The auditor erred as a matter of law in finding that the defendants who executed the bond sued upon had in contemplation, at the time of its execution and delivery, damages of a nature claimed and set up by the plaintiff in its petition and allowed by the auditor in his finding." The auditor found "that it is reasonable to suppose that the parties to this bond sued on contemplated damages of the nature sued upon consequent upon its breach." The damages claimed in the suit and found by the auditor were damages sustained by the plaintiff in consequence of the loss of freights which it, under a contract with the Southern Pine Company, would have received during the period covered by the supersedeas bond, if it had been allowed to complete its road to the point where such freights would have been delivered to it. The obligors in the bond bound themselves to pay to the obligee "all damages which the Offerman & Western Railroad Company should suffer by reason of its being restrained from condemning a right of way across the Waycross Air-Line Railroad at Nicholls, from the time when said crossing could have been condemned up to the time when said crossing should be actually put in and the road put in operation, provided the judgment refusing the injunction should be affirmed by the Supreme Court." We see no error in the finding of the auditor complained of. We agree with him "that it is reasonable to suppose that the parties to this bond sued on contemplated damages of the nature" of those sued for in this case. It seems to us that this would be a natural supposition in any case in which a railroad company, engaged in constructing a railroad for the purpose of hauling freight as a common carrier, was prevented from constructing its road to a given point where it would receive freights,

and bond was given to indemnify it for damages which it should sustain by reason of being prevented from constructing its road to such point, unless the circumstances at the time the bond was given were such as to preclude such a supposition. The circumstances at the time this bond was given, as shown by the evidence, were such as to render this supposition not only natural, but inevitable. The railroad of the plaintiff was being constructed for the purpose of hauling freight, and especially for the purpose of hauling lumber, etc., from the plant of the Southern Pine Company at Nicholls; and this the obligors in this bond, as the record shows, knew perfectly well; and when they bound themselves to pay all damages which the railroad company should sustain by reason of being prevented, for a designated period, from extending its road to a point where such freights would be received by it, they certainly obligated themselves to pay damages arising from the loss of the profits which would have been made by the hauling of such freights. When this case was before this court on a previous occasion upon a bill of exceptions sued out by the defendants, complaining of the overruling of a demurrer to the plaintiff's petition, Mr. Justice Cobb, speaking for the court, said: "A further contention of the plaintiff in error was that the demurrer should have been sustained for the reason that the damages claimed were too remote to be the basis of a legal recovery. We do not think that under the allegations of the petition this objection is well founded. When all the allegations of the petition are taken together, it is clearly shown that the very damages which are now sought to be recovered were those which were in the actual contemplation of the parties when the contract was entered into, and in cases of this character it is well settled that such damages, even though to some extent contingent and remote, may be recovered." *Waycross R. Co. v. Offerman R. Co.*, 114 Ga. 731 (3), 40 S. E. 738. It is sufficient now to say that the evidence on the trial before the auditor fully sustained the allegations of the plaintiff's petition. The pleadings in the injunction case in which this bond was given were introduced by the plaintiff. One has but to read them to see that damages from the loss of freight were in contemplation of the parties when this bond was executed. Those pleadings clearly show that the litigation between the two railroad companies was, at bottom, a contest over freights, and mainly over the large volume of freight traffic to be obtained from the Southern Pine Company at Nicholls; and that the petitioner knew that the relations between the Offerman & Western Railroad Company and the Southern Pine Company were so close and intimate that, other things being equal, this railroad company, if allowed to complete its line to the mill of the Pine Company, would secure practically all of this freight.

The petitioner itself charged that the stock in this railroad company was owned and controlled by the Pine Company or its stockholders, and that the connection between the two companies was such as to make the two corporations practically and in effect the same. In our opinion, there can be no reasonable doubt, from the bond and the evidence as to the circumstances under which it was executed, that it contemplated and covered all provable damages occasioned by the loss of freights the hauling of which the obligee in the bond would have obtained but for the interposition of the supersedeas.

3. The question as to what damages were contemplated by the parties when this bond was executed was one of law, to be determined from the written contract and the circumstances under which it was executed; and the testimony of persons, who, as sureties, signed the bond, as to what they privately understood among themselves when they signed in reference to the nature of the damages which it would cover, was irrelevant, and, although admitted by the auditor, could not legally affect the construction to be given to the contract by the auditor or the court.

4. It was admitted by the defendants that, if the plaintiff was entitled to recover anything at all, it was entitled to recover the amount found by the auditor. But certain exceptions to the report presented the question whether the evidence was sufficient to sustain a finding for the plaintiff for any amount at all. These exceptions were based upon two contentions, one of which was that the evidence showed that the plaintiff did not own the Offerman Railroad, without which it had no outlet for freight from Nicholls, during the time the damages were alleged to have accrued—that is, from December 23, 1899, to March 10, 1900, the period of time covered by the bond; and the other was that during this time it had no agreement with the Southern Pine Company to move the output of its mill, and therefore, whether it would have received such freights and, if so, to what extent, was purely a matter of speculation. It is true that the evidence shows that the contract between the Southern Pine Company and the Offerman & Western Railroad Company was not executed in writing until December 5, 1900; but it is also true that the written instrument executed on that date was simply in pursuance of a contract between them which was in existence during the whole of the period covered by the bond sued on in this case. Under that contract the pine company, in consideration of \$30,000 and certain covenants on the part of the railroad company, sold and conveyed to the latter the Offerman road, and for the same consideration agreed to ship the output of its mills over the Offerman & Western Railroad, provided the rate of freight was no higher than by any other route. The purchase price had been

paid by the railroad company to the pine company, and possession of the railroad, rolling stock, etc., delivered by the latter to the former, prior to the execution of this supersedeas bond. So the Offerman & Western Railroad Company not only controlled, but owned, a line of road over which to transport freight from the Southern Pine Company's plant at Nicholls, and had a contract with the pine company for the carrying of this freight, during the period of time covered by this bond. Both parties to the contract evidenced by the written agreement of December 5, 1900, were as much bound by its terms before it took formal and final shape in that instrument as they were afterwards. The contract had been entered into on November 6, 1899, possession of the property had been delivered to the purchaser a few days thereafter, and the purchase price had been paid early in December, 1899. This gave the Offerman & Western Railroad Company a perfect title, as against the Southern Pine Company, to the railroad, rolling stock, etc., and nothing more was needed to make the contract obligatory upon each of the parties thereto.

As the evidence demanded a verdict against each of these exceptions of fact, there was no error in directing the jury to so find. The exceptions of law and fact which were properly before the court having been legally disposed of as above indicated, the evidence demanding a finding in favor of the plaintiff, and the amount found by the auditor not being in dispute, the judgment making the report of the auditor the judgment of the court naturally and legally followed.

Judgment affirmed. All the Justices concurring.

(120 Ga. 78)

BLACKSTONE v. KRITZER.

(Supreme Court of Georgia. May 13, 1904.)

EXEMPTIONS—SETTING ASIDE—SUFFICIENCY OF PETITION—SCHEDULE—APPROVAL.

1. The petition for homestead must "state out of what property the exemption is claimed."

2. Whether the applicant owns more or less in value than \$1,600, and whether all or only a part of his estate is to be exempt, the schedule must contain a list of all the property owned by him.

3. The approval of the schedule does not operate to set aside as exempt, property described therein, but omitted from that part of the petition stating out of what property the exemption is claimed.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action between J. D. Blackstone and A. D. Kritzer. Petition by Blackstone to set aside certain property under the homestead laws. The petition was denied, and petitioner brings error. Affirmed.

On November 8, 1893, J. D. Blackstone filed a petition with the ordinary of Richmond county, reciting that he was the head

of a family consisting of his wife and four children. "Petitioner prays that the following described property belonging to him, to wit, one bay horse-mule named 'Rock,' value \$125 [and cows, hogs, harness, wagons, tools, furniture described], be set aside under the homestead laws of said state for the use and benefit of your petitioner and his said family, and that the same be made exempt from levy and sale by the creditors of petitioner, who attaches hereto a correct schedule of all property owned by him," etc. This petition was signed, and under the signature appears the following: "Complete schedule of property owned by J. B. Blackstone. One bay horse-mule, Rock, \$125; one sorrel mare-mule, Beck, \$125"—with a list of the other property described in the petition. There also appeared the order of publication, several orders of continuance, and, later, affidavits to show service upon the creditors, and, apparently upon a separate paper, the following: "Georgia, Richmond County. In the matter of the application of J. B. Blackstone for exemption of personalty and setting apart and valuation of homestead under the constitution. It appearing to the court that notice has been given," etc., "it is ordered that said homestead be granted, and that the petition and schedule be approved, and handed to the clerk of the superior court, to be by him recorded. Jan. 28, 1894." Signed by the ordinary. A mortgage *fi. fa.* dated December 4, 1902, was levied on the mule Beck, and Blackstone, as head of a family filed a claim. The case was submitted to the judge of the city court without a jury, who found the property subject, and ordered the levy to proceed; whereupon the claimant, as head of the homestead estate, made a motion for a new trial, and excepts to the court's refusal to grant the same.

F. W. Capers, for plaintiff in error. Wm. H. Barrett, for defendant in error.

LAMAR, J. The petition for homestead must "state out of what property the exemption is claimed." Attached to the petition must be a schedule containing a minute description of all the property belonging to the applicant. But it does not always follow that everything mentioned therein is to be set aside. The applicant's assets may exceed in value \$1,600. In such a case, of course, all cannot be exempt; yet the schedule must contain a list of everything he owns, even though a part may remain subject to levy and sale. If the applicant owns less than \$1,600, the rule is not changed. He may desire to retain a part for immediate sale, and may prefer not to include some of his property in the homestead exemption. He is not required to have all set apart as a homestead. Still the statute requires in such case also the same form of schedule. Whether the property is worth more or less than \$1,600, and whether all or

only a part thereof is to be set aside as a homestead, the schedule must be full and complete. It not only defines what is exempt, but may also be useful to creditors and levying officers in describing what is not exempt. Civ. Code 1895, § 2828, para. 1, 2. It may be that the approved schedule is prima facie evidence that the property therein described is exempt if less than \$1,600; but as to any included therein which was not named in the petition as part of the intended homestead the presumption would yield. In such cases the petition and schedule must be construed together. Compare *Larey v. Baker*, 85 Ga. 687, 11 S. E. 800; *Paschal v. Turner*, 116 Ga. 736, 42 S. E. 1010; *McDonald v. Williams*, 94 Ga. 515, 19 S. E. 830. Blackstone owned two mules. He named both animals in the schedule, but the petition only prayed that one should be set apart as exempt. That the mule levied on was omitted from the petition, but described in the schedule, and that the petition and schedule were both approved, did not have the effect of exempting what the petitioner had not asked should be exempt. The judge properly disallowed the claim, and ordered the execution to proceed against the mule which was not referred to in the petition.

Judgment affirmed. All the Justices concurring.

(120 Ga. 229)

WACHSTEIN v. GERMANIA BANK.

(Supreme Court of Georgia. May 13, 1904.)

PLEADING—EXHIBITS—ADMISSIONS.

1. Where one paragraph in a petition contains the allegations that "a copy of said protested check is hereto attached, marked 'Exhibit A,' to which reference is prayed," the admission in the answer that the paragraph is true is to be treated as an admission that the exhibit is a true copy of the original check, with all entries thereon.

2. The exhibit attached to the petition showed that the check had been properly indorsed for payment when presented.

3. The plaintiff proved his case as laid, and it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by S. Wachstein against the Germania Bank. Plaintiff was nonsuited, and brings error. Reversed.

Alexander & Hitch, for plaintiff in error. Geo. W. Owens, for defendant in error.

SIMMONS, C. J. Wachstein sued the Germania Bank for damage to his credit as a merchant, resulting from their protesting a check on the ground that there were not sufficient funds on hand, when in fact there was money to his credit sufficient to meet the check. After the protest the check was again presented, and again payment was refused on the ground of want of funds. The check was attached to the petition as an ex-

hibit. Appearing thereon was the indorsement of the payee, and of the bank to whom he in turn had indorsed it. The bank admitted these facts, but claimed that the failure to pay had been caused by an oversight occasioned by its depositing Wachstein's money to another account. It further pleaded that it had offered him \$50 as compensation for the damages inflicted, and by its plea made a continuing tender of that sum. The plaintiff offered evidence proving his financial condition and good standing as a merchant, and also to show that, without knowledge of the protest above referred to, he subsequently drew another check to the same payee in payment of a bill of goods, but that the payee declined to receive the same, and returned it, presumably on the ground that, as one check had been protested, he would not take another in payment of a bill of goods. At the conclusion of the evidence the court granted a nonsuit, on the ground, as stated in the brief of counsel for the plaintiff in error, that the petition did not allege that the check for protest of which the suit was brought had been properly indorsed; that it was an essential part of the plaintiff's case to allege and prove that the paper, when presented, contained all of the necessary indorsements in order to make the bank liable for failure to pay. The plaintiff excepted to the grant of a nonsuit.

If the petition was defective because there was no express allegation that the check was properly indorsed when presented for payment, advantage thereof should have been taken by special demurrer, and not by motion for a nonsuit. As a fact, however, the check attached as an exhibit showed that it had been properly indorsed. The answer admitted this fact when it admitted the truth of the paragraph in which the check was referred to as an exhibit. It was therefore unnecessary for the plaintiff to offer it in evidence, or incur the record by proving what was thus admitted to be true. The defendant, in its answer, admitted most of the material allegations in the petition, claimed that it had offered the plaintiff a sum in satisfaction of the damage done, and made a continuing tender of that amount. The plaintiff proved his case as laid, and it was error to grant a nonsuit.

Judgment reversed. All the Justices concurring.

(120 Ga. 231)

CARTLEDGE v. PIERPONT MFG. CO.

(Supreme Court of Georgia. May 12, 1904.)

MASTER AND SERVANT—DUTY TO WARN SERVANT—OBVIOUS DANGERS.

1. It not appearing that the machinery or appliances furnished to the plaintiff were in any way defective, or that the dangers against which it was alleged that the defendant negligently failed to warn him were such that the

§ 1. See *Master and Servant*, vol. 34, Cent. Dig. § 314.

plaintiff had not equal means with the defendant of knowing of them, the grant of a nonsuit was not erroneous.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by F. B. Cartledge against the Pierpont Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. V. Hohenstéin and P. W. Meldrim, for plaintiff in error. J. Randolph Anderson and O'Connor, O'Byrne & Hartridge, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(120 Ga. 97)

TABB v. MALLETTTE.

(Supreme Court of Georgia. May 13, 1904.)

GARNISHMENT—EXEMPTIONS—WAGES OF MUNICIPAL OFFICERS—LABORER'S WAGES—DIRECTION OF VERDICT.

1. A watchman employed by a private corporation to police its own property, who is paid by the employing company, and who is subject to discharge by his employer, is not a municipal officer whose wages are exempt from garnishment, notwithstanding such watchman is clothed with the power to make arrests, and is subject to the supervision and control of the police department of the city government.

2. A person under a contract of employment contemplating services mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, is not a laborer whose wages are exempt from process of garnishment.

3. There being no conflict in the evidence, the court properly directed a verdict.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Garnishment proceedings in justice court by Mrs. A. R. Mallette against E. C. Tabb, defendant, and the Central of Georgia Railway Company, garnishee. On appeal to the Superior Court, a verdict was directed for plaintiff, and defendant brings error. Affirmed.

P. J. O'Connor and John E. Schwarz, for plaintiff in error. D. H. Clark, for defendant in error.

EVANS, J. Mrs. A. R. Mallette sued E. C. Tabb in a justice's court, and, upon filing her affidavit and bond, caused a summons of garnishment to be issued and served on the Central of Georgia Railway Company. The garnishee answered that it was indebted to the defendant in a named sum, which was due to him for his monthly wages as a laborer, and that such wages were exempt from the process and liabilities of garnishment. The defendant also filed his answer, claiming that all money owing him by the

garnishee had been earned by him as a day laborer while in its employment. The issues formed on the answers were tried in the justice's court, and an appeal was taken to the superior court. On the trial of the appeal the evidence was as follows:

The paymaster of the garnishee company testified: The defendant, E. C. Tabb, "was employed by the Central Railway Company as a policeman. He is paid at the rate of \$60 per month. It is part of his duties to check off the number of bales of cotton or boxes of merchandise as they pass over the railroad bridge on the trucks, and to see that the number of bales and boxes correspond to the amount called for on the ticket held by the driver. In any case where there is a dispute, he turns the truck back. Tabb has nothing to do with the marks of the shipper on the cotton and boxes. He only counts the number of packages on the trucks, and sees that they correspond to the number on the ticket. In case of a question arising, I think the sergeant would settle the dispute. Tabb receives all orders from the sergeant, such as the limits of his beat and the length of his tours of duty. He is not allowed to sit down at any time while on duty, but must walk his beat continually. If he loses a day and has no good excuse, he is docked for same. I don't know of any mental work he does, except checking packages. Tabb is general custodian of the company's property. He is hired, paid, and discharged by the company."

Another witness—the superintendent of police for the city of Savannah—testified: "The Ocean Steamship force is, to a certain extent, under my control. When a man joins the police force, he is given a copy of the rules by which he is to be governed, and is supposed to acquaint himself with them as soon as possible. The men are never examined, so far as I know, as to their knowledge of the rules. When one of the rules is violated, the mayor has charge of the matter. Tabb is subject to the same rules as govern city policemen, and subject to the commands of the officers of the city police. All policemen are required to read and write English understandingly. Tabb is really not employed by the city, although subject to the same rules that govern the city police. He is employed, paid, and discharged by the Central of Georgia Railway Company."

The defendant, Tabb, as a witness in his own behalf, testified: "I am a policeman on the Ocean Steamship Company's wharf, and have been for four years. Before joining the police force I had to pass a physical examination. My tour of duty run from seven to ten hours—seven in the day and ten at night. During my tours of duty I am continually walking; am not allowed to sit down or rest, and am exposed to all kinds and conditions of weather. I am not allowed to hold conversation with any one, except in the discharge of my duties. I receive all

instructions from the sergeant. In any case of dispute, the matter is always left to the sergeant for settlement. In the absence of the regular bridgeman, I check the number of packages on the trucks or drays that pass over the bridge. I only count the number of packages. I also catch the line from incoming ships, and, in case of bad weather, I help move the boxes of merchandise on the wharf to places of safety. I am paid at the rate of \$60 per month, and am docked for loss of time. I was not required to pass mental examination. No rulebook was ever given me. * * * I make no written reports whatever. I have nothing whatever to do with the marks on cotton. * * * The limits of my beat are not always the same. We are changed about. The sergeant directs us what to do. If I am in doubt about my right to arrest a person, I send for the sergeant. If it is a plain case, I send the person to the barracks. There is a regular man to check packages at the bridge and to catch the lines from the ships, but, in case of his absence, I am required to do his work. It is a part of my duty. It is also part of my duty to move packages to places of safety during rain. I am in uniform during my tour of duty, and carry a pistol and club. During the absence of the sergeant I make the arrest if it becomes necessary to make an arrest. I send for the sergeant, and, if he cannot be found, I determine myself whether or not to arrest the party. I only help to remove freight to places of safety during rain. There are men employed for such purposes as this, but it is a part of my duty to help them in case of rain."

The plaintiff introduced in evidence certain provisions of the code of Savannah declaring that the watchmen employed by the railway company should be under the supervision of the officers of the police department, and under a duty to observe the rules therein set forth, by which the policemen of the city were governed.

Upon the conclusion of the evidence the court directed a verdict for the plaintiff, finding the fund in the hands of the garnishee subject to process of garnishment. Error is assigned on the direction of the verdict.

1. There can be no question about the salary of an officer of a municipality being exempt from the process of garnishment. *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Holt v. Experience*, 26 Ga. 113; *Leake v. Lacey*, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112. The reason for this exemption is founded on principles of sound public policy. In the case reported in 54 Ga. 399, 21 Am. Rep. 276, Judge McCay said: "The exemption is not for the benefit of the officer, but because the public is not to be harassed and inconvenienced by petty suits in the shape of

garnishments, and the efficiency of its servants interfered with by any uncertainty whether, when the salary is due, it will be paid." Where a private corporation employs, pays, and discharges its own employé, the fact that the city clothes such employé with the power to arrest violators of municipal ordinances, and places him under the superintendence of its police department, will not make him an employé of the city. The city owes him nothing for his service. His compensation is paid by the employing corporation, and his wages are in no sense payable out of the city's funds. Unless his wages are otherwise exempt, they can be reached by garnishment of the employer.

2. There is usually more or less difficulty in applying an abstract principle of law to a given statement of facts. This is illustrated in the present case, where attorneys for both plaintiff and defendant in error cite the same case (*Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300) in support of their respective contentions as to the definition of the word "laborer," as used in our garnishment statute. The character of the service rendered by the plaintiff in error is undisputed. He contends that the evidence shows that his service was mainly work of a physical nature. And the defendant in error insists that the only reasonable deduction from the evidence is that the service rendered under the contract of employment contemplated mainly work requiring mental skill and business capacity. The test of determining whether a particular individual performing certain services is a laborer is very carefully and accurately given by Judge Lumpkin in the case of *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300, and I have taken the liberty of using an extract from it in formulating the syllabus for this opinion. Applying this test to the present case, the plaintiff in error was not a laborer in the sense in which this word is used in section 4732 of the Civil Code of 1895. His employment called upon him to decide when a municipal ordinance had been infringed, and what course to pursue with regard to arresting the offender; what to do with him when arrested. Whenever the emergency arose, he was to preserve order, and at all times he supervised the safety and security of his employer's property. To discharge these functions would require the exercise of the intellectual faculties. Very little manual labor was performed by him, but most of his work was of a supervisory nature, demanding the exercise of mental skill and business capacity.

3. There being no conflict in the evidence, and all reasonable deductions or inferences therefrom demanding the verdict, the judgment is affirmed. All the Justices concurring.

(120 Ga. 74)

COMMERCIAL BANK v. J. K. ARMSBY CO.

(Supreme Court of Georgia. May 13, 1904.)

BROKERS — CONVERSION OF PROPERTY — BONA FIDE PURCHASERS.

1. Where a merchant ships goods to his broker without conveying title to him, but purely for the purpose of distribution to others, and sends to the broker a bill of lading indorsed in blank for the goods, the possession of which, by the general custom of trade, is regarded as evidence of the right to dispose of the property for which it is issued, he cannot, in an action of trover, recover the goods from a bank which has, in good faith, and without notice of the owner's title, taken the bill of lading as security for a loan of money to the broker on his individual account, and converted the property upon default in the payment of its debt.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the J. K. Armsby Company against the Commercial Bank. Judgment for plaintiff, and defendant brings error. Reversed.

Wm. H. Fleming, for plaintiff in error.
Jos. B. & Bryan Cumming, for defendant in error.

CANDLER, J. The J. K. Armsby Company, an Illinois corporation, shipped to Walton & Carr, their brokers in Augusta, a quantity of salmon for distribution to different parties to whom the goods had been sold. Walton & Carr were merely agents of the Armsby Company, and had no right or title to the salmon. The goods were shipped from a point in Oregon, by parties from whom they had been ordered by the Armsby Company, on a through bill of lading to Augusta, and were consigned to the order of the consignor, with directions to notify Walton & Carr. The Armsby Company sent Walton & Carr a check for the amount of the freight, which was paid, and it also mailed them the original bill of lading, which was indorsed blank. Carr, a member of the firm of Walton & Carr, took the bill of lading to the Commercial Bank of Augusta, and hypothecated it for a loan of money. Shortly thereafter Walton & Carr failed, and the bank converted the salmon for the payment of its debt, whereupon the Armsby Company brought against it the present suit, which was an action of trover. The case was tried before the judge of the city court of Richmond county, without a jury. The bank showed that it was the general custom of trade in Augusta that bills of lading "to order notify" were attached to drafts for the purchase price of the goods represented by them, that possession of the bill of lading could only be obtained by payment of the draft, that possession of such a bill of lading was considered prima facie evidence of ownership of the property for which it was issued, and that they were treated by banks as negotiable paper. It was also shown that the J. K. Armsby Company had

done business in Augusta for a number of years, and that, while Walton & Carr were merchandise brokers, they also bought and sold goods on their own account. It was admitted that neither the bank nor any of its officials knew or had reason to suspect that Carr had no right to convey the salmon, and that, in the event the bank should be held liable, the proper amount to be recovered was \$700. The judge found in favor of the plaintiff, and rendered judgment in its favor for the amount mentioned. The defendant excepted.

"Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title." Civ. Code, § 3539. The sole question for our determination, then, is, does a bill of lading of the character of the one involved in this suit constitute such an external indicium of the right of disposing of the property for which it was issued as to bring the case within the operation of the rule laid down in the Code section cited? As a general rule, the transferee of a bill of lading can obtain no better title to the goods which it covers than that which was in the person by whom it was transferred. Indeed, it is a self-evident proposition that no man can convey that which he does not possess. But the true owner of property may, by placing it in the power of another to defraud innocent purchasers by an apparently valid transfer of the property, cut himself off from claiming it, and thereby divest the title from himself. In 4 Am. & Eng. Enc. L. (2d Ed.) 551, it is said that an important exception to the general rule which has already been stated "arises in the case of the transfer of a bill of lading to a bona fide purchaser for value by a consignee to whom the goods are by the terms of the instrument made deliverable, or to whom the consignor and original owner of the goods has indorsed and delivered the bill. It seems to be established that in this case the transfer defeats the vendor's right of stoppage in transitu, and passes the title to the goods to the bona fide transferee." See, also, 6 Cyc. 424; 1 Mechem, Sales, § 166; Pollard v. Reardan, 65 Fed. 848, 13 C. C. A. 171. While a bill of lading is not in the full sense a negotiable instrument, it is treated by universal commercial usage as a symbol of the goods for which it is issued, and consequently it is in a measure negotiable. In Georgia it may be pledged as security for debt (Civ. Code 1895, § 2956), and a bona fide assignee for value is protected in his title against the owner's right of stoppage in transitu (Civ. Code 1895, § 3553). In American Nat. Bank v. Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51

Am. St. Rep. 155, the status of bills of lading under our law is discussed with considerable fullness; and, while the decision in that case is not directly in point on the question involved in the case at bar, the reasoning of Mr. Chief Justice Simmons has an important bearing thereon. The following language from the opinion of Mr. Justice Miller in the case of *McNeal v. Hill*, 96, Fed. Cas. No. 8,914, is there quoted with approval: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery, of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis*. From long use and trade they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale."

In this case there was no dispute as to the general custom of trade in regard to bills of lading of the character of the one negotiated by Carr with the Commercial Bank. It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill of lading was regarded as *prima facie* evidence of the title of the holder to the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for the purchase price of the goods, and can only be obtained by payment of the drafts. Carr's possession of the bill of lading was therefore *prima facie* evidence that he had paid a draft drawn by the consignor, and was entitled to the property. The departure of the Armsby Company from this custom placed it in the power of Carr to commit a fraud on the bank, an opportunity of which he seems to have promptly availed himself. Applying the well-known rule that, where one of two innocent persons must suffer from the wrong of another, the burden should be borne by him who placed it in the power of the wrongdoer to perpetrate the fraud, we fail to see how it can be held that the plaintiff can recover.

The Georgia cases cited by counsel for the defendant in error do not, in our opinion, conflict with what is here laid down. The case of *Tison v. Howard*, 57 Ga. 410, which is more nearly in point than any of the other cases cited, is easily distinguishable from the case at bar. There the owner of the goods received from the transportation company duplicate bills of lading, both of which he indorsed in blank; sending the

original to his factor, and depositing the duplicate in a bank for safe-keeping, and for no other purpose. The bailee bank indorsed the duplicate bill of lading, and secured from the factor an amount of money in excess of the value of the goods. The court held, in effect, that a bill of lading is not, in the full sense, a negotiable instrument, and that, the deposit of the bill with the bank being purely a bailment for safe-keeping, the virtual theft of it by the banker did not deprive the true owner of the goods of his title. In the case now under consideration no such state of facts is made to appear. The Armsby Company forwarded to Walton & Carr a bill of lading, the possession of which, under the universal custom of business, gave a *prima facie* right to the disposal of the goods for which it was issued. The purpose for which the instrument was confided to Walton & Carr does not definitely appear from the record, but there is nothing to indicate that it was merely intrusted to them for safe-keeping. There was nothing to put the bank on notice that title to the property was in any one other than the holder of the bill of lading. A fraud was committed by Carr, by means of which he obtained from the bank a large sum of money. To say nothing of the provisions of section 8539 of the Civil Code of 1895, the plainest principles of equity require that the Armsby Company, which made the commission of the fraud possible, and not the bank, should bear the loss.

Judgment reversed. All the Justices concur, except LAMAR, J., disqualified.

(120 Ga. 20)

CENTRAL OF GEORGIA RY. CO. v. McCLIFFORD.

(Supreme Court of Georgia. May 18, 1904.)

MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYE—DEFECTIVE APPLIANCES—CASE REQUIRED OF EMPLOYE—ACTION FOR INJURIES—INSTRUCTIONS—EXPERT TESTIMONY—MOTION FOR NEW TRIAL—REVIEW—RECORD—SUFFICIENCY OF EVIDENCE.

1. When, in the trial of a suit by an employe against a railroad company for damages for personal injuries, the judge charges the jury in clear and unequivocal terms, but in a general way, the law requiring the plaintiff, as a condition precedent to a recovery, to show that he was without fault, the failure to apply this principle in a hypothetical way to the particular facts, calling attention to what is claimed by the defendant to be negligence on the part of the plaintiff, will not be a sufficient reason for reversing the judgment refusing a new trial to the defendant, when there is no appropriate written request, presented in due time, asking for such an instruction.

2. A master is not relieved from liability to his servant who is injured by a defective instrumentality by the mere fact that the instrumentality is owned by a third person.

3. If the master constantly uses the instrumentality in his business, and so deals with it as to practically adopt it as his own, he becomes, relatively to a servant injured thereby, the owner, and is under the same duty to the servant as an owner would be.

4. Though the railroad company in this case did not own the fence and gate here involved, they were built across its track with its permission; the gate was constantly used by it in its business; had on it a lock put there by the company, keys to which were furnished to its employees; and was under its control to such an extent as to make it its duty, relatively to its employees using the gate, to see that it was in a suitable condition for use, and to give its employees warning in the event it was not.

5. The law requires of an employé the exercise of only ordinary diligence to prevent injury to himself.

6. An expert may be asked his opinion of a hypothetical case, even though the facts thereof may be the same as those of the case on trial.

7. A ground of a motion for a new trial complaining of the admission or rejection of evidence must be complete in itself, or in connection with exhibits attached to the motion. The Supreme Court will not look to any other part of the record to make perfect an incomplete assignment of error in a motion for a new trial.

8. The evidence warranted the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by P. O. McClifford against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action for damages for personal injuries, in which the plaintiff recovered a verdict. The case is here upon exceptions to the overruling of the defendant's motion for a new trial. The plaintiff was employed by the defendant as a coupler and switchman. The defendant had a track which ran parallel with the property of the Southern Cotton Oil Company, from which track three or four tracks led into the premises of the cotton oil company. Across one of these tracks the cotton oil company had erected a gate. The gate, while across the defendant's track, was upon land owned by the oil company, and was owned and maintained by it. The gate had a railroad lock upon it, which was put there by the defendant for the purpose of facilitating its access through the gate, and some of its employés were furnished with keys to the lock. The plaintiff was on top of a car in the discharge of his duties as switchman or coupler, which car, together with others, was being pushed by an engine toward the gate. The plaintiff observed that one wing of the gate was closed, and, according to testimony introduced in his behalf, gave the engineer repeated signals to stop the train, which could have been done, had the signals been obeyed. The engineer disregarded the signals, and the train ran into the closed gate, derailing the car on which plaintiff was standing. In attempting to get off the car, the plaintiff sustained the injuries complained of. There was some evidence that the wing of the gate which was closed was not supplied with a hook, and the inference from the testimony is that this was the reason for

that wing being closed. On this testimony the judge evidently based the charges referred to in the opinion.

Lawton & Cunningham, for plaintiff in error. C. T. Ladson and Garrard & Meldrim, for defendant in error.

COBB, J. (after stating the foregoing facts). 1. Complaint is made that the court failed to instruct the jury as to the main defense of the defendant, which was that the plaintiff was stationed on the car nearest the gate, that it was his duty to signal the engineer of any obstruction upon the track, and that he failed to give the engineer any warning until the car was so near the gate that it was impossible to stop the train in time to avoid the collision. The judge charged the jury that, before the plaintiff could recover, it must be shown that he was without fault or negligence; that if he, immediately or remotely, directly or indirectly, caused the injury, or contributed to it in any way, he was not entitled to recover; that, the plaintiff being an employé, any negligence on his part, however slight, which contributed in any appreciable degree to the injury, would defeat a recovery; and also that he could not recover if he was to blame. Having thus stated to the jury in this manner, although in a general way, the rule of law that imposed upon the plaintiff the duty of showing that he was without fault, as a condition precedent to a recovery, we do not think the judgment should be reversed for the failure of the judge to apply the principle specifically to the facts of the particular case, in the absence of an appropriate written request to this effect, presented in due time.

2-4. Ten grounds of the motion for a new trial contain assignments of error upon portions of the charge of the judge relating to the duty which the defendant owed the plaintiff in reference to the gate across its track. The charge was, in effect, that if the railroad company used the track upon the premises of the oil company, and carried its cars and engines through the gate, opening and closing it when necessary, and had its lock on the gate, with keys to the lock in the possession of its employés, the company owed to its employés the same duty in reference to the gate as if it had been the owner, and the gate had been erected upon its premises. Where a servant is injured by a defective instrumentality which is neither owned nor controlled by the master, but used by his direction, the authorities are conflicting as to whether the master is liable. See *Labatt's Master & Servant*, § 169; 3 *Elliott on Railroads*, § 1279. The author first cited expresses the opinion that the cases which declare the master to be liable "are more consistent than the others with those general conceptions of public policy which are the ultimate foundation of his obligations to his

servants." He then proceeds to say that in perhaps most of the cases the master's want of control over the instrumentality would constitute no serious obstacle to his acquiring information as to its condition, lack of information being the theory upon which nonliability is supposed to rest. This court has ruled squarely, however, that in the case just stated the master would not be liable unless he knew of the defective condition of the instrumentality. *Dunlap v. Railroad Co.*, 81 Ga. 136, 7 S. E. 283. We do not think the facts of this case bring it within the rule just stated, but rather within the rule that the master is liable to his servant for injuries received from defective instrumentalities not owned by the employer, but controlled by him, and used by him in his business. See 1 *Labatt's Master & Servant*, § 172. The evidence here shows that the owner of the gate had been accustomed to repair it, and that the railroad company was not expected to keep the gate in repair. But the evidence also shows that the railroad company constantly used the gate in its business, that it was built across its track, that it had on it a lock placed there by the railroad company, and that its employes were furnished with keys to this lock. The railroad company did not own the gate, but, when it permitted it to be built across its track, and used it in its business, it became, relatively to an employé, a part of the track, and as to him the company is to be treated as the owner; that is to say, it became so far the owner as to be under a duty to its employes to see that the gate was kept in repair. The company was bound to furnish its employes with a safe place to work, and it certainly could not allow its track to become unsafe by reason of an obstruction placed upon the track by a third person with its permission. We recognize that in cases like the present the line between liability and nonliability is very closely drawn, but we think the facts of this case show a breach of the duty which the defendant owed to the plaintiff to provide him with a safe place to work. To all intents and purposes, it was in control of the gate. It locked it and unlocked it, opened it and shut it, whenever occasion required; and it cannot defend against the plaintiff's suit on the mere ground that the duty to repair was on the Southern Cotton Oil Company. The railroad company was at least under a duty to inspect and to warn, even if it was not also under the duty, relatively to its employes, to keep the gate in repair. The charges complained of were not erroneous.

5. Complaint is made that the judge charged the jury that the plaintiff was bound to the exercise of ordinary care; it being contended that, as he was an employé, he was bound to the exercise of extraordinary diligence. There was no error in this charge. The degree of diligence which the law requires of an employé is ordinary diligence

only. *Central R. Co. v. Lanier*, 83 Ga. 591, 10 S. E. 279; *Richmond & Danville R. Co. v. Mitchell*, 92 Ga. 81, 18 S. E. 290 (2). The failure of the employé to exercise the degree of diligence required (that is, ordinary diligence), even in the slightest way, will preclude him from recovering; that is, he is at fault whenever he does anything or fails to do anything which would amount to a lack of ordinary care on the part of any person in the same or similar circumstances. If he immediately or remotely, directly or indirectly, causes the injury, or any part of it, or contributes to it by any act which an ordinarily prudent person would not have performed, or leaves undone anything which an ordinarily prudent person would have performed, he cannot recover. His lack of ordinary care, no matter how slight, which contributes in any appreciable degree to the injury, renders him to blame. This court has never held that an employé of a railroad company is bound to exercise extraordinary diligence. On the contrary, it has always held that ordinary diligence is all that is required. The expressions in *Kenney's Case*, 61 Ga. 590 (3), *Mitchell's Case*, 63 Ga. 181, *Hicks' Case*, 95 Ga. 302, 22 S. E. 613, and other cases relied upon by counsel as indicating that extraordinary diligence is required, are merely different ways of expressing the principle above laid down.

6. There was no error in allowing the plaintiff and the witness Kelley, as experts, to give their opinion upon the hypothetical case stated as to the distance in which a train of a given character could be stopped, although the case thus hypothetically stated was substantially the case as made by the evidence. In *Flanagan's Case*, 106 Ga. 109, 32 S. E. 80, it was distinctly ruled that, while it is improper to ask an expert his opinion of the case on trial, he may be asked his opinion of the same case hypothetically stated. There is nothing in *Southern Mutual Insurance Company v. Hudson*, 113 Ga. 434, 38 S. E. 964, which at all modifies or changes the rule laid down in the *Flanagan Case*, but, on the contrary, the two decisions are in entire accord; it being held in each that the expert must give his opinion upon a hypothetical case, although the facts of the case stated might be the same as those appearing from the evidence, but would not be allowed to give his opinion upon the facts and circumstances of the particular case.

7. Complaint is made in one ground of the motion for a new trial that the court erred in permitting the plaintiff "to introduce in evidence rule 519, claimed to be from the rulebook of the Central of Georgia Railway Company; said rule being set out as Exhibit A to the brief of evidence." There is nothing in the ground or the motion, or in any exhibit to the same, which indicates what are the contents of rule 519. Under numerous decisions of this court, this ground cannot be considered. The court will not

look from the motion and its exhibits to the brief of evidence and its exhibits, or any other portion of the record, for the facts necessary to make the ground complete. *Seaboard Air Line Railway v. Phillips*, 117 Ga. 106, 43 S. E. 494, and citations.

8. No error of law appears which, in our opinion, requires a reversal of the judgment. The charge was free from substantial error, and fairly submitted the issues to the jury. The evidence authorized the verdict.

Judgment affirmed. All the Justices concurring.

(120 Ga. 247)

LIPPMAN v. AETNA INS. CO.

(Supreme Court of Georgia. May 14, 1904.)

INSURANCE—FORFEITURE OF CONTRACT—WAIVER BY AGENT—PLEADING—TIME FOR ANSWERING—AMENDMENT.

1. Answers to suits in the city court of Savannah must be filed on or before the first day of the return term.

2. Where a demurrer and answer to a petition are filed too late, but, instead of moving to strike because not filed in time, the plaintiff invokes the judgment of the court on the demurrer, and amends the petition to conform to its judgment, it is too late, at a subsequent term of the court, to move to strike the demurrer and answer because not filed in time.

3. A material amendment to a petition opens the case, if in default, for answer by the defendant.

4. A forfeiture of a contract of insurance cannot be waived by a local agent of an insurance company, without express authority from the governing officials of the insurance company.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Mrs. Emma Lippman against the Aetna Insurance Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Saussy & Saussy, for plaintiff in error.
Adams & Adams, for defendant in error.

EVANS, J. Mrs. Emma Lippman filed her suit against the Aetna Insurance Company of Hartford, Conn., returnable to the May term, 1902, of the city court of Savannah. The first day of the May term was the fifth day of the month, and on that day counsel for the defendant had their names marked on the judge's docket as attorneys for the defendant, and on the following Monday, which was the second Monday of the term, filed its demurrer and plea under the rules of the court. The grounds of the demurrer were: (1) That no copy of the contract of insurance sued on was incorporated in or attached to the petition, nor did the petition purport to set forth a copy of what appears written or printed upon the face or in the body of the policy sued on; (2) that paragraph 8 of the petition failed to state wherein the defendant had acted in bad faith, or had been stubbornly litigious, so as to be re-

sponsible for counsel fees. Nothing further was done in the case until April 18, 1903, when the demurrer was heard and sustained, and plaintiff allowed 10 days to file an amendment containing or having attached thereto a copy of everything appearing on the face or in the body of the policy, including all the stipulations embraced in that portion of the same above the signatures of the company's officers by whom it was executed. On April 22, 1903, plaintiff complied with the terms of the order sustaining the demurrer, and amended her petition by attaching a copy of the policy of insurance. Whereupon, on May 4, 1903, the defendant amended its original plea, denying liability to the plaintiff because, in and by its policy of insurance, it was stipulated that, unless otherwise provided by agreement indorsed thereon or added thereto, the same should be void if the insured, at the time of effecting the insurance, had or should thereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by said policy; that, when the policy was taken out, the insured had two policies of insurance on the said property, one in favor of the Hartford Fire Insurance Company, issued November 17, 1899, for \$2,500, and another in favor of the Liverpool, London & Globe Insurance Company, issued on the said November 17, 1899, for \$1,000; that no agreement was indorsed on the policy, or added thereto, as to the said previous insurance, which existed on the said property at the time of the fire; and that, by reason thereof, the covenants and conditions of this policy of insurance were and are broken, and the plaintiff is not entitled to recover any sum whatever. On December 7, 1903, by her written motion previously filed on August 28, 1903, plaintiff moved to strike defendant's demurrer, plea and answer, and to enter up a default in the case nunc pro tunc, on the grounds: (1) That the plaintiff filed her petition against the defendant, and the same was duly served, returnable to the May term, 1902, of the court; that the first day of the May term, 1902, of the court was May 5th of said year, and on said day the defendant was not represented by counsel, nor had it filed any demurrer, plea, or answer to the petition; that afterwards defendant employed counsel, who on May 12, 1902, filed a demurrer, plea, and answer, but that the employment of counsel and the filing of the said demurrer, plea, and answer were too late, as the city court of Savannah under its constitution is a court in which cases are triable at the first term, and all pleadings and defenses and entries of appearance are required by law to be made on the first day of the term, and upon failure thereof default should be entered; (2) that defendant did not employ the counsel whose names are entered on the docket, and who filed said defense, until after the first day of the

term had passed, which fact was unknown to plaintiff until the present term of the court and within the last few days. The judge heard evidence on the issues of fact raised by this motion to strike. The evidence submitted was sufficient to sustain the finding that counsel was employed on the first day of the term, and had authority to appear on that day and make answer for the company. The motion was overruled, and the case proceeded to trial. Error is assigned on the judgment refusing to sustain plaintiff's motion to strike the company's defenses.

1. The law applicable to the filing of answers in the city court (Code 1882, § 4926) provides that: "The defendant shall file his answer in writing, on or before the opening of the court, at the return term of the suit, and the pleadings shall conform to the general law of the state. In case of default, the same shall be noted on the docket; and in such case, the plaintiff shall be entitled to proceed ex parte and establish his demand, upon proof thereof, at such return term." It is further provided, in section 4983 of the Code of 1882, that: "The judge of said court may make rules of practice for the same, not in conflict with the general laws of the state; and, in all cases of fees to officers where such general laws do not strictly apply, he may, by rule or order of court, fix such fees by analogy to the general law." The following rules of practice were adopted by the court at the February term, 1890, on the authority of the last-quoted section: "On the first day of the term the entire docket will be called. Cases in which no appearance is made shall be in default and so marked, and plaintiffs shall be at liberty to proceed ex parte after the first day if no appearance has been entered or answer filed during the first day." "Except new cases and those assigned under rule three, all cases called on the first day shall be subject to assignment for trial." "New cases shall be called for assignment on the second Monday of the term, and defendants shall have until such call to file answer in all cases where an appearance has been entered during the first day of the term." Plaintiff in error maintains that the rule promulgated by the judge providing the time the answer may be filed is void, because it is inconsistent with section 4926 of the Code of 1882 and the general law on the subject. Section 4926 of the Code is mandatory that a written answer shall be filed on or before the opening of the court at the return term of the suit. It would be an unwarranted construction to extend the meaning of the words "opening of the court" to include any other day except the first day of the term. If the plea could be filed after the first day of the term, it could be filed on the last day, as well as on any intermediate day. To give any other construction to this statute would be to deprive it of a definite meaning in this regard.

A failure to file the answer on the first day of the term would entitle the plaintiff to have the case noted on the docket as in default, and to proceed ex parte as provided by this section. Apparently recognizing the validity of the rules of practice prepared by the bar and promulgated by the judge, the plaintiff, without urging any objection that the demurrer and answer were filed too late, went to trial on the demurrer, and amended her petition to conform with the judgment on the demurrer. When the case was up for a hearing on the demurrer, the plaintiff ought to have urged her motion to strike the demurrer and plea because they were filed too late. Instead of taking advantage of defendant's failure to answer on the first day of the term, she invoked a ruling of the court on the merits of the demurrer, and complied with the terms of the judgment sustaining the demurrer, and allowed several months to pass before filing a motion to strike the company's defense and declare a default. The plaintiff will be presumed from her conduct to have waived her right to insist upon her motion at such a late day. *Pedrick v. McGill*, 80 Ga. 491, 5 S. E. 633; *Cook v. Childers*, 94 Ga. 718, 19 S. E. 819.

2. It was further contended that the amendment was material, and the allowance of the same opened the default, if any existed. The entire policy was added to the petition by amendment. The policy embraced many stipulations in the body of it above the signatures of the company's officers. These stipulations were not set out in the declaration. "While it was not essential to the validity of an action upon an insurance policy * * * to set out or attach a full copy of all which was written or printed upon such policy, the declaration ought to have contained or had attached thereto a copy of everything appearing upon the face and in the body of the policy, including all the stipulations embraced in that portion of the same above the signatures of the company's officers by whom it was executed." *Southern Mutual Ins. Co. v. Turnley*, 100 Ga. 296 (2), 27 S. E. 975. Some of these stipulations provided for compliance with conditions precedent to bringing suit. The amendment was of a substantial character; it gave a new phase to the case, and was of such materiality that its allowance permitted the filing of a plea to the matter alleged by way of amendment. Considering the case as in default, the allowance of a material amendment opens the case for answer by defendant. *Calhoun v. Mosley*, 114 Ga. 641, 40 S. E. 714. The court, therefore, properly overruled the motion to strike the pleadings of the defendant and enter judgment as in case of default.

3. The evidence on the main trial was substantially as follows: The policy of insurance was issued to Lewis Lippman on February 27, 1901. Among other stipulations in the body of the policy was the following:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." On October 22, 1901, Lippman assigned his interest in the policy to his wife, Mrs. Emma Lippman, the company consenting to this transfer. On December 23, 1901, a fire occurred on the premises described in the policy, and considerable property belonging to Mrs. Lippman was destroyed. Proofs of loss were submitted to the insurance company on January 10, 1902. These proofs of loss, which were signed by Mrs. Lippman, contained the following statement: "At the time of the fire * * * there was outstanding against said property insurance under the following companies, * * * to-wit: The Liverpool, London & Globe Insurance Company of Liverpool, England, Policy Number 5892, \$1000.00, issued November 17, 1899; Hartford Fire Insurance Company of Hartford, Conn., Policy Number 8201, \$2,500.00, issued November 17, 1899; The Citizens Insurance Company of Missouri, Policy Number 186,777, \$2,500.00, issued June 14, 1901. All of said companies are represented by agents in the City of Savannah, Ga." The firm of W. L. Wilson & Co. represented the Aetna Insurance Company, and, acting in its behalf, sent to Mrs. Lippman a letter, dated December 31, 1901, saying therein: "This is to advise you that the Aetna Insurance Co. of Hartford wishes to cancel its policy #6304, covering on your furniture, etc., and that the said policy will be canceled under its terms and conditions on January 5, 1902, thus giving you five days in which to replace the same. This cancellation is subject to the payment of any damage sustained by you by fire on Dec. 23, 1901, which has been appraised at \$900.00 with total contributing of insurance of \$7500.00, making this Co.'s liability \$180.00, which it stands ready to pay, making the return figure pro rata to you \$1.63, which we will hand you on demand or on receipt of proper receipt which we will furnish you." The trial judge, on motion of the defendant, nonsuited the plaintiff. The motion for nonsuit was predicated on the ground that at the time the policy sued on was issued there were two other policies on the same property, and one was issued thereafter, and that there was no proof of the company's assent to this additional insurance. The plaintiff contended in the court below, and contends here, that the evidence showed a waiver of the forfeiture resulting from the additional insurance without the company's assent. The evidence of waiver relied on was the letter from W. L. Wilson & Co. to Mrs. Emma Lippman, dated December 31, 1901, appearing in the foregoing synopsis of the evidence. The forfeiture had already occurred when this letter was written; the

policy by its own terms was void. In *Graham v. Niagara Fire Ins. Co.*, 106 Ga. 840, 32 S. E. 579, it was questioned whether, by the most formal acts of the governing body of the corporation, a waiver of a forfeiture happening before the waiver would be binding on the company. Certainly it can be said that a local agent, whose authority is to receive proposals for insurance and to make insurance by policies signed by the president and secretary of the insurance company and countersigned by himself as local agent, has no power to waive a forfeiture. *Graham v. Ins. Co.*, supra; *Underwriters' Agency v. Sutherland*, 55 Ga. 266; *Farmers' Mutual Ins. Ass'n v. Price*, 112 Ga. 267, 37 S. E. 427. When there is a forfeiture, the contract of insurance is at an end, and to revive it would require express authority from the company. The letter was in the nature of an offer of compromise. Treating it as an express recognition of the company's liability for a certain amount, and of the binding force of the policy at that time, it cannot bind the company unless the agent had authority to make such admissions, and to waive the forfeiture, so as to restore validity to the insurance contract. It does not appear that he had such authority. The burden is on the plaintiff, when he relies on the act of an agent to bind the principal, to show the agent's authority. The contract of insurance having been invalidated by taking concurrent insurance without permission, and the agent having no authority to waive this provision of the policy, the judgment awarding the nonsuit was right.

Judgment affirmed. All the Justices concurring.

(120 Ga. 226)

BERENDT v. RIPPS.

(Supreme Court of Georgia. May 13, 1904.)

JUDGMENT—MOTION TO OPEN—PLEA.

1. In a suit upon an absolute and unconditional promissory note, the court, in the absence of an issuable plea filed under oath, rendered an absolute judgment for the plaintiff, agreeing at the time, however, to open the judgment if the defendant would, within 10 days thereafter, file "a sufficient answer in law to said suit," and within the time the defendant filed a plea which sought to vary the terms of the note by ingrafting upon it a condition made by a parol, contemporaneous agreement, and thereupon moved to open the judgment. *Held*, that there was no error in refusing to grant the motion. Civ. Code 1895, § 3875, par. 1.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Max Ripps against I. Berendt. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Boyd and Twiggs & Oliver, for plaintiff in error.

FISH, P. J. Judgment affirmed. All the Justices concurring.

(135 N. C. 425)

WEEKS et al. v. QUINN.

(Supreme Court of North Carolina. May 17, 1904.)

DESCENT AND DISTRIBUTION—STATUTES—FAILURE OF LINEAL DESCENDANTS—DESCENT TO MOTHER.

1. Rev. St. c. 38, in the fourth canon of descent, provides that on a failure of lineal descendants, where the inheritance has been transmitted by descent, the inheritance shall descend to the next collateral relations of the person last seised, who were of the blood of the ancestor; but a proviso to the sixth rule provides that, in all cases where the person last seised shall have left no issue nor brother nor sister nor issue of such, the inheritance shall vest in the father, if living, and, if not, then in the mother. *Held*, that where one was survived by his daughter and widow, and the daughter inherited land from him and died before her mother, the widow, the mother inherited the estate, and, on her death, her heirs were entitled to the land as against the heirs of the father.

2. It was immaterial whether the widow or daughter had been in possession of the land; the statute of descents, rule 12 (Code 1883, § 1281), declaring that every person in whom a seisin is required by any of the provisions of the chapter shall be deemed to have been seised, if he may have any right, title, or interest in the inheritance.

Appeal from Superior Court, Rutherford County; B. F. Long, Judge.

Suit by J. D. Weeks and others against J. H. Quinn. From a judgment in favor of defendant, complainants appeal. Affirmed.

Eaves & Rucker and Morrow & Smith, for appellants. Quinn & Hamrick, for appellee.

MONTGOMERY, J. Under the common law, the fifth of the rules or canons of inheritance was that, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations being of the blood of the first purchaser; and rule 1 was an inflexible one that inheritance should never lineally ascend. By our statute of 1808, c. 739 (Rev. St. c. 38, rules 4 and 6; Code 1883, § 1281), changes were made in respect to those two rules of descent under the common law. The fourth canon of descent in chapter 38 of the Revised Statutes provides that on failure of lineal descendants, where the inheritance has been transmitted by descent, the inheritance shall descend to the next collateral relations of the person last seised who were of the blood of such ancestor; and in rule 6 there is a general provision that where the person last seised shall have left no issue nor brother nor sister nor the issue of such, the inheritance shall vest for life only in the parents of the intestate, or in either of them, if one only be living, and, on the death of the parents, then to the survivor, and afterwards be transmitted according to the preceding rules. That proviso was amended, as appears in the Revised Code, so as to vest the inheritance absolutely in the father if living, and, if not, then in the mother, if living, whether of the

blood of the ancestor from whom the land descended or not. That is the law as it is now written in the Code in the proviso in rule 6 of the chapter on descents.

The very question now before us is that which was before the court in the case of *McMichal v. Moore*, 56 N. C. 471, and the same principle is decided in *Kincald v. Beatty*, 98 N. C. 340, 4 S. E. 524, and *Early v. Early* (at this term) 46 S. E. 503. The court, in *McMichal v. Moore*, said: "This general provision in favor of the father and mother expressly departs from the principle of keeping the inheritance in the blood of the first purchaser, which for feudal reasons was strictly adhered to by the common law, and which is retained in our statutes in regard to collateral relations, except for the purpose of preventing an escheat. The parents are by the statute looked upon as lineal relations in the ascending line, and in respect to them the common-law principle is put entirely out of the way. Under the statute now in force, the inheritance vests absolutely in the father, if living, although he is not of the blood of the ancestor from whom the land descended. No words could make the intention of the lawmakers plainer than those used. In Rev. St. c. 38, the provision was that in such cases the inheritance should vest in the parents for life only, with the right of survivorship; as amended, the inheritance vests in the father, if living, absolutely; but in both statutes there is the same disregard of the blood of the first purchaser or ancestor from whom the land descended."

In the case before us, submitted under section 567 of the Code, it appears that William Weeks died intestate in 1901, seised and possessed of the lands described in the case submitted, leaving a widow, Alpha, and a daughter, Willie Belle. The daughter died in the lifetime of the mother, Alpha. The defendant J. H. Quinn qualified as administrator of Alpha, the widow of William Weeks, who had after his death intermarried with one Butler, and has commenced a special proceeding in the superior court of Rutherford county to subject the land and assets to pay the debts, and for partition among the heirs at law of his intestate, Mrs. Butler. The action was commenced by the plaintiffs, who are the heirs at law of William Weeks, from whom the land descended to his daughter, Willie Belle Weeks, and the defendants (besides Quinn, the administrator) are the next of kin of Mrs. Butler, formerly the widow of William Weeks.

As we have already said, the case of *McMichal v. Moore*, supra, is controlling here. Willie Belle, the daughter of the intestate, William Weeks, by the death of her father and the inheritance being cast upon her by the event, became the propositus or stock from whom the inheritance lineally ascended to her mother. It is immaterial who was in the actual possession of the land—whether Willie Belle, the daughter, or Alpha, the

mother—for the reason that by rule 12 of the chapter on descents in the Code it is declared that "every person in whom a seisin is required by any of the provisions of this chapter shall be deemed to have been seized, if he may have any right, title or interest in the inheritance." The court below gave judgment that the defendants are the owners of the land, and that they recover possession thereof. There is no error in that ruling.

Affirmed.

(135 N. C. 504)

BOWERS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 24, 1904.)

TELEGRAPH COMPANIES—DELIVERY OF MESSAGE—DELAY—DAMAGES—MENTAL ANGUISH.

1. A telegraph message, signed by plaintiff's mother, directing him to "come at once," was delayed in transmission by the telegraph company, so that plaintiff missed the train on which he might have gone to his mother, and the next train which he took did not make connection, so that plaintiff, in order to hasten his arrival, walked nine miles. His mother was not seriously ill when the message was sent, but wished to see plaintiff on business. *Held*, that it was plaintiff's own misapprehension which caused him any mental anguish he might have suffered, and not the negligence of the telegraph company.

2. Recovery may be had for mental anguish occasioned by the negligence of another.

Appeal from Superior Court, Durham County; Cooke, Judge.

Action by De Witt Bowers against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

F. H. Busbee & Son, for appellant. J. C. Biggs and Boone & Reade, for appellee.

CLARK, C. J. The plaintiff's mother, Lucy Bowers, sent him the following message: "Come at once. Lucy Bowers." This was given to the telegraph operator at Apex, N. C., soon after 8 a. m., and was delayed in transmission so that it was not delivered to the plaintiff at Durham, N. C., till 11:50 a. m., and after the east-bound train had passed Durham at 9:40 a. m., by which he might have gone to his mother. He left on the afternoon train, but, that train not making connection at Cary, the plaintiff got off at Morisville, and walked nine miles to his mother's. His mother had been unwell, but was not sick enough to have a doctor; and this message was sent, not because of illness, but because she wished to see her son on business.

The defendant was derelict in taking nearly four hours to transmit a message from Apex to Durham, and, nothing else appearing, the sender might recover back, if she demanded and was refused, the 25 cents

which was paid by her to secure its prompt transmission, for which purpose telegraph companies are granted charters to serve the public convenience. *Kennon v. Tel. Co.*, 128 N. C. 232, 35 S. E. 408. But we see no ground to authorize a recovery by the plaintiff for mental anguish. His mother was not dead, nor at the point of death. He knew that, because her name was signed to the dispatch. It was his own misapprehension which caused him any uneasiness, and not the negligence and delay of the defendant. He was not deprived by such delay of the opportunity of seeing his mother, who, indeed, is still alive. Mental anguish is as real as physical, and recovery in proper cases is allowed of just compensation when anguish, whether physical or mental, is caused by the negligence, default, or wrongful act of another. The difficulty of measuring compensation does not bar a recovery for physical anguish, nor when the anguish is mental. But if the plaintiff suffered any mental anguish in this case, it was not caused by the negligence of the defendant. In refusing to so instruct the jury at the request of the defendant, there was error.

The learned counsel for the defendant informs us that more actions for mental anguish are brought in this state than in any other than Texas. This is not in the record, but, if correct, the courts have cause to complain of the additional burden; but counsel certainly do not lose anything thereby, and are in no wise to be held responsible for it. The defendant is responsible for any loss in such litigation, for it can effectually prevent recovery in any action by the discharge of its duty in the prompt delivery of telegrams—especially of those whose tenor indicates that either mental anguish or pecuniary loss will be the probable result of a delay in transmission or delivery.

Error.

MONTGOMERY, WALKER, and CONNOR, JJ., concur in result.

(135 N. C. 443, 504)

ALLRED et al. v. SMITH et al.

(Supreme Court of North Carolina. May 17, 1904.)

JUDGMENTS—ESTOPPEL—PERSONS CONCLUDED—PARTIES AND PRIVIES—TENANTS IN COMMON—ERROR—FOR WHOM AVAILABLE—CANCELLATION OF DEEDS—NATURE AND EFFECT OF JUDGMENT—PRACTION—APPEALS FROM CLERK—EFFECT OF DECISION.

1. The deed of a person of unsound mind, not under guardianship, is merely voidable, and not void, and it conveys the title to the land, so that no estate passes to the heirs at law, but merely a right of action to attack the deed.

2. An estoppel by judgment must be mutual. It binds only parties and privies, and one who is neither can no more take advantage of the estoppel, as against the party on whom it operates, than he can be bound thereby.

3. Tenants in common are not privies, but their titles are distinct, and they may not take

advantage by way of estoppel of a judgment obtained by a co-tenant suing alone, which set aside a deed executed by their common ancestor for want of mental capacity on her part to execute it.

4. A judgment setting aside a deed is not one in rem settling the status of the deed as to all the world, but merely operates on the title conveyed by the deed as between the parties to the suit in which the judgment is rendered.

5. Judgments quasi in rem bind the parties only.

6. A tenant in common, who was not a party to a suit brought by a co-tenant to set aside a deed executed by their common ancestor to defendant in that suit, cannot take advantage of an error in the judgment rendered therein.

7. Parties claiming rights in property by virtue of a judgment should set up the entire record in the suit in which the judgment was rendered, in order to enable the court to see what was in litigation and what adjudged.

8. Under Code, §§ 264, 255, providing for appeals from the clerk to a judge of the superior court, the decision of the question by the judge, and the transmission of his decision to the clerk, after notice of which the parties may proceed as provided by law, a decision of the judge on reversing a ruling of the clerk sustaining a demurrer is not a final judgment, but operates to remand the case, so far as it is before the judge, to the clerk.

Clark, C. J., dissenting.

Appeal from Superior Court, Randolph County; Long, Judge.

Proceedings for partition by B. M. Allred and others against H. D. Smith and others. From a judgment reversing a judgment of the clerk of the superior court sustaining a demurrer to the answer, plaintiffs appeal. **Affirmed.**

Nancy Allred was the owner of the land in controversy, all parties to the land claiming title under her. She died leaving the plaintiffs and defendants her heirs at law. Prior to her death she executed a deed for the land in controversy to the defendant G. D. Allred. The plaintiff Willie Allred, after the death of her mother, instituted an action in the superior court against the defendant G. D. Allred, alleging that at the time of the execution of said deed the said Nancy Allred did not have sufficient mental capacity to execute the same; that she did not assume to sue for or in behalf of any children heirs at law of said Nancy Allred. At July term, 1903, the cause came to trial, and upon an issue submitted to the jury it was found that the said Nancy Allred did not have the sufficient mental capacity to execute the said deed, and it was "ordered, adjudged, and decreed that the deed described in the complaint, and which is recorded in Book 99, p. 310, in the office of the register of deeds of Randolph county, and which purports to convey the land described therein from Nancy Allred to the defendant G. D. Allred, is void, and of no effect; and it is further ordered, adjudged, and decreed that the said deed be delivered up and canceled of record; and it is further ordered that the clerk of this court certify a copy of this judgment to the register of deeds of Randolph county to the end that the same may

be registered in the office of the register of deeds for said county." From this judgment no appeal was taken. The plaintiffs instituted this proceeding for partition, and alleged that they and the defendants are each entitled to one-ninth undivided interest of said land as heirs at law of Nancy Allred. The defendant G. D. Allred says that he is entitled to eight-ninths undivided interest in said land by virtue of the deed from Nancy Allred to himself. He admits that by virtue of the judgment in the case of Willie Allred against himself she is entitled to one-ninth interest therein. The facts in regard to the execution of the deeds and a copy of the judgment are fully set out in the answer. The plaintiffs demurred to the answer for that it appeared upon the face of the complaint that the said deed under which the defendant G. D. Allred claimed had been declared void and canceled. The clerk sustained the demurrer, and directed a sale of the land for partition, to which judgment the defendant excepted, and appealed to the judge. Upon the said appeal the judge of the district reversed the judgment of the clerk and overruled the demurrer, adjudging: "Upon the record now before the court, the court adjudges that Willie Allred and G. Dallas Allred are tenants in common in the lands described in the petition, the said Willie entitled to one-ninth and G. Dallas to eight-ninths, and the judgment of the clerk to this extent is reversed and modified." From this judgment the plaintiffs other than Willie Allred appealed.

Oscar L. Sapp, for appellants. Robbins & Robbins and Hammer & Spence, for appellees.

CONNOR, J. The deed from Nancy Allred to the defendant G. D. Allred conveyed to him the title to the land in controversy. If she was non compos at the time of its execution, the deed was voidable, not void. "The deed of a person of unsound mind, not under guardianship, conveys the seisin." Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686. At her death no estate passed to her heirs at law. They had a right of action, and were entitled, either jointly or severally, to attack the deed in so far as it affected their rights. Only one of them did so. It is alleged, and the demurrer admits, that she "did not assume to sue for or in behalf of any of the other children." As the basis of her right to sue she alleged that she was an heir of Nancy Allred. This was admitted. The only issue submitted to the jury was directed to the mental capacity of the grantor. The facts appearing upon the pleadings before us are that Nancy executed the deed; that Willie brought the action to set it aside so that she might inherit her share of the land conveyed; that she prosecuted her action successfully, and has the fruits of her victory—one-

ninth undivided interest in the land. The brothers and sisters seek to avail themselves of the verdict and judgment in that case to vest title in themselves and to estop the defendant G. D. Allred from claiming any right to or title in the land under the deed. They are not parties to the action. The defendant does not seek to use the judgment as an estoppel, or to attack it. He concedes that as against the plaintiff Willie, in respect to her one-ninth, he is estopped. She claims no more. The parties to the action are content to abide its result. When the other plaintiffs, strangers to the action, and, as we shall see, not privies, seek to take title under the judgment, or to estop him from denying that they have title, he simply relies upon the well-established principle that "estoppels must be mutual, and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it." For this position he relies upon the numerous decisions of this court and the uniform current of authority from the time of Coke to this day. *Pearson, O. J.*, in *Griffin v. Richardson*, 33 N. C. 439, so declares the law. Also in *Falls v. Gamble*, 66 N. C. 455; *Ray v. Gardner*, 82 N. C. 146; *Bryan v. Malloy*, 90 N. C. 508. In *Peebles v. Pate*, 90 N. C. 348, it is said: "Every estoppel must be reciprocal. It must bind both parties. A stranger can neither take advantage of it nor be bound by it." *Temple v. Williams*, 91 N. C. 82. Mr. Starkie says: "When the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for between him and a party to such verdict the matter is *res novo*, although his title turn upon the same point." *Starkie on Ev.* 332. "Judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation. And in case of former adjudication set up in defense it is no bar unless the parties to the first judgment are the same as those to the second proceeding. On the principle that estoppels must be mutual, no person can take advantage of a former judgment or decree as decisive in his favor of a matter in controversy, unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way." *Black on Judgments*, § 534. We cannot more accurately state the principles underlying the doctrine of estoppel of record than by using the language of *Pearson, J.*, in *Armfield v. Moore*, 44 N. C. 157: "According to My Lord Coke, an estoppel is that which 'shuts a man's mouth from speaking the truth.' With this forbidding introduction a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system. The harsh words which the very learned commentator upon Littleton uses in giving a definition of this principle are to be attributed to the fact that before his day 'the

scholastic learning and subtle disquisition of the Norman lawyers (in the language of Blackstone) had tortured this principle so as to make it the means of great injustice; and the object of My Lord Coke was to denounce the abuse which he says had got to be "a very cunning and curious learning," and "was odious," and thereby restore the principle and make it subserve its true purpose as a plain, practical, fair, and necessary rule of law.' Estoppels must be mutual; that is, if one side is bound, the other must be. It only includes parties and privies, and does not extend to a stranger." *Coke, Litt.* 252d.

It is well settled that tenants in common are not privies. They do not claim under each other. They may claim their several titles and interests from entirely different sources. In this respect they differ from joint tenants and coparceners. "Tenants in common are they which have lands or tenements in fee simple, fee tail, or for terms of life, etc., and they have such lands or tenements by several titles, and not by a joint title; and none of them know of this several, but they ought by law to occupy these lands or tenements in common." *Coke, Litt.* 292. "It is therefore sufficient description of tenants in common that they are persons who hold by unity of possession." *Kent, Com.* 367. They may claim by deed, devise, or descent. In either case they are deemed to have several and distinct freeholds; "that being a leading characteristic of tenancy in common." "Each tenant is considered solely or severally seised of his land." *Kent, Com.* 368. They can in no proper or legal sense be called privies, because it is said: "In the law of estoppels 'privity' signifies merely succession of rights; that is, the devolution in whole or in part of the rights and duties of one person upon another; * * * the derivation of rights by one person from and holding in subordination to those of another as in the case of a tenant. No one can be bound by or take advantage of the estoppel of another who does not succeed or hold subordinate to his position." *Bigelow on Estoppel*, 347; *Black on Judgments*, 549. That tenants in common are not privies, and are therefore not bound by judgments rendered in actions brought by one of their co-tenants respecting the common property, is illustrated by the cases in which it is held that they are competent witnesses for their co-tenant. *Bennett v. Hethington*, 16 Serg. & R. 198, was an action of ejectment for the recovery of possession of the land held by the plaintiff and the witness. The demise was made by the plaintiff alone. *Gibson, C. J.*, after stating the principle that the interest which excluded a witness was not in the subject-matter of the action, but in the result or event of it, and that it was not necessary that all of tenants should join in the devise, said: "Here the plaintiff has elected to sue alone, and what would the witness get by his recovery? The possession of his free-

hold would not be restored, but for that he would have to bring a second action, in which the record in this would not be competent evidence." The same doctrine is held in *Hammett v. Blount's Lessee*, 1 Swan, 385. It is held by this court that a tenant in common may sue alone. *Carson's Heirs v. Smart*, 34 N. C. 369. And in the action of ejectment he would recover to the extent of his right. *Holdfast v. Shepard*, 28 N. C. 361. It was held in England and in many of the states of the Union that tenants in common could not make a joint demise; that to do so would be calculated to perplex the jury with the trial of a number of titles in one issue. *White v. Pickering's Lessee*, 12 Serg. & R. 435. In this case the court said: "There is no privity between the plaintiffs. The estate of each is distinct from the other, and they cannot join in a demise." For a discussion of this question, see *Sedgwick & Wait on Trial*, etc., 300, and cases cited. It was held by this court in *Nixon's Heirs v. Potts*, 8 N. C. 469, that they could join; the case being cited in *Hoyle v. Stowe*, 13 N. C. 318. *Ruffin, C. J.*, said that it was held "contrary to the rule in England, which is that, as their title is several, their demise must also be several. Their demise may be joint, because, although they cannot jointly convey the land, they may jointly demise for years, since a demise for years is but a contract for possession, and their possession is joint." No question of estoppel arose, because "the judgment was not conclusive upon the title or right of property even between the parties. The action could be repeated, and the same question retried indefinitely, because there was no privity between the successive fictitious plaintiffs. * * * Each successive ejectment was founded upon a new lease, entry, and ouster." *Sedgwick & Wait*, § 42. The learning upon the subject is of interest since the abolition of the action of ejectment, with its fictions, only as showing the reason upon which the doctrine of this and some other courts permitting a joint demise was founded. The changes made by the Code system, by which the jury may, upon appropriate issues, ascertain and declare the interest or estate of each party, either plaintiff or defendant, cannot be extended to work a change in the law of estoppel by record, by which one tenant in common may be estopped in respect to his title by a judgment in an action to which he was not a party. *Merrimon, J.*, says: "One tenant in common may sue in many cases without joining his co-tenant. Each has a separate and distinct freehold, and he may sue to recover possession when he has been disseised." *Overcash v. Kitchie*, 89 N. C. 384. It is true that, as against a trespasser having no title, a tenant in common suing alone will recover possession of the whole land. If the land belongs to the plaintiff and others in common, he has an undoubted right to expel an intruding trespasser and

secure possession, his right being full and complete, although others have the same right. *Yancey v. Greenlee*, 90 N. C. 817; *Brittain v. Daniels*, 94 N. C. 781; *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85. Because of this principle it does not follow that, if one tenant in common takes it upon himself to bring an action for the recovery of the common property, alleging title in himself or in himself and his co-tenants, and fails in his action, his co-tenants are thereby estopped. If this be the law, may we not think, with *My Lord Coke*, that by reason of "a curious and cunning learning" estoppels will become "odious?" This court has never so held. In *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692, the court permitted the plaintiff to sue for the recovery of a tract of land "in behalf of himself and all other persons interested herein as plaintiffs." *Davis, J.*, said: "As to how far the judgment may affect persons made parties under this order we express no opinion. But, independent of this, any one or more tenants in common may sue for the recovery of the possession of land." In *Gilchrist v. Middleton*, 107 N. C., at page 684, 12 S. E. 92, *Avery, J.*, said: "One tenant in common may sue alone, and recover the entire *interest* (italics ours) in the common property as against another claiming adversely to his co-tenants as well as himself, though he actually prove title to an undivided interest. This he is allowed to do in order to protect the rights of his co-tenant against trespassers and disseisors." We think the learned justice inadvertently used the word "interest" instead of "possession." A careful examination of the authorities fails to disclose a single case in which this court has said that the plaintiff can put in issue his co-tenant's interest in the common tenement. The reason assigned by the learned justice shows that the "entire interest" was not in issue. When the plaintiff shows any interest in himself as against one having no interest, he recovers possession of the entire tenement, because he is entitled, as against a stranger, "to the possession of every part and parcel of the subject-matter of the tenancy." *Freeman*, § 87. When he secures such possession, it inures to the benefit of his co-tenants. The same justice had occasion to review the authorities in *Foster v. Hackett*, 112 N. C. 546, 17 S. E. 426. He says: "It is obvious, therefore, that one of several co-tenants, when he brings an action against a trespasser on the common property, and proves title of the other co-tenant in establishing his own, may, under the common-law practice in ejectment applied to actions for the possession of land, recover the whole, though he may claim sole seisin in his complaint in himself, just as he can do under the procedure prescribed in the Code (section 185) by alleging that the action is brought in behalf of himself and others having a common interest; though it has

never been determined in this state how far, if at all, in the action under the provisions of the statute the co-tenants not actual parties would be concluded by the judgment." *Allen v. Salinger*, 103 N. C. 14, 8 S. E. 913; *Lenoir v. Mining Co.*, 118 N. C. 513, 18 S. E. 73. In *Winborne v. Lumber Co.*, 180 N. C. 32, 40 S. E. 825, Clark, J., says: "One tenant in common can recover the entire tract against a third party, for each tenant is entitled to possession of the whole except against a co-tenant." The correct principle is that in respect to the one unity—the possession—the acts of one tenant in common inure to the benefit of his co-tenant, as if an entry be made by one tenant. "As both have an equal right to the possession, the law presumes that if one only enters and takes the rents and profits he does this as well for his companion as for himself." *Freeman, Co-Tenancy*, § 166; *Day v. Howard*, 73 N. C. 1; *Caldwell v. Neely*, 81 N. C. 114; and many other cases in our Reports. So the possession, or the bringing an action for possession, by one repels the bar of the statute as to all. *Locklear v. Bulard*, 133 N. C. 260, 45 S. E. 580. In respect to title, interest, or estate to or in the common tenement they are strangers, and no act done by one can affect, inure to the benefit of, or injure the other. Each tenant has a right by reason of the unity, or the fealty which each owes the other, to rely upon his protection of the common possession. In respect to the title no act by one can affect the other; as, if one make a deed for the whole land, and the grantee go in possession, his possession is that of the co-tenant, and not adverse until the expiration of 20 years, when the law will presume an ouster. *Cloud v. Webb*, 14 N. C. 317; *Page v. Branch*, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 231; *Breden v. McLaurin*, 98 N. C. 307, 4 S. E. 136; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691. It would be an anomaly in the law if one tenant in common could, by matter in pais, deed, or record, estop his co-tenant in respect to his title, in regard to which they are absolute strangers. Our researches, with the aid of the excellent briefs of counsel, do not disclose any authority or reported case in which a party has been permitted to rely upon a judgment as an estoppel to which he was not a party or a privy, or which makes any exception to the well-settled rule that estoppels must be mutual. Applying these principles to the record before us, we can have no doubt that his honor was correct in overruling the demurrer. If the action of Willie Allred against the defendant had resulted otherwise, we would not for a moment suppose that the plaintiffs other than Willie would be affected by it. Why they did not join her in the action is not suggested, nor are we to conjecture. For the purpose of testing the question, however, suppose that they had released their right of action to attack the deed,

or that they were barred by the statute of limitations, or that they were of service to the plaintiff as witnesses—either of which reasons is consistent with the record—can it be that by absenting themselves from the action they can acquire title to property by an estoppel which they could not have acquired as parties to the action? If their contention be sound, the defendant is estopped as to them in the same manner and to the same extent as to Willie, the plaintiff. There is no suggestion that the judgment is competent as evidence. If of any efficacy, it is a complete bar, and "shuts the defendant's mouth to speak the truth." He has by estoppel lost the title to seven-ninths of a tract of land without having had an opportunity to defend it as against them. This would be to violate first principles, and introduce new and dangerous exceptions to the fundamental limitations of the law of estoppels. It would no longer be entitled to the indorsement of judges, and surely it would surprise the great chief justice who so ably defended it in *Armfield v. Moore*, supra.

The plaintiffs say that, conceding the law to be as we find it, the effect of the judgment is to cancel, avoid, and utterly destroy the deed; that it is "without legal efficacy, ineffectual to bind parties, or to convey or support a right." *Am. & Eng. Enc. vol. 28*, p. 473. The argument is ingenious, but will not bear inspection. It assumes the very question in issue. As to whom is it void? The parties to the action? Let us reverse the proposition: If the verdict and judgment had been that the deed was valid and effectual, could it be said that it was conclusively so as to the plaintiffs? The answer is obvious. The rule of the law is plain, fair, and necessary, and it is just. But they say the judgment is in rem, and settles the status of the deed. It is not the paper upon which the language of the law is written which vests the title. The court deals with the deed only as it affects title. This court has said that the record of a suit between A. and B. in which the validity of the assignment of a note was adjudged is no evidence of the validity of such assignment in an action between A. and B., the latter not being a party to the former suit. *Swepson v. Harvey*, 69 N. C. 387. The action clearly was not a proceeding in rem. If quasi in rem, the plaintiff is met with the difficulty that in such actions judgments are only binding between the parties. *Black on Judgments*, § 793. To the suggestion that plaintiff is attacking the judgment as being erroneous, it is sufficient to say that one not a party cannot take any advantage of an erroneous judgment. If Willie Allred was claiming the entire land because of the form of the judgment, the suggestion would have some apparent force.

There is another view of this case not adverted to. If the plaintiffs claim that they acquired certain rights of property under the

judgment, they should have set up the entire record, to the end that the court could see what was in litigation and what was adjudged.

After a careful examination of the authorities and arguments, we think that the judgment of his honor should be affirmed. It is a mistake to say that his honor rendered final judgment. The case was not before the judge for judgment, but only to pass upon the appeal from the ruling of the clerk on the demurrer. Code, §§ 254, 255. His honor's ruling remanded the case, in so far as it was before him, to the clerk. As the case is in the court for further orders, the plaintiffs may, if so advised, ask for permission to reply to the answer. Let this be certified.

Affirmed.

CLARK, C. J. (dissenting). In a proceeding duly constituted in a court of competent jurisdiction, and in which the defendant G. Dallas Allred was defendant, the jury found that Nancy Allred was without sufficient mental capacity to execute the deed to G. Dallas Allred covering the land in question, and the court adjudged that said deed "from Nancy Allred to D. Dallas Allred is void and of no effect; and it is further ordered, adjudged, and decreed that the said deed be delivered up and canceled of record," with further judgment that the decree should be certified to the register of deeds to be recorded in his office. The deed being adjudged "void and of no effect," the title of the grantee thereunder absolutely ceased (Code, §§ 426-428), as fully as if a reconveyance had been executed and recorded. The proceeding was in the nature of an action to remove a cloud from the title, and the judgment acting upon title to property adjudging the conveyance to the defendant to the action to be null and void, and directing its cancellation, and the registration of the decree in the register's office, where the conveyance to the defendant had been recorded, such proceeding has been held, "though not strictly proceedings in rem, * * * yet they are regarded as proceedings in rem sub modo." Hence the judgment canceling the defendant's title rendered it invalid as to all the world, as is the case with all judgments in rem. The matter stands, therefore, as if the conveyance to G. Dallas Allred had never been made. He certainly is bound by the judgment. The decree renders the deed void ab initio; and, if void, it is void as to every one, especially as to the plaintiffs, who claim under Nancy Allred. The decree having directed the cancellation of the deed and the registration of the decree in the register's office, there is in contemplation of law no such conveyance in existence. The registration of the decree of cancellation was directed that purchasers from G. D. Allred should have notice that he could convey no title. He cannot now set

up a title when a purchaser from him could not acquire title from him.

It matters not at whose instance, as plaintiff, such decree was rendered, or that it was at the instance of only one of several cotenants. It was rendered against the defendant. It binds him. Its effect was to declare that the title has never proceeded out of Nancy Allred, and to cancel the conveyance, and to strike the registration thereof off the register's books. It is not open, therefore, to the grantee in such deed to set it up as valid in this proceeding to partition the land, especially against the plaintiffs, who have acquired by descent all of Nancy Allred's title save the share which has descended to him. He holds that share by descent—the same title by which the plaintiffs hold theirs—and not under the void deed.

If in the proceeding to declare the deed void it had been held valid, this would have been a judgment in personam against Willie Allred, the plaintiff therein, and would not bind the other plaintiffs herein, because they do not claim under Willie Allred. But the judgment declaring the deed void and directing its cancellation acts quasi in rem sub modo upon the title which it sets aside, and is binding upon G. D. Allred, who is the same defendant, and who in this action attempts to set up the same title which, as against him, has been declared void. Further, being a decree quasi in rem sub modo, it is binding upon all who might claim under G. D. Allred. The decree of cancellation, registered as decreed, is notice to all the world. Code, §§ 426-428.

Closely analogous is the case where in an application of a railroad company to acquire the right to use the track of another company for purposes of its business the applicant was held concluded by a former adjudication against its corporate existence, rendered in a former proceeding by the same plaintiff for the same purpose against another railroad company (In re Brooklyn Railroad, 19 Hun, 814), and a determination that a creditor is entitled to share in a fund (Eppright v. Kauffman, 90 Mo. 25, 1 S. W. 736). The adjudication here that the deed is void is a judgment upon the rem, upon the status of the title, denying G. D. Allred's interest thereunder, and is conclusive upon him whenever and wherever thereafter he sets up title in himself under the deed which has been adjudged void and directed to be canceled. The principle is res judicata, and not strictly matter in estoppel. 24 Am. & Eng. (2d Ed.) 712. The judgment setting aside the deed to G. D. Allred as void inured to the benefit of the other plaintiffs, as cotenants, who became thereupon beneficiaries under and privies to the decree which canceled the deed. The legal consequence of the judgment declaring the deed void as to G. D. Allred can be availed of by strangers to the action. 11 Am. & Eng. (2d Ed.) 391. The judgment is also admissible, even if be-

tween strangers, as a link in the plaintiff's title, since it cancels the cloud cast upon it by the deed from Nancy Allred to G. D. Allred (24 Am. & Eng. 757); especially when, as here, the decree is a decree in chancery (Id. 758, and cases cited in note 2).

It was error certainly to render final judgment upon overruling the demurrer, unless it was found that the demurrer had not been "interposed in good faith." Code, § 272; Moore v. Hobbs, 77 N. C. 65; Bronson v. Ins. Co., 85 N. C. 411.

The deed was voidable; i. e., valid till declared void by the court. Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 113, 17 Am. St. Rep. 686. But when adjudged void, and directed to be canceled, it ceased to be voidable, and became absolutely void. No conveyance had been made to third parties by G. D. Allred prior to such decree. A conveyance by him thereafter would be void, and certainly no title remained in him when he could convey none.

(135 N. C. 501)

GARSEED v. STERNBERGER.

(Supreme Court of North Carolina. May 24, 1904.)

CONTRACTS—FUTURES—ILLEGALITY.

1. Where plaintiff bought cotton "futures" for the defendant and suffered loss, he cannot maintain an action for reimbursement, since the transaction is illegal, especially under Laws 1889, pp. 233, 234, c. 221, §§ 1, 3, 4, prohibiting all dealings in "future" contracts in which there is not a bona fide purchase for future delivery, but which contemplate payment of the difference in price, and providing that no action may be maintained on account of any such contract.

Appeal from Superior Court, Guilford County; O. H. Allen, Judge.

Action by H. T. Garseed against H. Sternberger. From a judgment sustaining a demurrer to the plaintiff's evidence and dismissing the action, plaintiff appeals. Affirmed.

J. N. Staples, for appellant. J. A. Long and J. E. Long, for appellee.

CLARK, C. J. The defendant, desiring to engage in buying cotton "futures" without being known, requested the plaintiff to buy them for him through the plaintiff's own broker in New York. Both the plaintiff and defendant lived in Greensboro, N. C. The defendant agreed to furnish all the money necessary for these transactions, and to guaranty the plaintiff against loss. Several of these transactions occurred, the defendant using the plaintiff's name, with his consent, and the orders being sent direct by the defendant to the plaintiff's brokers. After several such transactions, in this particular one the defendant gave the plaintiff a check for \$500, and told him he was going to buy

500 bales "June cotton." The defendant sent his instructions direct to the plaintiff's brokers. There was a loss of \$628.28 on this contract being closed out, which the New York brokers charged up to the plaintiff. The plaintiff thereupon called upon the defendant to reimburse him the amount (\$128.28) in excess of the sum of \$500 which had been handed him by the defendant. The defendant did not, after the loss, request the plaintiff to pay the \$128.28, nor promise, after such loss, to reimburse the plaintiff, but, on the contrary, denied liability, alleging that the loss was caused by the failure of the plaintiff's brokers to obey instructions. The plaintiff began this action before a justice of the peace to recover the said sum of \$128.52, as money paid to the defendant's use. The defendant pleaded that, the transaction being illegal, the plaintiff could not recover. Upon the plaintiff's testimony, as above, the defendant demurred to the evidence. The court sustained the demurrer and dismissed the action. In this there was no error.

In Clark on Contracts, 501, it is said: "If a broker or other agent is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal"—citing *Greenhood*, Pub. Pol. 110 (where the cases are collected); *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Gibbs v. Gas Co.*, 130 U. S. 896, 9 Sup. Ct. 553, 32 L. Ed. 979; and numerous other cases; saying further: "Not only is this true, but it has been held that any express promise made by the principal to reimburse him is void"—citing *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172, *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203, and *Everingham v. Melghan*, 55 Wis. 354, 18 N. W. 269, which sustain the text. But if there could be any doubt on this proposition, our chapter 221, p. 233, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," puts the matter beyond controversy. Section 1 is very elaborate, and forbids all classes and kinds of dealings in "future" contracts, in which, as in this case, the transaction is not a bona fide purchase of commodities for actual future delivery, but contemplates a payment or receipt of the difference in the price at the time of delivery from that named in the contract, and provides that no party "or agent of such party, directly or remotely connected with such contract in any way whatever, shall have or maintain any cause of action on account of any money or other thing of value paid, advanced or hypothecated by him, in connection with or on account of such contract or agency." Section 8 (page 234) provides that every person who is a party to any such contract, "and every person who shall be the agent, directly or

indirectly, of any such party in making, or furthering, or effectuating the same * * * shall be deemed guilty of a misdemeanor and on conviction in the superior court shall be fined not less than \$100 nor more than \$500 and may be imprisoned in the discretion of the court." And section 4 visits with like punishment every person who in this state shall "do any act or aid in any way in this state in the making or furthering such contract so made in another state."

No error.

(135 N. C. 542)

CRITCHER v. PORTER-McNEAL CO. et al.

(Supreme Court of North Carolina. May 27, 1904.)

SALE OF MACHINERY—BREACH OF WARRANTY—DAMAGES—SPECIAL DAMAGES.

1. In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value.

2. Plaintiff contracted with defendant for the purchase of an engine of a certain make, size, and capacity. He accepted another kind of an engine, with a guaranty on defendant's part that it would develop the capacity of the one contracted for, or that defendant would make it do so. *Held*, that plaintiff, after giving defendant a reasonable opportunity to make good the guaranty, had the right to reject the engine on its failure to come up to the guaranty, and his measure of damages would then be the amount paid, and such special damages sustained as was within the contemplation of the parties, subject to be reduced by a fair rent of the engine while in use, or he might accept it, and recover the difference between the contract price and its real value, with special damage, subject to the same deduction.

3. Where one contracted to sell an engine of a certain make, size, and capacity, with knowledge that it was to be used to run a sawmill, and furnished an engine of another size under a guaranty that the latter would develop the capacity of the engine contracted for, the guaranty must be construed as a warranty that the engine furnished would develop for the particular use the same power as the engine contracted for.

4. In an action for damages for breach of warranty on the sale of an engine to run a sawmill, plaintiff cannot recover as damages the loss of profits resulting from his inability to perform contracts for the sale of the output of the mill, in the absence of knowledge on the part of defendant that plaintiff had made such contracts.

5. Where, in an action for damages for breach of warranty on the sale of an engine to run a sawmill, plaintiff did not offer to show that he had logs on hand sufficient to run the mill any given number of days, or for what time contracts for the sale of the output extended, the exclusion of evidence showing that at the time of the purchase of the engine he had contracted for the sale of the output of the mill was not erroneous.

6. In an action for breach of warranty on the sale of an engine for use in a sawmill, under a guaranty that it will develop a certain horse power, or that defendant will make it do so, plaintiff is entitled to recover expenses incurred in running the mill, at defendant's request, to enable him to make the engine develop the designated horse power.

7. In an action for breach of warranty on the sale of an engine for use in a sawmill, plaintiff is entitled to interest on the amount invested in the mill for the time it was idle.

Appeal from Superior Court, Martin County; Ferguson, Judge.

Action by Roger Critcher against the Porter-McNeal Company and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

The plaintiff alleged: That he contracted with the defendants for the purchase of an Erie City, 25 horse power, 10x12, horizontal center crank engine, together with other machinery for the equipment and operation of a sawmill, at the agreed price of \$1,150, to be paid partly in cash, and the balance in several installments, for which he was to execute his promissory notes, secured by a deed in trust. The deed sent to the plaintiff for execution described the engine as "one 25 H. P. 9x12, horizontal center crank engine." Plaintiff wrote defendants, calling attention to the fact that the engine was described in the deed as 9x12, while he had contracted for one 10x12, and for that reason declined to execute the notes and deed. That defendants, in reply, wrote that they would guaranty that the engine described, and which they would send, "would develop 25 H. Power and be plenty large to operate" plaintiff's mill. That plaintiff, relying on said guaranty, before the engine arrived, signed the deed in trust and notes, and sent them to defendants, with the cash payment of \$400. That after the engine was put up it was found that it would not cut the logs, wanting power to do so. The plaintiff complained to defendants, and they urged him to continue to use the engine, and the trouble would disappear. That defendants urged that the oil used by plaintiff was not of good quality. That, after giving defendants full opportunity to make good their guaranty, they having failed to do so for nine months, plaintiff put the engine aside, and notified defendants that it was held subject to their order. Defendants thereupon advertised the property conveyed in the trust deed for sale. This action is brought for the purpose of enjoining the sale of the property, and to recover damages by way of recoupment, etc. The sale was enjoined. The defendants denied the material averments in the complaint.

The court, without objection, submitted the following issues:

"(1) Did the defendants guaranty that the engine sold to plaintiff would develop 25 horse power?" To which the jury answered, "Yes." "(2) Would the engine sold to plaintiff develop 25 horse power?" To which the jury answered, "No." The plaintiff's damages were fixed at \$98. The balance found due the defendants on the note was fixed at \$411, with interest, and subject to the \$98 damage.

The plaintiff testified in regard to the con-

tract and guaranty. He further testified that he signed the trust deed upon the faith of the guaranty. The engine was received about the 8th day of May, and was put up by experienced machinemen. From the beginning, plaintiff saw that it would not cut; found the trouble to be that it lacked power. It got worse all the time, and he continued to complain to the defendants. They sent a man out to examine it. He did not remedy it. Plaintiff, at the instance of defendants, sent engine to them at Norfolk. Was gone a week or 10 days. Shortly after its return, Mr. Hardy came again to overlook it. He did nothing to it. Plaintiff asked him how he could tell whether it would develop 25 horse power. He said, if it didn't cut a blind line with 80 pounds of pressure on fast speed, it would not develop 25 horse power. Plaintiff urged him to test it, but he declined. He said that plaintiff was not using proper oil. Gave him order for 25 gallons such as he recommended. The engine did no better with new oil. Plaintiff wrote to defendants frequently that they must do something to remedy the trouble. They continued to assure the plaintiff that it would improve, and they would remedy it. Plaintiff finally wrote defendants that, unless something was done at once to remedy the trouble, he would be obliged to put it aside and purchase another, which plaintiff finally did. Was trying to use it 9 or 10 months, relying upon the assurance of defendants that it would get all right, or they would remedy it. It was idle two-thirds of the time. It would never develop 25 horse power. Plaintiff testified: "I had been operating a mill previous to the time I made the contract with the defendants. Had between \$1,200 and \$1,500 invested in mill and other fixtures, and \$1,500 to \$2,000 additional in logs and team. Had five men engaged by the year in the service of the mill [giving amount of wages paid, etc.]. They were idle part of the time. In addition, I had drivers, loggers, and some men cutting logs in connection with the mill. The teams were idle when the mill was not running. I had commenced to cut logs for the mill before I contracted with the defendants. Had a quantity of logs on hand. I lost on account of the idleness of the mill." The plaintiff proposed to prove that, at the time of his contract with defendants, plaintiff had contracted with reliable parties for the sale of the output of his mill at a stipulated price, and that plaintiff was unable to comply with said contract on account of the failure of the defendants to furnish the engine contracted for. This evidence was offered upon the question of damages, and upon objection was excluded. Plaintiff excepted. The plaintiff further testified: That the engine which he got was afterwards priced by defendant Porter at \$168. That a fair output of a 25 horse power engine was 6,000 to 8,000 feet a day. The engine furnished did not average over 1,500

feet a day. That the usual profits during the time the engine was in use was \$1.50 per thousand feet, clear of expenses. He had a quantity of logs. On account of idleness of mill, between 12,000 and 20,000 feet were not hauled from the woods.

His honor instructed the jury in regard to the measure of damages as follows: "If you should find that the engine in question would not develop 25 horse power, then the measure of the damages which the plaintiff is entitled to recover is the difference between the price paid or agreed to be paid for the engine and the real or true value of the engine in fact sold and delivered to the plaintiff. There is no fixed price stipulated for the engine in the written contract between the parties. So you will inquire and ascertain from the evidence what was the price charged for the engine furnished the plaintiff, and subtract the real value of the engine furnished at the time it was received from the price charged; and the remainder is the measure of the plaintiff's damage in this case, if you should find the second issue in his favor." Plaintiff asked certain instructions which were refused, and to such refusal plaintiff excepted, and, from a judgment on the verdict, appealed.

Gilliam & Martin, for appellant. Harry W. Stubbs and H. S. Ward, for appellees.

CONNOR, J. (after stating the facts). The only question presented by the plaintiff's exceptions relates to the kind and measure of damages to which he is entitled upon the evidence and finding of the jury. It is well settled by all of the text-books and adjudged cases that, in the absence of any special conditions or special damage, the true measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value. *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *Mfg. Co. v. Gray*, 126 N. C. 108, 35 S. E. 236. There are cases, however, to be found in our court and the courts of other states, in which, by reason of special and peculiar circumstances, other elements of loss enter, and may be recovered as damages. If the plaintiff had, immediately upon the receipt of the engine, ascertained that it did not develop 25 horse power, as warranted to do, rejected it, or, as he expresses it, "put it aside," notifying the defendant thereof, it is clear that he would have been entitled to recover the amount paid, and to a cancellation of his notes and the trust deed, together with such damage as he sustained, and which were within the contemplation of the parties, in his effort to use it. If he had retained and used it, his measure of damages would have been the difference between the contract price and the actual value of the engine, with such special damages as were within the contemplation of the parties. *Joyce on*

Damages, § 1716. The question before us is, however, complicated by the fact that a contract collateral to the principal one was made by the parties. The plaintiff knew that the engine which he accepted, and for which he paid in cash and notes, was not the same which he contracted for. He accepted it with a contract of guaranty that it would develop 25 horse power, or that the defendant would make it do so. This contract was not performed on the part of the defendant, and for which breach of contract he claims damages. It was not contemplated that the engine should be returned until the defendants were given a reasonable time within which to make it develop 25 horse power. Therefore the rule usually applicable to breaches of warranty in the sale of machinery does not apply. We are of opinion that, after a reasonable opportunity given the defendants to make good the guaranty, the plaintiff had the right to reject the engine. If he had paid for it, he could have sued for damages; and it would seem that the measure of his recovery would be the amount paid, and such incidental or special damage as was within the contemplation of the parties, and as he had sustained, subject to be reduced by a fair rent of the engine while using it. If, instead of rejecting it, he retained the engine, he would recover the difference between the contract price and its real value, with special damage, subject to the same deduction. The courts find difficulty in defining and fixing the limits to what are termed "special damages." All authors and judges concur that the rule or principle to be followed is that laid down in the leading case of *Headley v. Baxendale*, Exch. 341: "When two parties make a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in a great multitude of cases, not affected by any special circumstances for

such a breach of contract, for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would have been very unjust to have deprived them."

The judges concur in the principle, but find great difficulty in applying the rule to the evervarying cases which are presented for adjudication. Simple contracts of purchase, with warranty as to soundness or quality, are of easy solution; but when, by varying the original contract, either attaching new agreements or conditions, or making contracts collateral to the original, thus introducing difficult and complicated elements, the courts find it extremely difficult to apply general principles working out satisfactory results. *Beasley, C. J.*, in *Crater v. Binninger*, 83 N. J. Law, 513, 97 Am. Dec. 737, referring to the rule laid down in *Headley v. Baxendale*, supra, says: "This is the usual statement of the rule, but the difficulty has been to apply this general proposition to this particular case, for, in any attempt to examine causes in connection with their effects, it will be soon apparent that some criterion is necessary by which to decide what result is proximate and what remote, in a legal sense, to the given act. The standard set up by the decisions above cited supplies, to a reasonable degree, this deficiency. The test is that those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequences of his fraud or breach of contract." *Mace v. Ramsey*, 74 N. C. 11.

The testimony discloses a contract for the sale of an engine of a certain make, size, and capacity. It would seem a reasonable inference that the sellers knew that it was to be used to run a sawmill for cutting logs into boards. Their guaranty must, in the light of these facts, be construed as an assurance that although the engine was 9x12, instead of 10x12, as contracted for, it would develop for this particular use the same power as the engine contracted for, or that they would make it do so. This, of course, involved the idea that the plaintiff was to put it in position for use, and use it, giving the defendants a reasonable time and opportunity to fulfill their contract. What damage would usually result from a breach of this contract? What would a man selling such machinery, knowing the use to which it was to be put, the place to which it was sent, etc., have reasonably contemplated as the usual result of a failure to make this develop 25 horse power? The plaintiff offered to show that at the time of making the contract he had contracted with reliable parties for the sale of the output of his mill at a stipulated price. The refusal to permit him to show this is the basis of his first exception. It is well settled that, while for breach of contract the law seeks to give

full compensation for actual loss sustained, it will not undertake to estimate uncertain profits. We think that, in the absence of any knowledge on the part of the defendants that the plaintiff had made such a contract, damages resulting from it could not be said to be within their contemplation. There is the further objection that the plaintiff did not offer to show that he had logs on hand sufficient to run the mill any given number of days, or for what time the contract extended. If the question as stated in the record had been answered, the jury could not possibly have made it the basis for assessing damages. There were too many elements of uncertainty involved to form the basis of any verdict. It may be that the plaintiff intended to show how these matters were, but we must pass upon the exception as presented to us in the record. In *Lewis v. Rountree*, 79 N. C. 123, 28 Am. Rep. 309, the plaintiff was permitted to recover upon the basis of the price of the rosin in New York, to which point it was shipped, for the reason that it was purchased for that purpose, and the defendant had notice of it. In *Mace v. Ramsey*, *supra*, the boat was hired for a particular occasion, and the plaintiff had engaged a certain number of passengers at an agreed price. The court held that such loss as ensued was within the contemplation of the parties. In *Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602, it was held that damages could not be recovered for failing to ship machinery for a cotton mill, based upon anticipated profits from the output of the mill; Lumpkin, J., saying: "The gains were too remote and uncertain, depending upon a variety of contingencies, the failure of any one of which would subvert the whole computation." The slightest reflection will show the number of contingencies attending a sale of the output of a sawmill—the weather, a breakdown of the mill, failure to get logs, etc. *Sycamore Co. v. Strurme*, 18 Neb. 210, 18 N. W. 202. His honor properly excluded the testimony.

The plaintiff excepts to the refusal of the court to give certain special instructions: First, that the plaintiff is entitled to recover reasonable rent and insurance for the buildings which were idle by reason of the delay of the defendants to furnish an engine according to contract. We find no evidence upon which to base this instruction. The plaintiff says nothing of any buildings being idle or of any insurance paid. The same is true in regard to the second prayer. There is no evidence that the logs were damaged, or, if so, to what amount. The third prayer is based upon the principle announced in *Kester v. Miller*, *supra*. The plaintiff was entitled to this instruction. For the reasons given in that case, the plaintiff is entitled to such damages as he sustained while operating the mill, at the defendants' request, to enable them to make the engine develop 25 horse power. The defendants knew that

the mill was being operated at their request and for their benefit. They knew that it required hands, teams, etc., to operate the mill, and any loss sustained in doing so must have been within the contemplation of the parties. It is true, the evidence on this question is very meager; and, if there was no more than we find in the record, the jury would have found difficulty in assessing the plaintiff's damages. There was, however, some evidence of the number of hands engaged about the mill, the price paid them, and the difference per day in the output of the mill as it was and should have been according to the contract, and the value thereof. This exception must be sustained. *Mfg. Co. v. Rogers*, *supra*. This ruling does not include hands and teams employed in logging. It includes only those employed in running the mill. The fourth prayer is disposed of by the ruling upon the rejection of the proposed evidence. The same ruling applies to the fifth prayer. The sixth is included in the disposition of the third prayer. The seventh prayer is disposed of by what is said in regard to the fourth. There is no evidence that the defendant knew of the employment of teams, etc., for logging the mill. The eighth prayer, in so far as it applies to the amount invested in the milling outfit, should have been given. For any time that the milling machinery was idle, the plaintiff is entitled to interest on the amount invested. *Boyle v. Reeder*, 23 N. C. 607; *Rocky Mt. Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. There is no evidence to sustain the ninth prayer, and the same is true as to the tenth.

We have carefully examined the entire record. For the reasons pointed out, there must be a new trial on the third issue, as to damages. The plaintiff will recover the costs in this court. New trial.

(125 N. C. 623)

HOOD et ux. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 27, 1904.)

TELEGRAPHS—DELIVERY OF MESSAGE—NOTICE TO SENDER—NEGLIGENCE.

1. Where a telegraph company failed to make any attempt to deliver a message because the sendee lived beyond free delivery limits, and also failed to notify the sender of additional charges for such delivery, or of refusal to deliver it at all, the company is liable for damages resulting from its negligence in failing to make the delivery.

2. Where an action was dismissed for lack of evidence, a new action could be brought for the same cause within one year.

Appeal from Superior Court, Mecklenburg County; McNeill, Judge.

Action by S. L. Hood and wife against the Western Union Telegraph Company. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Maxwell & Keerans, for appellants. F. H. Busbee & Son, for appellee.

OLARK, C. J. The evidence is that the male plaintiff, at the request of the feme plaintiff, his wife, and for her use and benefit, delivered to the telegraph operator in Charlotte at 7 a. m., April 1, 1900, the following prepaid message to be transmitted to Concord, N. C., to W. M. Petrea, the father of the feme plaintiff: "Come at once. Baby is sick." The child was very ill, and the object of the message was that the feme plaintiff's father and mother might come to Charlotte to comfort and assist her. The telegraph operator was told that the child was very ill, and that the message should be sent at once, and he promised that it should be. The sendee lived seven or eight miles from Concord, but was well known at that place. It was the first message ever sent by the plaintiffs, and they knew nothing about free delivery limits, and, this being the nearest telegraph station to the sendee, supposed the message would be delivered. The operator, neither at Charlotte nor Concord, made any objection, nor informed the plaintiff of any hesitancy or difficulty in delivering, and the plaintiffs, supposing the message had been delivered, expected and looked for the arrival of the plaintiff's mother and father till midnight. The child died 4 p. m. that afternoon. If the defendant had advised the senders that an additional sum would be required before delivery, it would have been paid; or, if advised promptly that the defendant would not deliver it at all, the plaintiffs would have made other arrangements to notify Petrea and wife; and that Petrea and wife would have come to Charlotte that day if he had received the message, and would have paid any extra charges demanded if the telegram had been delivered to him. Such is the substance of the evidence. It was further in evidence that it was the general custom of the telegraph company at Concord either to allow its messenger boy to deliver messages out in the country, and collect from sendees, or to wire back to the sending office the additional charges for such delivery, and to advise the sender what such charges would be. The evidence is that, if either course had been pursued, the sender and the sendee (as the case might be) would have paid the charges. It was also in evidence that the office in Concord frequently did deliver, or allowed its messenger boys to deliver, messages out in the country outside of Concord without charges being prepaid, when they thought the sendee would pay the charges; and when in doubt about this the Concord operator always advised the sending office that the sender should be notified what such charges would be; that the Concord office had frequently sent such messages out in the country by N. J. Corl, a liveryman, and he had often collected the extra charge

without prepayment being guarantied; that, if the message had been handed to Corl, he would have delivered it to Petrea without prepayment being guarantied by the defendant; that a similar custom of delivery outside of free delivery limits also prevailed in Charlotte; that the plaintiffs had lived in Charlotte two years prior to sending this message, their mail being delivered daily by the post-office carrier; that the messenger boy in Charlotte on duty that day knew where the plaintiffs resided, but the defendant made no inquiry of him, nor made any effort to notify the plaintiffs of the nondelivery of the message, nor of any doubt or hesitation as to delivering it to the sendee; that they had no relatives in Charlotte to assist them in preparing their child (who was their eldest and only child) for burial, and, deciding to carry the body to the feme plaintiff's father's home for burial on the next morning (Monday) at 7 a. m., the male plaintiff, at the request of and for the use and benefit of his wife, the female plaintiff, delivered the following prepaid message directed to James Dry at Concord, "Tell Mr. Petrea to meet corpse on train No. 36. Have some one to dig grave;" that this message was sent in order that the plaintiffs might be met by some one in Concord on the arrival of said train—either by Petrea or some one else—so that the male plaintiff might not have to leave his wife with the corpse, and go out to procure a team to carry them into the country; that when he prepaid the message the husband of the feme plaintiff told the operator in Charlotte where Dry resided in Concord, and the operator promised to forward the message at once; that, relying on such promise, they went to Concord with the child's body on train No. 36, but no one met them on arrival; that the male plaintiff had to leave his wife with a relative, and go out to procure a conveyance; that the train arrived at Concord at 11 a. m., but the message was not delivered to Dry till 10 a. m. (3 hours after its delivery to the defendant's agent in Charlotte), being too late for him to notify Petrea in time for the latter to have some one to meet the plaintiffs on arrival of the train, which he would have done if the message had been delivered promptly to James Dry, who would at once have sent it to Petrea, and could have done so in an hour, and that it could have been delivered to Dry in 20 minutes after its receipt at the Concord office; that when Petrea got the message the conveyance was started off in a few minutes to meet the plaintiffs, but too late; that on Monday, after the second message was delivered to the defendant, the plaintiffs, in reply to their inquiry, were for the first time informed that the prior message had not been delivered because Petrea lived seven miles in the country, and a postal card had been put in the post-office to advise him, but no such card was ever delivered; that the feme plain-

tiff suffered much grief by the failure of her mother and father to come to Charlotte on Sunday's train, as they would have done if the telegram had been delivered according to the defendant's custom, or if nondelivery had been at once notified to the plaintiffs, so that they could (as they would) have secured delivery by other means, and also by the failure to meet her at the train on the arrival of the body, and her husband under those circumstances having to leave her to go out to procure a conveyance. There was no evidence offered by the defendant.

It was error to nonsuit the plaintiffs upon this testimony. It is clear beyond controversy that the defendant was guilty of very great negligence, and no one of the slightest sensibility will deny that the probable result would be and was needless grief and mental suffering in consequence inflicted thereby upon the feme plaintiff. What would be a just compensation, if any, is a matter which can be settled only by a jury, whose verdict, if excessive, is subject to the power of the court to be set aside. It may be that the defendant's evidence may establish a different state of facts materially mitigating the plaintiffs' prima facie case or defeating it entirely. But the legal propositions involved, establishing a prima facie right in the feme plaintiff to recover, are so clearly settled as to require no discussion. Among the cases exactly in point is *Hendricks v. Tel. Co.*, 126 N. C. 311, 35 S. E. 543, 78 Am. St. Rep. 658, in which it is said: "We think it is the duty of the company, in all cases where it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence per se, it is clear evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided; a better address might be given; mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would tend to show diligence on the part of the company." This language is approved in *Laudie v. Tel. Co.*, 126 N. C. 436, 35 S. E. 810, 78 Am. St. Rep. 688; *Hinson v. Tel. Co.*, 132 N. C. 467, 43 S. E. 945. "It may be further noted that the company does not say that the message will not be delivered beyond such limits, but that a special charge will be made to cover the cost of delivery, which seems to clearly imply that it would be delivered. No fixed limit of distance nor definite sum is specified, and it is difficult to say how the sender can be presumed to know either in the absence of information from the company." *Hendricks v. Tel. Co.*, supra; *Bryan v. Tel. Co.*, 133 N. C. 605, 45 S. E. 938. "The failure of the telegraph company to deliver a message is not excused, though it appears that the sender lived beyond the free delivery

limits, and the extra charge for delivery beyond the limits had not been paid; it not appearing that the sender knew the company had any free delivery limits, or that it demanded payment of an extra charge." *Bright v. Tel. Co.*, 132 N. C. 317, 43 S. E. 841. The plaintiffs' action was dismissed for lack of sufficient evidence on a former trial, and a new action was brought. A new action may be brought in such cases (*Prevatt v. Harrelson*, 132 N. C. 254, 43 S. E. 800; *Evans v. Alridge*, 133 N. C. 380, 45 S. E. 772; *Nunnally v. Railroad* (no opinion) and other cases, at this term), provided the new action is brought, as here, within one year. *Meekins v. Railroad*, 131 N. C. 2, 42 S. E. 333.

New trial.

WALKER, J., did not sit on the hearing of this case. MONTGOMERY and CONNOR, JJ., concur in result.

(135 N. C. 540)

SITTON v. EDWARD-EVERSOLE LUMBER CO.

(Supreme Court of North Carolina. May 24, 1904.)

WITNESSES—TRIALS—PROOF OF ATTENDANCE—COSTS.

1. Though a witness may prove his attendance against the party who subpoenaed him, his attendance can only be taxed against the opposing party, if unsuccessful, when the witness was examined on the trial, or was tendered to the opposing party for examination, subject to the limitation that not to exceed two such witnesses can be taxed to prove a single fact.

Appeal from Superior Court, Swain County; E. B. Jones, Judge.

Action by M. L. Sitton against Edward-Eversole Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

A. M. Fry, for appellant. Bryson & Black, for appellee.

CLARK, C. J. A witness can always prove his attendance against the party who subpoenas him, but his attendance can only be taxed against the opposite party (if it loses the verdict) when he has been examined as a witness on the trial, or was tendered to such opposite party on the trial; and even then not more than two such witnesses can be taxed to prove any single fact. Code, § 1370; *Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338; *State v. Massey*, 104 N. C., at page 881, 10 S. E. 608. In *Henderson v. Williams*, 120 N. C. 339, 27 S. E. 30, where the defendant's witnesses were present when the case was called for trial on a nonsuit, the costs of such witnesses (not to exceed, of course, two to prove any single fact—Code, § 1370) were taxed against the plaintiff because the defendant "had no opportunity to swear, examine, or tender his witnesses

by reason of the nonsuit." It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses, and prevent being taxed with an excessive number upon any single point by such witnesses being sworn and tendered to the opposite party for examination. *Porter v. Durham*, 79 N. C. 596. It is true that in *Loftis v. Baxter*, 66 N. C. 340, it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for "sworn and examined or tendered"; i. e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined that their materiality may be shown. Otherwise a successful party may oppress the losing party by subpoenaing and swearing any number of witnesses, and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of their materiality. They must be examined, or tendered to the opposite party to be examined, should he so choose; and if examined by the opposite party they are to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses. In *Cureton v. Garrison*, supra, the court held "no error" upon the following ruling of the judge (Hoke) below: "If the witnesses were not sworn and examined or tendered, even though attending under subpoena, and though they would have given material evidence, their fees cannot be taxed against the losing party."

The judgment below taxing against the losing party witnesses of the other side who were neither examined nor tendered on the trial is reversed.

(136 N. C. 488)

COWLES v. LOVIN.

(Supreme Court of North Carolina. May 24, 1904.)

REJECTMENT — DOCUMENTARY EVIDENCE — IDENTIFICATION — INSTRUCTIONS — NECESSITY TO REQUEST — APPEAL — EXCEPTIONS — HARMLESS ERROR.

1. Where the deposition of a nonresident surveyor who made certain plats of the land in controversy was taken, but no attempt was made therein to identify or explain the plats and certificates, and they were not otherwise proved, the court properly refused to permit them to be introduced in evidence.

2. Erroneous admission of evidence which was subsequently excluded by the court was harmless.

3. Where an exception to an instruction did not correctly set out the same it could not be reviewed on appeal.

4. Mere omission to charge on a particular point is not ground for exception after verdict, unless the court was requested in apt time to give the instruction.

Appeal from Superior Court, Graham County; Hoke, Judge.

Action by Calvin J. Cowles against S. B. Lovin. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Dillard & Bell and T. A. Morphew, for appellant. E. B. Norvell, for appellee.

WALKER, J. This action was brought to recover possession of several tracts of land described in the complaint. The plaintiff, in support of his title and right to possession, introduced in evidence certain grants and mesne conveyances connecting his title with those grants. There was evidence tending to show that the grants and deeds covered the locus in quo. The defendant resisted the plaintiff's recovery upon the grounds (1) that it had not been sufficiently shown that his paper title embraced the land in dispute, and (2) that the defendant and those under whom he claimed had been in adverse possession of the land for seven years under color of title. The court held that there was no evidence to sustain the defendant's second ground of defense, and, that being eliminated, the case turned entirely upon the question whether the plaintiff had sufficiently located the grants under which he claimed the land. The court charged the jury fully on the question of boundary, and left it to them upon the evidence to say whether the descriptions in the grants introduced by the plaintiff included the disputed land. The jury, in answer to the issue submitted to them, found that they did not, and, judgment for the defendant having been entered on the verdict, the plaintiff excepted and appealed.

In order to locate the grants, the plaintiff offered in evidence certificates of survey made by H. P. Hyde, to which certain plats were annexed. The certificates were in the handwriting of Hyde, who was county surveyor when they were made. Hyde was living in the state of Texas at the time of the trial. The defendant objected to this evidence, and it was excluded. This is the subject of the plaintiff's first exception. The deposition of Hyde, who had made a survey under order of the court in this case, was taken and read at the trial, but no reference was made therein to the plats and certificates. The latter show the location of the tracts of land as claimed by the plaintiff. It was not shown, or at least it does not appear in the case, at what time, or under what circumstances, or for what purpose the plats and certificates were made by Hyde. He was examined as a witness before a commissioner, and his deposi-

tion was a part of the evidence. It does not appear therefrom that he was asked any questions in regard to the plats and certificates, or that any attempt was made to identify or explain them, so as to make them admissible under any known rule of evidence. They are nothing more than the written declarations of a third person who is living as to the boundaries of the land. After a most careful consideration of the argument and authorities cited by the plaintiff in support of their competency, we do not see upon what principle they are admissible. The ruling of the court by which they were excluded was correct. *Burwell v. Sneed*, 104 N. C. 118, 10 S. E. 152; *Dobson v. Whisenhant*, 101 N. C. 645, 8 S. E. 126; *Ray v. Castle*, 79 N. C. 580; *Perkins v. Brinkley*, 133 N. C. 348, 45 S. E. 652. This was the principal exception of the plaintiff, as we take it.

The second and third exceptions are manifestly untenable. The will of Hooper and the deed of Carver, sheriff, to Cooper, were introduced by the defendant, and as they were excluded by the subsequent ruling of the court from the case, the error, if there was any, in admitting them originally, was cured, or at least was harmless.

It is stated in the "case" that the instruction of the court as to the rule admitting hearsay evidence of boundary is not correctly set out in the plaintiff's fourth exception. This statement is sufficient to dispose of the exception, but we have examined the charge of the court, to which we suppose the fourth and fifth exceptions were taken, and find no error therein. We think the court distinguished properly between reputation and hearsay evidence in respect to the location of boundaries. *Dobson v. Finley*, 53 N. C. 495; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823. If there were any error in the charge relating to reputation and hearsay, as proof of boundary, we do not see how the plaintiff could be prejudiced by it. No phase of the case is presented in the record, as it appears to us, to which the exception, if otherwise properly taken, could be pertinent.

The remaining exceptions are based upon the alleged failure, not the refusal, of the court to give certain specified instructions. The rule, without any exception applicable to this case, is that a mere omission to charge upon a particular point is not ground of exception after verdict, unless the court was requested in apt time to give the instruction. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *Russell v. Railroad*, 118 N. C. 1098, 24 S. E. 512; *Howard v. Turner*, 125 N. C. 107, 34 S. E. 229; *Clark's Code* (3d Ed.) pp. 535, 538.

The issues were sufficient to support the judgment, and they afforded the plaintiff ample opportunity to present any phase of the case arising upon the evidence. This

is all that is required in submitting issues to the jury. We have not been able to discover any error in the rulings of the court.

No error.

(135 N. C. 642)

JOHNSON et al. v. DUVALL et al.

(Supreme Court of North Carolina. May 27, 1904.)

DEEDS—COMMISSIONER—CERTIFICATE OF ACKNOWLEDGMENT—SEAL—NECESSITY—TIMBER LANDS—SUITS TO TRY TITLE—ALLOWANCE OF PARTY TO CUT TIMBER—ORDER—FINDINGS.

1. A commissioner of deeds for North Carolina, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in North Carolina.

2. In making an order authorized by Laws 1901, p. 900, c. 668, providing that if in actions to try title to timber lands the court, on finding that the claim of one party is not made in good faith, and is not based on a prima facie title, and that the claim of the other party is made in good faith, and is supported by a prima facie title, may allow the latter to cut timber on the lands in controversy pending the trial, the court must find as a fact, and incorporate the finding in the order, that the claim of the party against whom it is made is not made in good faith, and that the contention of the party allowed to cut the timber is made in good faith, and based on a prima facie title.

Appeal from Superior Court, Swain County; E. B. Jones, Judge.

Action by Eunice S. Johnson and others against Morgan Duvall and others. From an order permitting defendant J. B. Thomas to cut and remove timber from the land in controversy pending the trial, plaintiffs appeal. Reversed.

The record in this case presents an appeal from an order made by his honor Judge Jones, permitting the defendant J. B. Thomas to cut and remove timber from the lands in controversy pending the trial of the cause upon its merits. The facts found by his honor are that the title to the locus in quo was conceded to have been in W. H. Wilson, under whom all parties claim title. On February 1, 1859, said Wilson executed a deed containing operative words sufficient to pass the title to Alice A. Farrer. The original deed was not in evidence. A certified copy of the deed, together with the certificate of probate and order of registration, was used in the hearing before the court upon the motion for the injunction. It appears that the acknowledgment of the execution by the maker was before a commissioner of deeds for this state residing in the city of Washington, D. C. His certificate concludes with the words, "Given under my hand and seal," etc. There is nothing on the certified copy showing that an official seal was affixed to the certificate. A certificate is attached, entitled "Court of Pleas & Quarter Sess. March Term, A. D. 1859." "On motion it was ordered by the court that the foregoing deed for land in Jackson county, North Carolina, from W. H. Wilson and Martha R. Wilson

of Prince George County, State of Maryland to A. A. Farrer of Montgomery County, State aforesaid, be recorded and registered in Jackson County, with privy examination thereto as appears from the certificate of Chas. Walter, commissioner of deeds for the State of North Carolina, residing in Washington City. Certified the 8th day of April, A. D. 1859. A. M. Enloe, Clerk. Witness: Wm. R. Buchanan, R. J. C." The land was devised by A. A. Farrer to George and James Frame, the last-named devising his interest to said George Frame, who, on March 10, 1904, conveyed such title as he had to J. B. Thomas, who, at March term, 1904, was made a party defendant by the court. The said W. H. Wilson, on August 16, 1884, executed a deed for said land to his wife, Martha R. Wilson, who by her last will and testament conferred upon her executor power to sell the same. Pursuant to such power the said executor on February 24, 1893, conveyed the said land to the ancestors of the plaintiffs. There was evidence before his honor in regard to the payment of taxes. There was no evidence of any possession by either of the parties, the locus in quo being wild mountain land, chiefly valuable for timber. The plaintiffs allege that the defendants Duvall and Mendenhall were cutting timber on the land, and prayed an injunction pending the litigation. A restraining order was made by his honor Judge Ferguson enjoining the defendants Duvall and Mendenhall from cutting the timber until the final hearing. At the same time an order was made continuing the motion for a receiver to be heard before his honor Judge Jones. The said J. B. Thomas filed an affidavit in the cause, setting out his title, and alleging that he was operating a sawmill, with a large crew of hands, near the lands; that he was about through with the timber, and desired to move his mill and outfits on the land covered by the grants which are in controversy in this action, and upon such affidavit moved that he be permitted to cut and remove the logs. His honor granted the motion, and the plaintiffs appealed.

Geo. H. Smathers and Shepherd & Shepherd, for appellants. A. M. Fry, for appellees.

CONNOR, J. It will be observed that this action was originally brought against Mendenhall and Duvall, and they were enjoined from cutting the timber from plaintiff's land. Thereafter Thomas, who had been made party defendant, filed an affidavit, which was heard before Judge Jones, as the basis for a motion to be permitted to cut and remove the timber during the pending of the action. His honor granted the order, basing his action upon his opinion that the title to the land passed by the deed executed by William H. Wilson to Alice A. Farrer bearing date August 1, 1859, which title vested in Thomas.

The deed from Frame to Thomas contains certain provisions and stipulations which were argued by counsel, constituting an agreement for maintenance of a lawsuit, thereby vitiating the deed. The discussion in this court was largely directed to the validity of the probate of the deed from Wilson to Farrer; the plaintiffs contending that it was invalid, for that no seal was attached to the certificate of the commissioner of deeds, and, further, that the order of registration was defective in that there was no adjudication that the deed had been properly proved before the commissioner of deeds. The power of the commissioner to take acknowledgment or proof of the execution of deeds executed in other states conveying land situate in this state is found in chapter 37, § 5, of the Revised Code. It does not appear from an examination of that section that the commissioner is required to affix any seal to his certificate, the language being: "And duly certified by him, such deed, power of attorney, bill of sale or other instrument, being exhibited in the court of pleas and quarter sessions of the county where the property is situate, or to one of the judges of the Supreme Court or of the superior courts of this state, shall be ordered to be registered with the certificates thereto annexed." It is certainly usual for commissioners of deeds or affidavits to affix their official seal to certificates made by them. We have carefully examined the several statutes bearing upon the subject and cited in the briefs, and find no statute requiring a seal to be affixed to such certificate.

It is further contended that the certificate of the clerk does not show affirmatively that the court adjudged the certificate of the commissioner to be in due form, or that the proof or acknowledgment was properly taken. It will be observed that the deed was exhibited in open court, and it may be upon the trial that it will appear from the minutes of the court that the proper adjudication was made. It would seem that the law would raise a presumption to that effect. We prefer deferring a decision of this question until the cause shall be brought to trial, and the evidence, together with the minutes of the court of pleas and quarter sessions, introduced. There is, however, a view of the case, not presented by the briefs, which we think it proper to decide, as it affects a matter of interest to the public. The order is evidently based upon the power conferred upon the court by chapter 666, p. 900, of the Laws of 1901, the first section of which provides: "That in all actions to try title to timber lands and in all actions for trespass thereon for cutting timber trees, whenever the court shall find as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to

said land or timber trees shall be finally determined in such action. That whenever in any such action, the judge shall find as a fact that the contention of either party thereto is not in good faith and is not based upon evidence constituting a prima facie title, then upon motion of the other party thereto who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the said timber trees by giving bond," etc. We think that, before an order vitally affecting the rights of either party shall be made, such as the permission to cut the timber, the court shall find as a fact, and incorporate such finding in the order, that the contention of the party against whose claim the order is made is not in good faith, and that the contention of the party in favor of whom the order is made is in good faith, and based upon a prima facie title. The order in this cause finds neither of these facts, and for that reason, we think, is erroneous.

Serious questions being presented for determination on the hearing of this cause, we think that, in the absence of any finding that the plaintiffs' contention was not made in good faith, and that the defendants' contention was bona fide, and based upon a prima facie title, the property should have been left in statu quo until the final hearing. Without passing upon the other questions argued before us, the order of his honor is reversed.

Reversed.

(185 N. C. 532)

BECK v. MERONEY et al.

(Supreme Court of North Carolina. May 24, 1904.)

TAXATION—REDEMPTION—PAYMENT—MEDIUM—
AMOUNT DUE—COMPUTATION—ERRORS—AC-
TIONS—LIMITATIONS—PLEADING.

1. In an action to set aside a tax deed as a cloud on title, it was not necessary that the complaint should allege that all the taxes on the land had been paid, but was sufficient that plaintiff proved that he had title to the property at the time it was sold for taxes, and that all the taxes had been paid.

2. Where the taxes for which land in controversy was sold, together with the costs and interest, had been paid by the tax debtor within a year after the sale allotted for redemption, the tax deed, which was valid on its face, constituted a cloud on the debtor's title.

3. Where land is sold for taxes, the purchaser, during the time allowed for redemption, has a statutory lien on the land for taxes, costs, and interest, which is discharged by payment of the taxes and charges within the redemption period.

4. Where a sheriff, as ex officio tax collector, erroneously computed the amount necessary to redeem land from tax sale, and the tax debtor paid the amount demanded by the sheriff, such payment constituted a redemption, the debtor being entitled to rely on the statement of the state's officer as to the amount due.

5. Where a sheriff received a check in payment of taxes for which land had been sold, but the sheriff collected the check and tendered

money to the purchaser of the tax title in payment of the amount due by the redemptioner, which the purchaser refused to receive, the fact that the sheriff received the check instead of money did not deprive the payment of its effect as constituting a redemption.

6. An action to set aside a tax deed as a cloud on title, as authorized by Act 1893, p. 37, c. 6, is not an action to recover real estate sold for nonpayment of taxes within the three-year statute of limitations provided for such actions.

Appeal from Superior Court, Cherokee County; Hoke, Judge.

Action by Louis H. Beck, as trustee, etc., against B. B. Meroney and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Dillard & Bell, F. P. Axley, and R. L. Cooper, for appellants. E. B. Norvell and Ben Posey, for appellee.

MONTGOMERY, J. The defendants, in 1898, bought the mineral interests in the land described in the complaint at a sheriff's sale for taxes, and more than a year thereafter received the deed from the tax collector to the property. In the meantime, and within six months after the sale for taxes, the plaintiff paid through his agent, Southerland, to the sheriff of the county, the amount estimated to be due by the sheriff for taxes, costs, and interest. The defendants in the court below moved *ore tenus* to dismiss the complaint because it was not alleged therein that all the taxes due on the land had been paid, and that it was alleged in the complaint that the defendants' deed was absolutely void, and tended to cast a cloud upon the plaintiff's title. The motion was properly denied. We think it was not necessary that it should have been alleged in the complaint that the taxes had been paid on the land. The revenue act, under which the land was sold, did not require that. In *Moore v. Byrd*, 118 N. C. 688, 23 S. E. 968, it will be seen that the court construed the statute to mean that the tax debtor must show by the evidence that he had title to the property at the time of the sale, and that all taxes had been paid upon the property; and the plaintiff introduced such evidence. The complaint not only contained the allegation that the tax deed held by the defendants was absolutely void (and so it was if the land had been redeemed by the tax debtor), but it also contained the allegation that the deed on its face was apparently regular and valid. If the taxes therefore, and the costs and interest, had been paid by the plaintiff tax debtor within the year allowed for redemption, then the deed, being valid on its face, constituted a cloud on the plaintiff's title. When land is sold for taxes in this state, the purchaser during the time allowed for redemption has a statutory lien upon the land for the taxes, costs, and interest; but when the taxes and charges are paid within the year allowed for redemption the lien is discharged by the payment. The agent of the plaintiff

approached the defendants for the purpose of redeeming the land, and upon their refusal to receive payment he paid the amount to the sheriff of the county, who himself made out the amount estimated to be due. Because the sheriff made a mistake in the calculation of about 50 cents, the defendants insist that redemption did not follow the payment of the amount due by the sheriff's calculation. There can be nothing in that contention in reason, justice, or law. A taxpayer in this state has the right to rely, in redeeming his land from sale for taxes, upon the statement of the tax collector, the officer of the state for the collection of its revenue.

The defendants contend further that, because the revenue law required that the sheriff should collect taxes in money, therefore, because he received a check on a bank from the tax debtor's agent, there was no redemption. But it appears in the evidence that the sheriff collected and used, as sheriff, the check, and tendered to the defendants not the check, but money, in payment of the amount due by the tax debtor, and that they refused to receive it.

The defendants pleaded the three-years statute of limitations as a defense to the action. The revenue law in force at the time the land was sold for taxes provided that "no action for the recovery of real property sold for nonpayment of taxes shall lie unless the same be brought within three years after the sheriff's deed is made as above provided." It is true that more than three years had elapsed between the execution of the sheriff's deed and the time of the commencement of this action, but this is not an action for the recovery of the land. It is simply an action to remove a cloud from the plaintiff's title under Act 1893, p. 37, c. 6.

No error.

(125 N. C. 488)

CARTER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 24, 1904.)

RAILROADS—PERSONS ON TRACKS—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

1. One walking or sitting or lying down on a railroad track is guilty of contributory negligence.

2. Where plaintiff's intestate was down upon defendant's track in such a position that he could have been seen by the engineer, if the latter had been looking, at a distance of 150 yards, and in time to have stopped the train and prevented the injury, plaintiff may recover under the doctrine of last clear chance.

Appeal from Superior Court, Iredell County; W. R. Allen, Judge.

Action by W. W. Carter, as administrator, etc., against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. C. Caldwell, for appellant. Armfield & Turner and J. F. Gamble, for appellee.

MONTGOMERY, J. All of the exceptions of the defendant may be considered under the one to the refusal of the court below to dismiss the action on the motion of the defendant to have the plaintiff nonsuited because there was no evidence tending to show negligence on the part of the defendant in the killing of the plaintiff's intestate. There was evidence going to show that the intestate was found dead lying right along the side of the railroad track; that blood and flesh and human hair were seen on the track between the rails a few steps from the intestate's body; that one arm and one foot were cut off, the forehead mashed, and the scalp torn off, and that the clothing around the middle of the body was stripped off; and, besides, that the intestate was intoxicated. The engineer in charge of the engine at the time the intestate was killed testified that he was sitting straight up in the cab, looking ahead through the front window, and that the first thing he observed was "a bulk of something rolling into the ditch beside the track." We are of the opinion that the evidence which we have recited tended to show that the intestate was killed while he was down and helpless upon the track. The evidence of the severed arm and leg went to show that he was run over by the engine, and the engineer's testimony corroborated that view, for, as he said, he was looking straight ahead, and did not see the man standing or walking upon the track. Of course, the intestate was guilty of contributory negligence, whether he was walking or sitting or lying down on the railroad track when he was killed. *Upton v. Railroad*, 128 N. C. 173, 38 S. E. 736. This court there said: "The intestate having been negligent, before a recovery can be had against the defendant on the ground of its negligence in not availing itself of the 'last clear chance,' it must be shown by the plaintiff by proper evidence not simply that the intestate was on the track in the way of the engine, but that he was there apparently asleep, or in other helpless condition, and that the engineer had discovered his condition, or, by keeping a reasonable watchout, could have discovered it in time to have prevented the injury, and that after he had discovered it, or could by proper watchfulness have had reasonable grounds that such was the condition of the intestate, he failed to use all available means to prevent the injury." As we have said, the evidence tended to show that the intestate was down upon the track; and there was further evidence for the plaintiff going to show that the intestate could have been seen by the engineer, if he had been looking, a distance of 150 yards, and in time to have stopped the train and prevented the injury. There was a good deal of evidence to the contrary, but all of it had to be submitted to the jury. In *Upton's Case*, supra, the appearance of the body did not indicate that the intestate had been run

over by the train, but, on the contrary, that he was in a sitting position on the end of a cross-tie, with his face from the track.

There was no error in the course of the trial, and the judgment must be affirmed.

(135 N. C. 553)

JONES v. DURHAM WATER CO. et al.
(Supreme Court of North Carolina. May 24, 1904.)

MUNICIPAL CORPORATIONS—FIRE PROTECTION—CONTRACTS—ACTIONS—PARTIES.

1. Where a water company contracts to supply a town and its inhabitants with water for extinguishing fires, a property owner may maintain an action against the company in his own name for a loss sustained by failure to supply water for extinguishing a fire.

2. Under a contract with a water company to supply water for extinguishing fires, requiring that it shall provide pressure on four minutes' notice to throw ten streams a certain height, a property owner, suing for damages for failure to furnish water for the extinguishment of a fire, need not show that notice was given the company, as such provision was for an extraordinary pressure to show the capacity of the plant.

Appeal from Superior Court, Durham County; C. M. Cooke, Judge.

Action by R. M. Jones against the Durham Water Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

Boone & Reade and Manning & Foushee, for appellant. Winston & Bryant and Fuller & Fuller, for appellees.

CLARK, C. J. The defendant contracted with the town of Durham to put in a water plant (section 2) "to abundantly supply said town of Durham and its inhabitants with pure and wholesome water fit for all domestic purposes;" (section 3) "and will furnish at said hydrants at all points all water necessary for all fire extinguishing and other public purposes;" (section 5) "an adequate supply of water for the sprinkling with carts of all paved streets * * * and for the extinguishment of fires;" (section 6) "that if at any time it shall fail to furnish an adequate supply for all fire and other public purposes as herein stipulated," etc. There was evidence tending to show that the house of plaintiff in said town was burned down because of an almost total lack of pressure; that the stream of water did not reach more than half way to the eaves of the house, 20 feet being the greatest height to which the water was thrown. There can be no real contention that the plaintiff, a citizen and taxpayer, and one of the beneficiaries in the purview of this contract cannot prosecute this action. He is the real party in interest. He is taxed with payment of his pro rata of the annual rental. The town cannot maintain this action for the loss sustained by him by reason of the defendant's failure to perform the provisions of the contract above recited. For this injury the

plaintiff alone can sue. This point was discussed and settled in *Gorrell v. Water Co.*, 124 N. C. 598, 32 S. E. 720, 48 L. R. A. 513, 70 Am. St. Rep. 598, which has been followed in *Fisher v. Water Co.*, 128 N. C. 375, 38 S. E. 912, and cited and approved in *Lacy v. Webb*, 130 N. C. 546, 41 S. E. 549, and *Gastonia v. Engineering Co.*, 131 N. C. 366, 42 S. E. 858, in which last the doctrine is elaborated. The same principle had been often affirmed prior to *Gorrell's Case*, to wit, that the beneficiary of a contract, though not a party to it, nor expressly named therein, can maintain an action for a breach of such contract, causing injury to him, if the contract was made for his benefit. Among the many cases to that effect are *Sherrill v. Tel. Co.*, 109 N. C. 527, 14 S. E. 94 (action for failure to deliver telegram); *Id.*, 116 N. C. 658, 21 S. E. 429; and *Shoaf v. Ins. Co.*, 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804. This contract specifies that the defendant shall furnish the town "and its inhabitants * * * all water necessary for fire extinguishing."

The real point in this case is that section 1 of the contract sets out that the defendant "shall provide means and apparatus which will enable it at all times within four minutes after a call for such pressure has been given by the proper officer of the fire department of said town to furnish to said town for fire service 10 fire streams from any 10 hydrants to a vertical height of 100 feet in still air, such stream being taken from the hydrant with 100 feet of hose and a 1-inch nozzle," subject to provisions in sections 12, 13, and 14. These latter sections provide that if, on a test, the defendant gives only nine streams 100 feet high within four minutes after notice, the rental of \$4,000 (allowed if ten streams of required height are furnished) shall be reduced to \$3,950; if only eight such streams, then only \$3,850 rental; if only seven, then the rental shall be \$3,800; and so on down to five streams of requisite height and size. His honor instructed the jury that by virtue of these provisions, unless notice of four minutes, or other reasonable notice, was given the defendant, the plaintiff could not recover. In this there was error. The pressure to throw ten streams and not less than five streams 100 feet vertical in still air was an extraordinary pressure required, upon four minutes' notice, to show the capacity of the water plant, and as a means of measuring the rental to be paid. This stipulation has no bearing upon the duty of the defendant to furnish a supply of water "adequate for the extinguishment of fire" as provided in sections 2, 3, 5, and 6 of the contract. These provisions in sections 2, 3, 5, and 6 were in force at all times, and it did not require four minutes' notice to make inadequate the pressure which threw the water "only 20 feet high, being only half way to the eaves." If the complaint had been that the ten streams or seven streams of

specified height and size were not furnished, then the four minutes' notice should be alleged and shown, but not in this case.

Error.

(135 N. C. 493)

BRITTAIN v. WESTHALL

(Supreme Court of North Carolina. May 24, 1904.)

NONSUIT — APPEAL — REVIEW OF EVIDENCE — PRINCIPAL AND AGENT — EXISTENCE OF RELATION — EVIDENCE — ADMISSIBILITY — SUFFICIENCY.

1. On a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true, and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established.

2. In a suit for a balance due on the price of lumber, alleged to have been purchased by T. as agent for defendant, a clause in a contract between T. and the defendant under which the latter agreed to furnish the money with which T. was to buy the lumber, the title to the lumber to remain in the defendant, the prices to be fixed by agreement between them and the purchases to be made for and in the name of the defendant, was evidence fit to be considered by the jury upon the question of agency.

3. Testimony by the plaintiff that he sold the lumber to T. and defendant under the contract, that T. said he was buying the lumber for defendant, who furnished the money, and that plaintiff sold on defendant's credit, was proper evidence on the question of agency.

4. If an agent is authorized to buy for cash to be furnished by the principal, and he violates his instructions and buys on credit, and the principal thereafter receives the goods so bought by his agent and appropriates them to his own use, he is liable for the price, unless he can show that he furnished his agent with the necessary funds to buy the lumber, and the latter nevertheless bought on a credit, and that the principal received the goods without any notice of that fact, and will be prejudiced if he is made to pay for them.

5. In a suit for a balance due on the price of lumber, alleged to have been purchased of plaintiff by T. as agent for defendant, checks given plaintiff by T., bearing an entry on the face, in plaintiff's handwriting, that they were given for lumber bought for defendant, were admissible only in corroboration of plaintiff's testimony that he was told by T. that he was buying for defendant, and were not competent as substantive testimony, though the checks were in defendant's possession.

6. In a suit for the price of lumber alleged to have been purchased by one as agent for defendant, evidence examined, and held sufficient to require submission to the jury of the question of agency.

Appeal from Superior Court, Catawba County; Neal, Judge.

Action by D. M. Brittain against W. H. Westhall. From a judgment for defendant, plaintiff appeals. Reversed.

L. L. Witherspoon and M. H. Yount, for appellant. Self & Whitener, for appellee.

WALKER, J. The plaintiff brought this action before a justice of the peace to recover the sum of \$182, the balance claimed

to be due for lumber sold and delivered to the defendant through one J. A. Townsend, who, the plaintiff alleged, was the agent of defendant to buy the lumber, but this allegation was denied by the defendant, and he also denied that he is indebted to the plaintiff in any amount. The justice gave judgment for the plaintiff, and the defendant appealed, and the superior court, after hearing the evidence, nonsuited the plaintiff on motion of the defendant, and the latter accepted and appealed.

The case turns upon the question whether the said Townsend, at the time the lumber was purchased, was the agent of the defendant and authorized to buy for him as he did. In order to establish the affirmative of this issue joined between the parties, the plaintiff introduced in evidence an agreement between Townsend and Westhall, dated January 13, 1903, by which the former agreed to ship to the latter all the lumber to be manufactured from timber taken from, and to be taken from, the land described in a certain deed of trust made by Townsend to A. S. Abernathy, as well as from all other land the timber on which the said Westhall had already contracted or thereafter contracted to buy, and all other lumber which Townsend should buy from any and all other persons. It was further agreed that Westhall should credit Townsend on the debt secured by the deed of trust with the money due for lumber manufactured from timber cut on the land described in the deed of trust, at certain prices specified in the contract, and that Townsend should receive credit at the same prices for the lumber bought by him and shipped to the defendant, with certain deductions. The contract contains this clause: "Said party of the second part is to furnish to the party of the first part, at his discretion, such sums of money as may be necessary for him, the said party of the first part, to pay for such lumber as he may buy from such other person or persons, but the said party of the first part shall buy such lumber only at such prices as shall be agreed upon between him and the party of the second part, and said purchases of lumber so made by the party of the first part shall always be in the name of and for the party of the second part, in whom the title shall always be and remain. It is understood and agreed between the parties that the party of the second part is not to pay for or become chargeable with the cost of logging or manufacturing into lumber the timber taken from said land mentioned and described in said deed of trust, or for the timber bought by or to be bought by the party of the second part, nor is he to pay for or become chargeable with the cost of hauling the timber from said land to the place of manufacturing the same into lumber, or for hauling said lumber from the place of manufacture to the place of shipment."

The plaintiff, examined in his own behalf, testified that he sold the lumber in 1903 to Townsend, who said that he was buying it for Westhall; that he sold it on Westhall's credit, and Townsend said that Westhall was to furnish the money. The plaintiff hauled the lumber to the railroad station and turned it over to Townsend, who paid for it with checks drawn by him on the bank, payable to the plaintiff's order. On the face of each check was this indorsement in the plaintiff's handwriting: "This check for lumber bought for W. H. Westhall." The defendant objected to the introduction of the checks; the objection was overruled, and the defendant excepted. The other testimony was not objected to. The plaintiff further testified that he had been paid \$250 on the contract and sale of the lumber, and that there is still due him a balance of \$182 by the defendant. The latter told the plaintiff that he had possession of a part of the lumber, and the plaintiff saw about 10,000 feet of the lumber in the possession of the defendant after he took charge of Townsend's property. The lumber was worth \$10.50 per thousand feet. Townsend had become a bankrupt and left the state, and the court ordered his property to be turned over to the plaintiff. The plaintiff knew nothing of the written contract or its contents until after he had sold the lumber to Townsend. He relied on the latter's statement that he was buying for Westhall. A witness, A. S. Abernathy, testified that he had a conversation with the plaintiff before this suit was brought, in which he said that Townsend told him he bought the lumber for Westhall, though the plaintiff did not claim that Westhall was liable.

It is well settled that on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true, and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony. *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *Hopkins v. Railroad*, 131 N. C. 463, 42 S. E. 902. Tested by this rule, we think there was some evidence which tended to show that Townsend was acting as agent for the defendant when he bought the lumber. The clause in the contract between Townsend and the defendant under which the latter agreed to furnish the money with which Townsend was to buy the lumber, the title to the lumber to remain in the defendant, the prices to be fixed by agreement between them, and the purchases to be made for and in the name of the defendant, was evidence fit to be considered by the jury upon the question of agency. If Townsend was buying the lumber for the purpose of selling it to the de-

fendant, such a stipulation as the one we have just mentioned would hardly have been inserted in the contract. If such was the nature of the transaction, why did the defendant furnish the money to make the purchases and require that the lumber should be bought in his name and for him, and that the title should be in him? This is rather an unusual method of buying property through one who is not the agent of the purchaser, but who is buying for himself for the purpose of reselling. If Townsend was buying on his own account, but under an agreement to sell the lumber so bought by him to the defendant, we do not see why the purchase should be made for the defendant and in his name, and why the title should vest in the defendant at the very time the purchase was made. It may be that all this can be explained, but it at least shows that the plaintiff is entitled to have the contract submitted to the jury for their consideration, in connection with any other evidence which may tend to strengthen or weaken the argument based upon it.

But the plaintiff himself testified that he sold the lumber to Townsend and Westhall under the contract; that Townsend said he was buying the lumber for Westhall, who furnished the money; and the plaintiff further testified that he sold the lumber on Westhall's credit. This evidence was not objected to by the defendant, and we are unable to see why it was not proper for the jury to consider it. It is true that an agency to buy for cash does not imply authority in the agent to pledge the credit of the principal. An agent can only contract for his principal within the limit of his authority, and persons dealing with an agent having limited powers must generally inquire as to the extent of his authority. But if the agent is authorized to buy for cash to be furnished by the principal, and he violates his instructions and buys on credit, and the principal thereafter receives the goods so bought by his agent and appropriates them to his own use, he is liable for the price, unless he can show that he furnished his agent with the necessary funds to buy the lumber, and the latter nevertheless bought on a credit, and that the principal received the goods without any notice of that fact, and will be prejudiced if he is made to pay for them.

In this case there is evidence that the defendant had the lumber, or, at least, some of it, in his possession, and told the plaintiff that he had some of it, and it does not appear whether he had supplied his alleged agent with sufficient funds to make the purchases from time to time. Surely he should not be allowed to keep the lumber if he had failed in this respect and the lumber had not been paid for. *Patton v. Brittain*, 32 N. C. 8; *Miller v. Lumber Co.*, 66 N. C. 508; *Brown v. Smith*, 67 N. C. 245.

There is evidence to the effect that the de-

defendant stated to the plaintiff that the property was given to him by order of the court, but the jury might have rejected this testimony and found the facts in accordance with the other testimony in the case and the plaintiff's contention, and the rule is that the plaintiff is entitled to have the case go to the jury, if in any view of the evidence, or by any combination of the facts which the testimony tends to prove, he may be able to recover.

The evidence in the case in support of the plaintiff's cause of action may not be very conclusive, and the defendant may show that he is the rightful owner of the lumber; but we are not at liberty to express any opinion as to these matters, nor are we permitted to weigh the testimony and decide where the preponderance is. We can only pass upon the question whether there was any evidence legally sufficient to be submitted to the jury for the purpose of sustaining the plaintiff's side of the issue. We think there was some evidence of that character upon the record as now presented. The entries on the checks could be competent only in corroboration of the plaintiff, who testified that Townsend told him he was buying for Westhall, and he (the plaintiff) sold the lumber on Westhall's credit. We do not now perceive upon what ground they can be competent as substantive testimony. The mere declaration of the plaintiff that the checks were given for lumber bought for Westhall is not competent even to prove that they were so given, as against the defendant, nor that Townsend was authorized to buy on the credit of Westhall, nor to prove any other material fact. It is merely an unsworn declaration, which is not substantive proof, and the fact that the checks went into the possession of Westhall does not change its character or impart to it probative force.

The judgment of nonsuit must be set aside, and a new trial awarded. Error.

(135 N. C. 556)

**NATIONAL UNION BANK OF MARYLAND
v. HOLLINGSWORTH et al.**

(Supreme Court of North Carolina. May 24,
1904.)

PARTNERSHIP—DISSOLUTION—DEATH OF PARTNER—NOTICE—SURVIVING PARTNER—NOTES—INDORSEMENT—INDIVIDUAL LIABILITY—CORPORATIONS—ORGANIZATIONS—TRANSFER OF ASSETS—DEBTS OF CORPORATORS—LIABILITY OF CORPORATION.

1. Where, in an action on a note against a firm which had been dissolved by the death of two of the partners, the personal representatives of such deceased partners were not made parties, their liability was not in issue.

2. Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm.

3. A surviving partner has no power after dissolution to renew or indorse a firm note in the name of the firm.

4. A surviving partner, who, more than two years after dissolution of the firm, indorsed a note in the firm name for the renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind the firm.

5. Where a surviving partner of a firm, who was personally liable on an indorsement of a note in the firm name without authority, organized a corporation, and transferred the assets of the firm to such corporation in payment of his subscription to the corporation's stock, without intent to defraud his creditors, the corporation was not liable for such debt.

Appeal from Superior Court, Buncombe County; Hoke, Judge.

Action by the National Union Bank of Maryland against J. B. Hollingsworth and others. From a judgment in favor of plaintiff for less than the relief demanded, both parties appeal. Reversed on defendants' appeal, and affirmed on plaintiff's appeal.

On and prior to the 5th day of September, 1895, O. L. Cottrell, A. S. Watkins, and W. S. Robertson, of Richmond, Va., under the firm name of Cottrell, Watkins & Co., conducted a hardware business in the city of Richmond. This firm, some years prior to said date, purchased the stock of goods of Van Gilder & Brown, of Asheville, N. C., and formed a copartnership with Joseph E. Dickerson, of said city of Asheville, under the firm name and style of J. E. Dickerson & Co., for the purpose of conducting a hardware business at Asheville. The business of said firm was kept separate and apart from that of Cottrell, Watkins & Co. Dickerson had no interest in the business of the Richmond firm. On September 5, 1895, O. L. Cottrell died, and from that time until December 12, 1895, the surviving partners both of Cottrell, Watkins & Co. and J. E. Dickerson & Co. continued the business with a view of winding up both concerns. On December 12, 1895, J. E. Dickerson purchased from the surviving partners of Cottrell, Watkins & Co. and the administrator of the deceased partner their interest in the assets and property of the firm of J. E. Dickerson & Co. At said date the firm of J. E. Dickerson & Co. was indebted to the firm of Watkins, Cottrell & Co. in the sum of about \$16,000. Dickerson agreed to assume and pay this amount and all other debts of the firm of J. E. Dickerson & Co., and, in addition thereto, to pay to the surviving partners and the representatives of the deceased partner of the firm of Cottrell, Watkins & Co. the sum of \$16,500, making a total indebtedness to the firm of Cottrell, Watkins & Co. of \$32,500. Of this amount, he paid \$8,000 in cash, and thereafter \$2,000; leaving an indebtedness in May, 1897, of about \$23,000. On March 7, 1896, A. S. Watkins, another member of the firm of Cottrell,

Watkins & Co., died. Dickerson agreed to reduce the debt of \$23,000 from time to time, until, within three years, it was to be extinguished. On May 7, 1897, Robertson, the surviving partner, together with the administrators of Cottrell and Watkins, learned for the first time that Dickerson had organized a corporation with a capital stock of \$30,000, of which he owned $\frac{20}{50}$, the balance thereof being in the hands of W. H. Penland and S. T. Dorsett. Upon being asked for security for the indebtedness due Cottrell, Watkins & Co., as aforesaid, Dickerson agreed to deposit with Robertson his certificate of stock in the corporation of the J. E. Dickerson Company. The certificate of stock was not actually delivered at that time, as it had not been printed and issued; but on May 18, 1897, he complied with his promise by inclosing to Cottrell, Watkins & Co., at Richmond, a certificate for 200 shares of stock in the J. E. Dickerson Company, with a power of attorney, signed in blank, to transfer the same, to be held as collateral security for the debt of \$23,000 due Cottrell, Watkins & Co. as aforesaid, and to indemnify the said firm against loss on account of certain indorsements which it had made for Dickerson on some notes of the late firm of J. E. Dickerson & Co. in one of the Richmond banks. These notes they subsequently paid. In consideration of giving this security, Dickerson was to have five years in which to pay the debt of \$23,000. Robertson, the surviving partner, and the administrators of the deceased partners, at the time of taking said stock as collateral security, had no knowledge or suspicion that Dickerson was financially embarrassed. They accepted the stock without inquiry or investigation as to the financial condition of Dickerson. From the date of the receipt of said stock, May 18, 1897, until September 22, 1897, there was no communication between Dickerson and the holders of the stock. On September 23, 1897, Robertson, surviving partner, learning of the failure of the bank in Asheville of which Dickerson was a director, visited Asheville for the purpose of looking into the condition of the affairs of the J. E. Dickerson Company. After a conference with Dickerson and his counsel, and an examination into the assets and affairs of the corporation, on September 23, 1897, the said J. E. Dickerson, in discharge and extinguishment of the said indebtedness to Cottrell, Watkins & Co., amounting to about \$20,000, sold and transferred to W. S. Robertson, surviving partner of Cottrell, Watkins & Co., all of his right, title, and interest in the said 200 shares of the capital stock of the J. E. Dickerson Company, which had been held by the said Robertson as collateral security as aforesaid. The remaining 10 shares of the capital stock of said company were also transferred to said Robertson by the owners thereof. J. E. Dickerson also transferred and assigned all of his right, title,

and interest in the goods, chattels, bills, notes, and other assets of every kind and character owned by or belonging to the J. E. Dickerson Company, together with a certain sewing machine business owned by J. E. Dickerson, and all sewing machines, etc., belonging to and used by him in said sewing machine business, and all accounts due him in said business. On the same day the said J. E. Dickerson executed an assignment to the said W. S. Robertson, surviving partner as aforesaid, for all his right, title, and interest in all property of every kind and character belonging to the firm of J. E. Dickerson & Co., as well as the corporation known as the J. E. Dickerson Company, and also all the capital stock of said corporation. On the same day the said W. S. Robertson, surviving partner as aforesaid, executed to J. E. Dickerson a full release of the said indebtedness due the firm of Cottrell, Watkins & Co. as aforesaid. Robertson at the same time and in the same instrument agreed to collect certain notes therein set forth, which had been held by the firm of Cottrell, Watkins & Co., and pay the proceeds thereof to the wife and son of J. E. Dickerson in the proportions therein set forth. On September 30, 1897, Robertson, surviving partner as aforesaid, filed a bill in equity, in the Circuit Court of the United States for the Western District of North Carolina against the J. E. Dickerson Company and J. E. Dickerson, trading as J. E. Dickerson & Co., reciting the matters and things hereinbefore set forth, and further setting forth that certain attachments had been levied upon the property of the J. E. Dickerson Company, against the said J. E. Dickerson, trading as J. E. Dickerson & Co., and asking that a receiver be appointed to take charge of the stock, assets, and other property of the J. E. Dickerson Company, and to pay all of its debts and wind up its business, and pay over to the plaintiff the balance remaining in his hands. On September 30, 1897, an order was made in said cause appointing J. B. Rankin receiver of said corporation, and of its property of every kind and character. The said receiver executed bond in accordance with the provisions of said order, and took into his possession the property of said corporation. Thereafter other orders were made in said cause from time to time in regard to winding up the business of the corporation, and disposition of the assets; and on November 6, 1897, an order was made allowing the attorneys of the plaintiff to enter a special appearance for the purpose of moving to dismiss the bill on the ground that the suit was collusive, and was filed by both plaintiff and defendant for the purpose of defrauding other parties in interest. No further action was taken in this suit. The record shows that on February 24, 1898, J. E. Dickerson, W. H. Penland, and S. T. Dorsett filed in the office of the Secretary of

State articles of incorporation of the J. E. Dickerson Company, and that pursuant thereto the secretary issued to said company a certificate of incorporation bearing date February 27, 1896. The capital stock of the corporation was fixed at \$5,000, with the privilege of increasing it to \$100,000 divided into shares of \$100 each. Books of subscription were opened, and capital stock subscribed as follows: J. E. Dickerson, 48 shares, \$4,800; S. T. Dorsett, 1 share, \$100; W. H. Penland, 1 share, \$100. And Dickerson advanced the amount to pay for the said 2 shares. On March 14, 1896, at a meeting of the stockholders, by-laws were adopted, and the following officers elected: W. H. Penland, president; J. E. Dickerson, secretary and treasurer; and S. T. Dorsett, W. H. Penland, and J. E. Dickerson, directors. And the following entry was made: "The directors were directed to consider the advisability of purchasing the stock and good will of J. E. Dickerson & Co., and of increasing the capital stock from \$5,000 to \$30,000." At an adjourned meeting, March 17, 1896, it was voted to increase the capital stock to \$30,000, whereupon J. E. Dickerson subscribed 250 shares, and the following indorsement was made on the minutes: "The secretary and treasurer was instructed to purchase the stock and good will of J. E. Dickerson & Co., for the corporation at a valuation as shown by the inventory to be taken on August 1, 1896; the corporation to take the business after August 1, 1896." J. E. Dickerson executed his note to the corporation for the capital stock subscribed by him, and thereafter said note was paid by a transfer to the corporation of the goods and assets of J. E. Dickerson & Co. Books were opened by the J. E. Dickerson Company, and the business conducted by the corporation. Certificate No. 1 was issued to J. E. Dickerson for 290 shares of the capital stock of the company; said certificate bearing date May 1, 1897, and indorsed September 25, 1897, as follows: "For value received I hereby sell, assign and transfer to W. S. Robertson, surviving partner of Cottrell, Watkins & Co. 290 shares of the within mentioned stock of the J. E. Dickerson Company and hereby constitute and appoint Fred Moore, attorney irrevocable to transfer the said stock on the books of said company with full power of substitution in the premises." Signed by J. E. Dickerson, and duly attested.

There was evidence tending to show that the stationery used by the J. E. Dickerson Company, upon which was printed "J. E. Dickerson & Co.," was that remaining on hand of J. E. Dickerson & Co., and that letters were written by the Cottrell-Watkins Company, addressed to the J. E. Dickerson Company and J. E. Dickerson & Co., in regard to the business transactions, etc., and that invoices were made out to J. E. Dickerson & Co. There was also evidence that checks were signed, in the course of business of the J. E. Dickerson Com-

pany, in the name of J. E. Dickerson & Co. It was also in evidence that the Asheville bank kept an account of J. E. Dickerson and J. E. Dickerson & Co., and that notes were indorsed in the name of J. E. Dickerson & Co.; that actions were brought in a justice's court in the name of J. E. Dickerson & Co. upon accounts due the firm prior to the death of Cottrell. The business was conducted at the same place, and the sign was not removed.

On July 15, 1897, the defendant J. B. Hollingsworth executed his promissory note payable to J. E. Dickerson & Co., in the sum of \$1,900, due and payable four months after date at the First National Bank of Asheville. Said note was indorsed "J. E. Dickerson & Co.," to the said bank, and by it indorsed to the plaintiff, the National Union Bank of Maryland. When the note became due, it was presented for payment to the First National Bank of Asheville, and also to J. E. Dickerson, and to the defendant Hollingsworth, and payment thereof was refused and the note protested.

The plaintiff alleged and introduced testimony tending to show that on May 25, 1893, the plaintiff bank at the request of the First National Bank of Asheville, rediscounted for said bank several thousand dollars of notes, which notes had been discounted by, and were then the property of, the First National Bank of Asheville, and which were, for valuable consideration, and before maturity, indorsed by the Asheville bank to the plaintiff, thereby becoming the property of the plaintiff. Among said notes were several which bore the indorsement of J. E. Dickerson & Co., which was at that time the firm composed of J. E. Dickerson, O. L. Cottrell, A. S. Watkins, and W. S. Robertson; one being a note by Hollingsworth for \$4,900. The plaintiff bank made an investigation of the financial standing and responsibility of the makers and indorsers of said notes, and ascertained that Cottrell, Watkins, and Robertson were solvent and worth large amounts of property. Said notes were not paid at maturity, but renewals were executed by the original makers, and made payable to the defendants J. E. Dickerson & Co., and indorsed by J. E. Dickerson & Co. and the First National Bank of Asheville, and by said bank deposited with the plaintiff, "which said renewals were accepted by the plaintiff in settlement of the original notes referred to, and from May 25, 1893, up to and including July 15, 1897, during a long course of business, the original makers of said notes, not being able to meet them at maturity, executed renewals thereof, which were indorsed by the defendants J. E. Dickerson & Co. and by the First National Bank of Asheville, and were afterwards deposited by the First National Bank of Asheville with the plaintiff in payment of the notes hereinbefore referred to, and that said note of \$1,900 was given in renewal of other notes, the original of which

was dated some time in the year 1893." The defendants deny that at any time after September 5, 1895, the firm of J. E. Dickerson & Co. indorsed any note or notes to the First National Bank of Asheville or the plaintiff in this action. The plaintiff alleges that it rediscounted these notes for the Asheville Bank, relying upon the financial worth and responsibility of Cottrell, Watkins, and Robertson, and it had no notice of the dissolution of the firm of J. E. Dickerson & Co., and that no such notice was ever published or advertised in any paper in the state of North Carolina or elsewhere, and that no notice whatever was given to the plaintiff of said dissolution, and that the plaintiff knew nothing of the attempted dissolution of the firm until the failure of the bank at Asheville. J. E. Dickerson was director of the Asheville bank, and continued such until its failure. The note for \$1,900 was executed by Hollingsworth as an accommodation, for the purpose of enabling the J. E. Dickerson Company to receive the proceeds thereof, and the proceeds were credited on the books of the Asheville bank to an account in the name of J. E. Dickerson & Co. for the use and benefit of the J. E. Dickerson Company; and the said J. E. Dickerson concealed the fact from the plaintiff, as well as from the Asheville Bank, of the withdrawal of Cottrell, Watkins & Co. from the firm, etc. The plaintiff further alleged that J. E. Dickerson continued the business at the old stand, and under the old name of J. E. Dickerson & Co., advertising to the world that the business was being conducted, as it had been for many years prior thereto, under the name of J. E. Dickerson & Co., and that, at the time the said J. E. Dickerson pretended to purchase from his copartners the said business, the said J. E. Dickerson and the firm of J. E. Dickerson & Co. were largely indebted to various persons, including the plaintiff, in large sums of money—about \$20,000—and, in order to cheat and defraud the plaintiff and his other creditors of the money which he and the firm of J. E. Dickerson & Co. owed them, the said Dickerson endeavored to have the business incorporated under the name of the J. E. Dickerson Company; that the incorporators and stockholders of said corporation were W. H. Penland and S. T. Dorsett, and that they never in fact owned any of the stock of said corporation; that it was subscribed for, by them at the request of J. E. Dickerson, in order to consummate the fraud. All of these allegations were denied by the defendants, J. E. Rankin, receiver, and the J. E. Dickerson Company.

W. H. Penland was cashier and S. T. Dorsett teller, of the First National Bank of Asheville during the time that the transactions herein were being conducted. Penland and Dorsett knew of the death of Cottrell, but there was no direct evidence that the president of the bank knew it. The de-

fendant Robertson testified that he knew nothing of the indebtedness to the Asheville Bank or to the plaintiff bank of J. E. Dickerson or J. E. Dickerson & Co.; that he did not learn of the existence of this note until a few days before this suit was brought. He denied that there was any purpose on his part, in taking the security from Dickerson, to defraud any of the creditors of Dickerson; and that the debts of J. E. Dickerson Company have been paid in full. J. E. Dickerson further testified that the original note of \$4,900, and the several notes given in renewal thereof, were made for the accommodation of the Asheville Bank, to enable them to discount them and to get the money on it, and that neither J. E. Dickerson & Co., nor the J. E. Dickerson Company, received any benefit whatever therefrom; that the proceeds of the note were credited to Hollingsworth, and afterwards charged to "bills payable."

The defendants who answered tendered the following issues: "(1) Were the defendants J. E. Dickerson and W. S. Robertson and O. L. Cottrell and A. S. Watkins copartners trading as J. E. Dickerson & Co. on the 15th of July, 1897? (2) Did J. E. Dickerson, W. S. Robertson, O. L. Cottrell, and A. S. Watkins, under the firm name and style of J. E. Dickerson & Co., and the defendant J. E. Dickerson Company, for value, indorse the note sued on to the First National Bank of Asheville? (3) Did the First National Bank of Asheville thereafter indorse the note sued on to the plaintiff? (4) Was said note duly presented to J. E. Dickerson, W. S. Robertson, O. L. Cottrell, and A. S. Watkins, trading as J. E. Dickerson & Co., when it became due, and was the same duly protested as to them? (5) Did the defendant J. E. Dickerson & Co. receive the benefit and advantage of the money paid by the plaintiff for the note sued on? (6) Did the defendant assign and sell on or about the 27th of September, 1897, at a time when it was insolvent, its assets and property to W. S. Robertson, with intent to defraud its creditors?" His honor declined to submit the issues tendered, and in lieu thereof submitted the following: "(1) Are the defendants J. B. Hollingsworth, J. E. Dickerson & Co., and the First National Bank of Asheville indebted to the plaintiff, and, if so, in what sum? (2) Is the defendant J. E. Dickerson Company indebted to the plaintiff, and, if so, in what amount? (3) Is the defendant W. S. Robertson personally indebted to the plaintiff, and, if so, in what amount? (4) At the time the action was commenced and attachment levied, did the defendants W. S. Robertson and J. E. Rankin, receiver, hold the property levied on in this cause in trust to satisfy the present claim and demand of the plaintiff?" The only defendants who answered were the J. E. Dickerson Company and J. E. Rankin, receiver, but the defendant Robertson, after answers filed, having

been made a party defendant, and served by publication of summons, adopted the answer filed by his codefendants. The defendants excepted to the refusal to submit the issues tendered, and to the issues as submitted. The defendants submitted a series of instructions presenting their contentions, and requested the court to charge the jury in accordance therewith, all of which were declined. His honor charged the jury that, if they believed the evidence, they should answer the first, second, and fourth issues, "Yes." To the refusal to give the instructions asked, and to the instructions given, the defendants Rankin, receiver, Robertson, and the J. E. Dickerson Company excepted, and appealed from the judgment rendered upon the verdict.

Moore & Rollins and Geo. L. Christian, for plaintiff. Julius C. Martin and Chas. A. Webb, for defendants.

CONNOR, J. This action is prosecuted by the plaintiff for the purpose, first, of recovering a judgment against J. E. Dickerson & Co., including the defendant Robertson; second, against the J. E. Dickerson Company; and, third, for the purpose of subjecting the assets of the J. E. Dickerson Company in the hands of the receiver to the payment of such judgment. There is no controversy in regard to the liability of Hollingsworth, the maker of the note, or of J. E. Dickerson and the Asheville Bank as indorsers. His honor having instructed the jury to answer the third issue "No," upon this appeal the question as to the liability of Robertson is eliminated. The personal representatives of Cottrell and Watkins not being parties, no question is presented in respect to the liability of the deceased partners.

We take it to be elementary that the death of Cottrell worked, by operation of law, a dissolution of the firm of J. E. Dickerson & Co. George on Partnership, 257; Bates on Partnership, § 610.

It is equally well settled that, where the dissolution is brought about by operation of law, by the death of one of the partners, it is not necessary to give notice, to prevent liability attaching to the estate of the deceased partner, or to either of the surviving partners, for any future contracts made in the name of the firm. In *Marlett v. Jackman*, 8 Allen, 287, Bigelow, C. J., says: "Two text-writers, however, of great learning and authority, have laid down the rule that, when a copartnership is dissolved by the death of one of the copartners, no notice of the dissolution is necessary, and the surviving partners are not bound by any new contract entered into by one of the firm in the partnership name after dissolution, although it is made with a person who had previously dealt with the firm, and had no notice or knowledge that it was terminated by the death of one of the members." Citing Kent's

Commentaries, Story on Partnership, and Colyer on Partnership. The learned chief justice further says: "Starting, then, with the admitted proposition that death works a dissolution of a firm, and that thereby the estate of the deceased partner and his personal representatives, as well as his share of the assets of the firm, are absolutely relieved and absolved from any new contracts or subsequent transactions of the surviving partners which are not necessary to the settlement of the joint business, the inquiry at once arises as to the effect of such a dissolution, caused by the act of God, on the relative rights and duties of the surviving copartner. One of the essential elements of the contract of copartnership consists in the right which each member has to the continuance of all his associates as members of the firm. * * * When, therefore, by the death of a member of the firm, his personal liability ceases, and his estate is by operation of law absolved from all future contracts and transactions entered into in the name of the firm, it would seem to follow as a necessary consequence that the power of the surviving copartners to bind each other by new contracts and engagements must at once cease. The copartnership would then be terminated not only as to the deceased partner and his estate, but also as to the other members of the firm. The *delectus personarum* would not longer exist."

It seems to be equally well settled that a surviving partner has no power after dissolution to renew or indorse a note in the name of the firm. "The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created. The implied power of the ex partner does not extend to giving a note or to drawing a bill in the firm's name. Nor could he bind the firm by a check in its name. Renewals of outstanding bills or notes of the firm stand on the same footing, and, as the ex partner could not draw a bill or note for a firm debt, neither could he renew a bill or note of the firm given for their debt." Daniel, Neg. Inst. § 870. "Where a note is issued by a partner after dissolution, it will not bind the other partners, even though given for a debt due by the firm." Id. 871. "Where the dissolution is by the death of one of the partners, the surviving partner may indorse a note payable to the firm in his own name." *Bristol v. Sprague*, 8 Wend. 423; *Whitman v. Leonard*, 3 Pick. 177; *Charles v. Remick*, 156 Ill. 327, 49 N. E. 970; *Woodson v. Wood*, 84 Va. 478, 5 S. E. 277; *Lusk v. Smith*, 8 Barb. 570; *Myatts v. Bell*, 41 Ala. 222. In *Abell v. Sutton*, 3 East, 110, Lord Kenyon said in regard to the liability of a partner for an indorsement made after the dissolution of the firm: "To contend that this liability to be bound by the acts of his partner extends to times subsequent to the dissolution is to my

mind a most monstrous proposition. A man in that case could never know when he is to be at peace, and retired from all the concerns of a partnership." 22 Am. & Eng. Enc. 214. "A note given by one partner after dissolution of the partnership does not bind the other partner, although given in the partnership name, and in consideration or settlement of a subsisting partnership liability." *Haddock v. Crocheron*, 32 Tex. 277, 5 Am. Rep. 244; *White v. Tudor*, 24 Tex. 639, 78 Am. Dec. 128; *Fellows v. Wyman*, 33 N. H. 351.

It is claimed, however, that the note in suit was given in renewal of notes executed by the same persons. The contention in regard to this phase of the case is: The defendant Hollingsworth executed a note payable to J. E. Dickerson & Co. for \$4,900 in August, 1893, which was indorsed to and discounted by the Bank of Asheville, and indorsed to and rediscounted by the plaintiff bank. This note at maturity was returned to the Asheville bank, indorsed for collection, and charged to said bank by the plaintiff bank. Upon its receipt by the Asheville bank, it was credited to the plaintiff bank. The Asheville bank then procured a renewal note from the same parties, which was sent to the plaintiff bank for rediscount. It was in evidence that the plaintiff bank was under no obligation to rediscount the note thus taken in renewal. It would seem that each rediscount by the plaintiff bank was a separate and distinct transaction. It was in evidence that each note, as it was sent to the Asheville bank, and a new one taken, was marked "Paid," and surrendered to the makers. Whether these transactions, resulting in the execution of the note in suit, operated as a payment of the original note, it is not necessary to decide. What constitutes a payment, otherwise than by money, is usually a mixed question of law and fact, dependent frequently upon the intention of the parties. It is undoubtedly true that the renewal of the note secured by mortgage or collateral will not operate to discharge the security. It is equally well settled that the giving of a note or draft for an existing indebtedness does not operate, unless so agreed by the parties, to extinguish the original indebtedness, and upon the dishonor of the note or draft the creditor may sue upon the original consideration. "A note given by all the parties to pay for the goods delivered would not extinguish the original undertaking, like a bond or judgment taken for it. The plaintiffs might still maintain their action for goods sold and delivered, provided they produced and delivered up the note on trial, or proved it was destroyed." *Wilson v. Jennings*, 15 N. C. 90, cited in *Mauney v. Coit*, 86 N. C. 471. "The general doctrine is that the mere giving of a note for a debt is not a discharge or payment of the debt, and the note may be surrendered, and a recovery had on the debt. But if there are

any facts tending to show that the note, even when given by one of several joint debtors, was received in payment of the debt, then it becomes a question for the jury to determine whether it was so received, and, if they find that it was, then no action can be maintained on the debt." *Lee's Administrators v. Fontaine*, 10 Ala. 755, 44 Am. Dec. 505. In *Spear v. Atkinson*, 23 N. C. 262, the plaintiffs sold a bill of goods to the defendants, for which they gave their promissory note. Afterwards one of the defendants drew a bill of exchange in favor of the plaintiffs, and took up the promissory note. The bill was presented for payment and dishonored. There was no proof that the bill had been returned to the drawer, or that the plaintiffs ever offered to surrender it at the trial. In an action in assumpsit on the original bill of goods, the plaintiffs were nonsuited, and the judgment affirmed; *Daniel, J.*, saying: "If the plaintiffs, therefore, had surrendered the bill, even on the trial, they might have recovered upon the original consideration. For the taking of the note first, and then the bill, did not merge the original consideration, as a bond would have done." The right of the creditor in such case is to sue upon the original consideration or contract. If, by any act of his, either of the original debtors is released, as by extending the time of payment upon valuable consideration or otherwise, such defense must be set up by such debtor. This action being upon the note executed July 15, 1897, more than two years after the death of Cottrell, and the dissolution of the partnership, and also after the purchase by Dickerson of the interest of the surviving partners in the assets of the old firm of J. E. Dickerson & Co., the action cannot be maintained as upon a bond indorsed by the firm of J. E. Dickerson & Co. J. E. Dickerson is, of course, individually liable, and the fact that he indorsed the note as J. E. Dickerson & Co. in no manner affects his individual liability. It would be a singular result, and work a great hardship upon partners, if they could be bound upon indorsements made by their late partners under the circumstances existing in this case.

The plaintiff, however, says that it is entitled to judgment against the corporation, the J. E. Dickerson Company, and his honor was of that opinion. This contention is based upon the theory that it permitted its business to be conducted in the name of J. E. Dickerson & Co.; that the business sign was never changed, the same stationery was used, goods were bought and sold in the name of J. E. Dickerson & Co., the correspondence was carried on in that name, and the account at the bank was kept in that name. There can be no question as to the validity of the articles of incorporation. Whatever may have been the motive of Dickerson in forming the corporation, it became a *de jure* as well as a *de facto* corporation, and could only be bound

upon contract made in its corporate name, and for corporate purposes, or for debts for which it had received the consideration. This note was never payable to the corporation, was not executed in consideration of any debt due the corporation, was never indorsed by any officer of the corporation in his official capacity, and it is difficult to perceive how it could have become liable upon the cause of action set forth in the complaint; that is, the promissory note of Hollingsworth. The cashier of the bank, its teller, and one of its directors knew of the existence of the corporation, and knew that it had purchased the assets and stock of J. E. Dickerson & Co., and that J. E. Dickerson & Co. had ceased to exist in respect to the hardware business. It is not necessary for us to decide to what extent the knowledge of these persons is to be imputed to the bank, as fixing it with notice of the status of the parties. Certainly, if his honor was correct in telling the jury that upon the evidence the firm of J. E. Dickerson & Co. was liable upon the indorsement, this would exclude the idea that the J. E. Dickerson Company was liable upon the same indorsement. It must be kept in mind that this action is upon the indorsement upon the note, and not upon any open account or other form of indebtedness by the corporation to the Asheville Bank. In order to maintain its action against the J. E. Dickerson Company, the plaintiff must connect the corporation with, and make it a party to, the note of Hollingsworth, because it was only in this way that it acquired any right of action. We therefore conclude that upon the issue as submitted to the jury, and upon the evidence introduced by the plaintiff, his honor was in error in charging the jury to answer the second issue in the affirmative.

The plaintiff says that, however this may be, J. E. Dickerson was, in any point of view, personally liable upon the indorsement, and that he formed the corporation for the purpose of defrauding his creditors; that pursuant thereto, and in execution of such fraudulent purpose, he transferred his property to the corporation; that the transfer of the stock followed by the absolute sale thereof to the defendant Robinson was a fraud upon his creditors. For the purpose of examining this phase of the case, the intent with which Dickerson formed the corporation of J. E. Dickerson Company is material only as a circumstance or fact to be considered by the jury in connection with other facts. He had a legal right to do so. In the transfer of the assets of J. E. Dickerson & Co. to said corporation, and taking in payment therefor the stock of said corporation, he committed no fraud upon his creditors, unless done with a fraudulent intent. The shares of stock represented the property which he put into the corporation, and were liable for his debts, as the property would have been. The deposit of this stock as collateral security for the

debt due Cottrell, Watkins & Co. was based upon a valuable consideration, and was a valid transaction, as against his other creditors, in the absence of any fraudulent intent. The subsequent sale of the stock, in consideration of the release of the indebtedness to Cottrell, Watkins & Co., was, in the absence of fraud, valid against all persons except the creditors of the J. E. Dickerson Company. The payment of these creditors was assumed by Robertson, and it is in evidence that all of the creditors of the corporation, proving their claims pursuant to the orders in the suit in equity, have been paid.

The plaintiff, however, says that the corporation took the property subject to the debts of J. E. Dickerson or J. E. Dickerson & Co., or, in the language of the brief, "when a corporation takes the assets of an individual or partnership concern, and issues in payment therefor its stock, as was done in this case, the assets thus passing to the corporation remain liable for all of the debts of the concern." Upon this principle the plaintiff contends that the J. E. Dickerson Company is liable for the note in controversy. It seems well settled "that a corporation buying all the property of another corporation, and paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation, or have the property sold to pay such obligations." Cook on Corp. § 673. This doctrine is based upon the principle that corporate property is held in trust first for the benefit of the creditors of the corporation, and then for the stockholders, and that such trust attaches to it in the hands of the new corporation. In *Hibernia Ins. Co. v. St. L. & N. O. Transportation Co.* (C. C.) 13 Fed. 516, McCrary, C. J., says: "A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all of his property for a fair consideration if the transaction is bona fide, and the buyer will not be required to take care that the seller provides for and pays all of his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but be deprived of corporate existence, and place itself beyond the reach of processes at law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all of the corporate property, without paying all of the corporate debts." Taylor on Corp. 655. It is also said that, "where a corporation formed by and consisting of the members of a copartnership takes a conveyance or assignment of all of the assets of the partnership for the purpose of continuing the business, it is to be presumed that it has assumed the partnership debts, and it is prima facie liable therefor." Clark & Marshall on Corp. 346. The same writer says:

"But a corporation that has taken over the property of a partnership is not liable for the debts of the latter until it is shown that the sale was fraudulent as to the creditors of the latter, or that there was an express contract to assume such liability, or that the transaction was a mere continuation of the partnership."

All of the cases to which our attention has been called have arisen in an effort of the creditors of the first corporation or of the partnership to follow the property impressed with the trust into the new corporation. In *Andres v. Morgan*, Trustee, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712, the facts were that certain persons were conducting business as a partnership known as the Franklin Mill Company. The partnership being indebted, a corporation was chartered and organized; the property being transferred to the corporation; each partner taking stock representing his interest in the partnership property. The corporation, becoming insolvent, executed a deed of trust. The creditors of the partnership sought to prove their claims against the assets of the corporation. Marshall, J., says: "On this state of the case, it is very clear that the corporation was liable for this debt, whether it had expressly assumed the indebtedness of the partnership or not. It is not to be regarded as an ordinary sale of property by one to another. A partnership is a quasi legal entity. It owns property and has liabilities as such. Its creditors have a right to the payment of their claims from the partnership assets in preference to individual creditors, and have in equity a lien on the assets of the firm, that may be worked out through the partners. So that, when the partners transferred all of the property of the firm to the company, the partnership was dissolved, and the rights of its creditors followed the partners and the property into the corporation, and it was bound to discharge the debts of the partnership, having received the property of the partnership on which it had obtained credit. It could not retain the property and repudiate the liability."

A careful examination of the authorities fails to disclose any case in which the principle upon which a new corporation becomes liable by reason of taking the assets of the old corporation or a partnership is applied to the transfer of property by an individual in payment of his subscription to the capital stock of a corporation, in the absence of any finding that such transfer was made with intent to defraud his creditors. In *Austin v. Tecumseh Bank* (Neb.) 68 N. W. 628, 35 L. R. A. 444, 59 Am. St. Rep. 543, the facts were: Russell & Holmes were engaged in business as bankers. The plaintiff deposited with them the sum of \$300, and received a certificate therefor. The firm went into liquidation, closed its business, and organized a corporation having the name of the Bank

of Russell & Holmes, and engaged in the business of banking as the successor of said bankers, Russell & Holmes. Thereafter the Bank of Russell & Holmes went into liquidation and closed its business, when the defendant bank was duly organized and created by virtue of the national banking act. The plaintiff sued the defendant bank on his certificate of deposit, alleging that the defendant was organized, created, and came into possession of the property, assets, etc., of the Bank of Russell & Holmes, and of the late firm of Russell & Holmes, and that thereby the defendant bank became liable to the plaintiff for the deposit so received. The plaintiff alleged that the business of the defendant bank was carried on in the same building previously occupied by the Bank of Russell & Holmes, and that all the owners and officers of said bank became stockholders of the corporation bank, and, as such, managed and controlled its business, whereby the defendant assumed this indebtedness and became liable therefor. The plaintiff further alleged that the Bank of Russell & Holmes was wholly insolvent. The defendant denied the material allegations of the complaint. The circuit court gave to the jury a peremptory charge to find for the defendant. Upon appeal, Post, C. J., said: "The judgment of the district court appears to rest upon the conclusion that the plaintiff has failed to state a cause of action against this defendant, and our investigation of the subject has led to the same result. It will be observed from a careful reading of the petition that it is not charged that the Bank of Russell & Holmes became a national bank; that said corporation was reorganized under the national banking act or otherwise; that its liabilities, or any part thereof, were in fact assumed by the defendant herein, or that the latter did not in good faith, in the usual course of business, purchase and pay for the rights and property therein described." After discussing the question involved, the chief justice concludes: "There are to be found in the Reports and text-books expressions apparently sustaining the proposition that a corporation which upon its organization succeeds to the business and property of another corporation or firm is from that fact alone chargeable with the indebtedness of the latter. It is, for instance, said by Mr. Beach in his excellent work on the Law of Private Corporations, § 360, that 'where an old established corporation sells out to a newly organized one, and turns over all its property, the new company becomes liable upon the debts and contracts of the old.' The strict accuracy of that statement, may, we think, be doubted, in view of the omission therefrom of any reference to the purpose or character of the transaction contemplated, or the consideration therefor." He then proceeds to classify the cases in which such liability attaches: "(1) Cases in which the liability of the new

corporation results, not from the operation of law, but from its contract relation with the old; (2) cases in which the transfer of the property and franchise amounts to a fraud upon the creditors of the old corporation; (3) cases where the circumstances attending the creation of the new corporation, and its succession to the business, franchise, and property of the old, are such as to raise the presumption or warrant the finding that it is a mere continuation of the former—that it is, in short, the same corporate body under a different name. And the facts upon which such finding or presumption depends will not be presumed, but should affirmatively appear from the pleadings and proofs." It will be observed that there is no suggestion that these principles would apply to the cases in which an individual transferred his property in payment of his stock. We can see no difference between the transaction set forth in this record and the one in which Dickerson had sold his property and taken a note therefor. This certainly would be no fraud upon creditors, unless made with a fraudulent intent. If, in the latter case, he had transferred the note to a bona fide purchaser for value and without notice, the purchaser would acquire a good title as against his creditors. The case of *Friedenwald v. Tobacco Works*, 117 N. C. 544, 23 S. E. 490, comes within the first and third classes. The firm of J. E. Dickerson & Co. was not liable upon this note. J. E. Dickerson, trading under the name of J. E. Dickerson & Co., was personally liable thereon.

For the purpose of passing upon the defendant's exception to his honor's charge upon the fourth issue, we must assume that he accepted the defendant's testimony as true. From that point of view, the condition of the property at the time of the organization of the corporation was as follows: The firm of J. E. Dickerson & Co. having been dissolved, its entire assets had become the property of J. E. Dickerson by purchase from the surviving partner and personal representatives of the deceased partners. This condition continued from the date of the purchase, December 12, 1895, until August 1, 1897. At that date there were no liens upon the property, and Dickerson had a right to sell it or transfer it to either of his creditors in payment of their debts, provided it was done in good faith. Upon the formation of the corporation an inventory of the goods was taken, and the corporation purchased them, issuing to Dickerson stock in payment therefor; Dickerson agreeing to pay the debts of J. E. Dickerson & Co. There was no concealment of the transaction from the First National Bank of Asheville; the cashier being one of the incorporators, and knowing all of the facts connected with it. We see no evidence, from the defendant's testimony, at least, tending to show any fraud upon his creditors, except that Dickerson says that his purpose in organ-

izing the corporation was to avoid certain liability on account of a suit in the federal court, upon which it seems no judgment has ever been obtained. The shares of stock which were issued to Dickerson were subject to his debts to the same extent as the property assigned to the corporation. There being no liens upon his stock, he had a right to sell it or assign it to either of his creditors. He swears that this was done in good faith, without intent to defraud any one. Mr. Robertson says that at the time he took the assignment he knew nothing of Dickerson's indebtedness. When the final transaction occurred, in which Dickerson parted with the title to the stock and all his interest in the goods and other assets of the J. E. Dickerson Company, there was a surrender of the indebtedness to Robertson and the personal representatives of the deceased partners. This certainly constituted Robertson a purchaser for value, and there is no evidence that he had any notice of Dickerson's indebtedness to the bank. We are unable to see why this did not vest in Robertson a perfect title to the stock and to such interest as Dickerson had in the property, being that which remained after the payment of the debts of the corporation. Robertson having assumed the payment of these debts, and they having been paid, no question arises in respect to any indebtedness of the corporation. The action of Dickerson in respect to the formation of the corporation was not, as a matter of law, a fraud upon his creditors. So far as we can see from his testimony, he regarded the Asheville Bank as absolutely solvent. The note upon which he was indorser was made for the accommodation of the bank. It seems from the testimony that he became indebted to the bank in some large amount, but at what time such indebtedness accrued, or exactly how it came about, is not very clear from the testimony. In fact, there seems to be much controversy as to the origin and extent of his indebtedness. Dickerson's testimony tends to show a course of dealing with and on part of the bank which was well calculated to, and did, result in fraud upon the plaintiff. If his purpose in the formation of the corporation, transfer of his property, and his subsequent dealings in respect thereto with the defendant Robertson, were with a fraudulent intent, and this was known to Robertson, or he was put upon notice, the assignment of stock to him could be set aside by Dickerson's creditors. These, however, were questions of fact, which should have been submitted to the jury under proper instructions from the court. The corporation did not assume the indebtedness of J. E. Dickerson, and is not liable as a corporation therefor unless such liability attaches by operation of law. If there was any fraudulent purpose on the part of Dickerson in transferring the property to the corporation, his creditors had their remedy to

follow and subject it to the payment of their debts, unless other and superior rights had attached. Such purpose is expressly denied by *Dickerson*. It therefore became an issue of fact to be determined by the jury. Many facts and circumstances are called to our attention as constituting fraud which are competent as evidence, but do not of themselves, considered either singly or taken together, constitute fraud per se. "An insolvent owner of property has the same right as one who is solvent to dispose of it by a sale or conveyance to secure a present indebtedness, in the absence of an operating bankrupt act, when done bona fide, and not with the covinous purpose of hindering or defrauding creditors, and the presence of such purpose alike vitiates and avoids the conveyance made by either. When the vitiating intent appears in the instrument itself, the court ascertains and adjudges the fact, and no jury finding is necessary. But when the fraud is to be inferred from surrounding circumstances, and is not an element in the transaction, it must be found by a jury, and upon a proper issue framed to raise the inquiry." *Beasley v. Bray*, 98 N. C. 266, 8 S. E. 497.

The cause should be remanded, and a new trial had upon the issue of fraud raised by the pleadings, and the claim of the defendant *Robertson* that in any event he is a purchaser for value and without notice. The burden of proof upon the first issue will be upon the plaintiff, and as to the second upon the defendant. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635. Let this be certified. New trial.

Plaintiff's Appeal.

His honor instructed the jury to answer the third issue—"Is the defendant *W. S. Robertson* personally indebted to the plaintiff, and, if so, in what amount?"—in the negative. The plaintiff excepted and appealed. For the reasons given in the opinion in the defendants' appeal, we are of the opinion that his honor correctly instructed the jury. There is no aspect of the testimony in which the defendant *W. S. Robertson* could be personally liable to the plaintiff. The judgment in that respect must be affirmed. Affirmed.

(120 Ga. 287)

OLIVEROS v. STATE.

(Supreme Court of Georgia. May 14, 1904.)

MISTRIAL—EXPRESSION OF OPINION BY COURT.

1. Where, in the trial of one accused of embezzlement, a certain receipt, signed by the accused, acknowledging the reception of the money, was offered in evidence by the state, and objected to by the accused, and the trial judge, in giving his reasons for admitting it, expressed his opinion as to the effect and weight of such a receipt as evidence, this did not authorize the judge of his own motion, over the protest of the accused, to declare a mistrial and discharge the jury.

2. It was therefore error, when a mistrial had been so granted, and the accused arraigned before a second jury, to overrule a plea of former jeopardy.

(Syllabus by the Court.)

3. The Constitution of this state enlarges the general rule, and expressly provides for a second arraignment after the grant of a mistrial.

4. Considering the gravity of the issue, mistrials should not be lightly granted, as for errors of the court in admitting or excluding evidence.

5. But, under the exception stated in the Constitution, a mistrial is not limited to cases of physical necessity, as for the sickness of a juror, but may be ordered where it is necessary to cure the effect of occurrences or misconduct tending to destroy the fairness of the trial.

Per *Lamar and Candler, JJ.*, specially concurring.

Error from Superior Court, Chatham County; *Geo. T. Cann, Judge.*

J. B. Oliveros was convicted of embezzlement, and brings error. Reversed.

See 45 S. E. 596.

Twiggs & Oliver, for plaintiff in error. *W. W. Osborne, Sol. Gen.*, for the State.

SIMMONS, C. J. The record discloses that *Oliveros* was put upon trial under an indictment charging him with embezzlement. He pleaded not guilty. The jury had been impaneled and sworn to try this issue between the state and the accused. *Oliveros* appears to have been the cashier of a railroad company. In order to prove that he had received the money charged to have been embezzled, a receipt signed by him was tendered in evidence. This receipt acknowledged the reception by him of a certain package of money from an express company. One of the objections urged by the accused to the admission of this receipt was that it was not the highest and best evidence. The trial judge overruled the objections, and said, in announcing his opinion as to the admissibility of the evidence: "A receipt showing the delivery of a package is about as high evidence as you can get. It is about as high evidence as one can get that a man has received anything when he acknowledges it in writing." Counsel for the accused called the attention of the judge to his remarks upon the effect and weight of the receipt, and the judge said: "What I mean to say and what I did say is this: When a man acknowledges the receipt of money, it is about as high evidence as a man can have. I didn't speak of the receipt at all. The acknowledgment of the receipt of money by a party is about as high evidence as you can produce that he received it. All receipts are open to attack. The receipt of a deed is open to attack. It is prima facie evidence of the receipt of money. It is not conclusive." The trial then proceeded for the rest of the day. At night a recess was taken. The following morning the judge, over the protest of the accused, discharged the jury and declared a mistrial because of the remarks set out above.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 330.

deeming them so erroneous as to vitiate any verdict that might be found against the accused. At the following term of the court the accused was again arraigned and put upon trial before another jury upon the same indictment. He pleaded former jeopardy. The plea was overruled, and he excepted.

Was the trial judge right, under the above-stated facts, in discharging the jury and declaring a mistrial over the protest of the accused? We think not. To justify the grant of a mistrial without the consent of the accused, there must be either a moral or a physical necessity. See *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281. The facts in the present case do not show either a moral or a physical necessity. This being true, the sole question, then, for decision is whether the trial judge may declare a mistrial for an error of law committed by him during the progress of the case in admitting or excluding evidence or some other erroneous ruling. While many exceptions have been made by the courts to the rule that in no case could a mistrial be declared after the jury had been sworn and impaneled and put upon the prisoner, we have sought diligently to ascertain if any court had ever held, as a new exception, that a judge might declare a mistrial because of an error committed by himself; and have been unable to find such a case. The only one cited in the briefs of counsel, and the only one we have been able to find, which deals with such a point, is *Hilands v. Com.*, 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235. That case holds, in substance, that the judge has no authority or power to grant a mistrial for an error committed by himself. The Constitution of this state declares that "no person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." When, therefore, a person accused of crime has been put upon his trial, and a jury, selected by him and the state, charged with the case, there must be a verdict either for him or against him, unless there is an absolute moral or physical necessity for a mistrial, or he consents to the same. Consequently, if a judge capriciously or erroneously declares a mistrial, and the accused is again put upon trial, he will be placed in jeopardy a second time for the same offense. It may be argued, however, that this same section of the Constitution provides that this rule as to jeopardy shall not obtain in case of mistrial. That is doubtless true if the mistrial arises from absolute moral or physical necessity. This was the rule of a large majority of the courts before these words were put in our organic law, and, of course, they were placed there with knowledge on the part of the makers of the Constitution of what the courts had held to be a legal mistrial. They were also placed there, we presume, to settle what was a disputed question among some of the courts as to whether a person could again be placed

upon trial for the same offense, and under the same indictment, after a mistrial for any cause. The Constitution and laws of this state safeguard the lives and liberties of the people, and the courts have established procedure with this view and purpose. They have established, as before remarked, exceptions to the old iron-clad rule that there must be a verdict, as pointed out by the writer in *Stocks v. State*, 91 Ga. 831, 18 S. E. 847; but they have not made, and we apprehend will never make, the exception that a mistrial may be declared in a criminal case on the judge's own motion, when he thinks that he has committed error. It would not do to hold that, whenever a judge comes to the conclusion that he has committed error in the trial of a criminal case he can declare a mistrial, and put the accused upon trial before another jury. No one could tell where such a ruling would lead. If the judge could do this in one trial, he could do it in the second or third, or even fourth. The law does not intend that one accused of crime shall be harassed in this way.

But it is argued that the judge expressed an opinion in the present case in the presence of the jury, and that under our Civil Code of 1895, § 4334, it became an imperious necessity for him to grant a mistrial. That section reads as follows: "It is error for any or either of the judges of the superior courts of this state, in any case, whether civil or criminal, or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and should any judge of said court violate the provisions of this section, such violation shall be held by the Supreme Court to be error, and the decision in such case reversed, and a new trial granted in the court below, with such directions as the said Supreme Court may lawfully give." It is claimed that when the judge said in the present case, in the presence of the jury, that a receipt signed by a person acknowledging the reception of money was the highest evidence, he expressed an opinion as to what had been proved, and, as this section declares that the Supreme Court shall in every such case grant a new trial, and such an error is incurable, the judge was justified in granting a mistrial. In the first place, the Code does not, in this section, deal with mistrials. It provides that when a judge violates its provisions the Supreme Court shall grant a new trial. That is the remedy and the relief provided in this section. We apprehend that the Legislature which passed this act had too much regard for the rights of accused persons to put it in the power of a trial judge on his own motion to grant a mistrial for its violation and again place the accused in jeopardy. But it is said also that it would have been a farce for the judge to have continued the trial after this expression of opinion, and consumed the time of

the court and country in going on with a trial, when he knew that he would have to grant a new trial in case of conviction. That is a commercial argument, which amounts to nothing in the administration of law, especially when the life or liberty of a citizen is in danger. A further reply is that the accused, under the law and the Constitution, was entitled to a verdict at the hands of that particular jury. It was not certain, even with this expression of opinion, if it be one, that the accused would have been convicted. If convicted, his remedy was an application for a new trial, and, if his exceptions to the judge's remarks were well taken, this court, under the Code, would have been compelled to grant the new trial.

The case has been dealt with thus far upon the assumption that the judge had really violated the provisions of the Code section above cited; but, comparing the remarks of the judge and the words of this section, I, speaking for myself, cannot see how it was a violation of this section, especially when I consider the circumstances under which the remarks were made. A receipt signed by the accused was offered in evidence. Objection was raised by the accused, one of the grounds being that the receipt was not the highest evidence. After counsel had stated these objections, the judge, in announcing his decision as to the admissibility of the evidence, used the words set out in the first portion of this opinion. In my opinion, there was not a word or a sentence used by the judge which constituted an expression or intimation to the jury as to what had been proved in the case. Technically, there is a difference between evidence and proof. Evidence tends to establish or disprove an alleged matter of fact in issue. Proof is the effect of evidence, while evidence is merely the means of making proof. A fact is not proved unless it is established. The remarks of the judge did not express or intimate an opinion that any fact had or had not been proved or established. Indeed, the remarks were made about an instrument which had been offered in evidence, but which had not, prior to the judge's remarks, been admitted. If subject to any criticism, it was that the judge expressed an opinion as to the weight of the evidence, and not as to what had been proved. Expression of opinion as to the weight of evidence may or may not be error, according to the circumstances under which the opinion is expressed; but even where error, it need not be a violation of the Civil Code of 1895, § 4334. Again, speaking for myself, I think this court has given this section too broad and liberal a construction. It was doubtless enacted to correct a custom of the judges which had descended to them from the common-law courts of England and this country, but which the Legislature thought was a usurpation of the functions of the jury. Whether this be true or not, we all think that when an objection is made to evidence

offered the judge has a right, if he deems proper, to give the reasons for his decision on the objections; and such reasons so given, if pertinent to the objections made, do not constitute such an expression of opinion as to violate the Code section above cited. This construction of the act of 1850 (now Civ. Code 1895, § 4334) was adopted soon after the passage of the act in the cases of *Wyley v. Stanford*, 22 Ga. 397, and *Reinhart v. Miller*, 22 Ga. 403 (10), 68 Am. Dec. 506. See, also, *Scarborough v. State*, 46 Ga. 33; *Clafin v. Continental Jersey Works*, 85 Ga. 28, 11 S. E. 721. In *Croom v. State*, 90 Ga. 430, 17 S. E. 1003, this court held, through Bleckley, C. J., that "generally what the court says in stating to counsel the reason for denying a motion to exclude or rule out evidence is, if pertinent to the question raised by counsel, not error, although the reason given involve a statement as to certain testimony which is already in, or as to their being nothing in evidence showing that the circumstances are as counsel claim." In *Scarborough v. State*, supra, *McCay, J.*, said: "It would be impossible to carry on a trial if this section of the Code, prohibiting a judge from expressing any opinion as to what is proven, is to be construed as is contended for. A judge, in deciding as to the admissibility of testimony, must always, to some extent, decide as to its weight, since often its admissibility depends on that. So he must often determine what has been proven; so as to say whether certain other things may be proven. To decide a nonsuit, he must decide if there be enough proven to justify a verdict, etc. The only practicable rule is to treat the jury as possessed of common sense, and as capable of understanding what is addressed by the judge to them and what is not. He may not express to the jury any opinion, but if, in the decision of any legal question, as it arises, he must pass upon facts, the statute does not apply. It must be reasonably construed. In this view of the law, we see no error in the remark of the judge. He only said to the counsel what was his view of the law, and this he had a right to do." From these authorities it would seem that the judge in the present case expressed no such opinion of what had been proved as would violate section 4334, and his remarks therefore could not be such misconduct on his part, as was argued by counsel for the state, as to compel him to grant a mistrial, even if misconduct on the part of the judge would authorize such a proceeding. This much has been said in reply to the argument of counsel that the judge had committed an incurable error, and was therefore justified in granting a mistrial; but we put our decision upon higher ground—that is, that after one accused of crime has been put upon trial, and the jury charged with his case, a mistrial cannot be declared by the judge, over the protest of the accused, except for absolute moral or phys-

ical necessity; and that an error of law committed by the judge will not authorize him, without the consent of the accused, to discharge the jury and order a mistrial.

Judgment reversed. All the Justices concurring.

LAMAR, J. I concur in the judgment. If the statement by the judge in the presence of the jury be treated as an error requiring a new trial under the statutory command contained in the Civil Code of 1895, § 4834, it was a ruling of which the defendant alone had the right to complain; and, as he protested against the withdrawal of the case, it should not have been ordered. I concur also in the ruling as to "necessity," if it is intended thereby to mean that the mistrial is not the necessary result, but the necessary cure; this distinction being proper in view of that provision in the Bill of Rights intended to modify the former rule of construction, which was so strict that it more often defeated than served the ends of justice. It is fundamental that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb." Const. U. S. Amend. art. 5. In ancient days this was understood to mean that a trial once begun must terminate in a verdict, or else that the defendant could not be a second time arraigned for the same offense. In the change from barbaric conditions there has been a strong tendency to get away from a construction which compelled the starving and carting of juries in order to secure a verdict. In some jurisdictions this tendency has found expression in statutory or constitutional provisions giving to the state in specified instances the right to sue out a writ of error. See *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202; *Smith v. State*, 41 N. J. Law, 598; *State v. Wyse*, 33 S. C. 582, 12 S. E. 556. Compare *People v. Webb*, 38 Cal. 467; *Jones v. State*, 15 Ark. 261; *United States v. Sanges*, 144 U. S. 810, 12 Sup. Ct. 609, 36 L. Ed. 445. Compare *State v. Jones*, 7 Ga. 424, as to fraud of the accused. Undoubtedly, however, the exemption from being twice put in jeopardy on its face is absolute; and hence, in treating a mistrial as a qualification grafted by construction upon the unqualified language of the rule, the courts felt constrained to limit such exception to those instances in which it was ordered because of some extreme, manifest, urgent, or imperious necessity. But under the Constitution of this state (Civ. Code 1895, § 5706) the right to arraign the defendant after a mistrial does not depend upon construction. The very section of the Bill of Rights which contains the guaranty against double jeopardy is coupled with the words, "save on his own motion for a new trial after a conviction, or in case of mistrial." The Constitution does not define what sort of a mistrial, and of course cannot mean one improperly

granted. According to its explicit declaration, it would seem to provide for a second arraignment where a mistrial had been ordered for any reason legally sufficient. Considering the gravity of the issue, it could never be granted capriciously, nor because of mere errors of the judge in admitting or excluding evidence, nor for erroneous rulings during the trial. For, even if such errors have been adverse to the defendant, he may still have a chance of being acquitted, and is entitled to stand upon his deliverance. But in criminal as well as in civil cases judicial investigation has for its purpose the ascertainment of truth and the administration of justice to both parties. There may be many occurrences in the presence of the jury which render this result so impossible—which so inevitably tend to vitiate the trial—that the judge, in the exercise of a sound legal discretion, would be authorized to take the case from the jury and declare a mistrial. When he does so the Bill of Rights declares that the mistrial shall not prevent a second arraignment. No matter what may be the general rule, no matter how limited and restricted the exceptions elsewhere, they afford no standard by which to measure the meaning of a new provision incorporated in our Constitution in pursuance of a policy which was intended to broaden rather than restrict the rights of the state. This view is sustained even by those cases in our Reports which hold that a mistrial can only be granted because of some moral or physical necessity. For in *Nolan v. State*, 55 Ga. 524, 21 Am. Rep. 281, where this language was first used in construing the new provision of the Constitution, it was said that "the tendency of late has been to lower the standard so as to comprehend moral as well as physical necessity, and, in the region of the moral, to be content with very moderate tests." This "moderate test," if it can be called a necessity, does not consist merely in the sickness of the jurors, or other fact rendering it physically impossible to proceed with the case; but a mistrial may properly be allowed in consequence of any fact, occurrence, or misconduct calculated to vitiate the verdict. The bystanders may cry, "Hang him! Hang him!" as in *Woolfolk's Case* (Ga.) 8 S. E. 724; and on motion therefor a mistrial might properly have been granted. The result would not have been different if a mob had invaded the court room with shouts of "Acquit him! Turn him loose!" In either case a mistrial is ordered because demanded by the ends of justice. The judge himself might feel called on to make such an order because of his own conduct, where he had inadvertently done an act which would vitiate the verdict. So, too, the misconduct of jurors, counsel, accused, or bystanders might likewise be such as to authorize a mistrial. Not that it was physically or morally impossible to proceed with the trial such as it is or would then be.

It could go on as a physical fact, as it did in Woolfolk's Case; but the verdict of acquittal of conviction would never be recognized as that calm and deliberate judgment of 12 men to which the accused was entitled, and to which, be it noted, the state was also entitled. A mistrial is not a necessary result of misconduct, but a cure made necessary by misconduct. It is not so much a necessary effect as a necessary remedy to prevent the effect. Of course, if the occurrence is one calculated to harm the defendant alone, he may choose to waive it, and to have the trial proceed, and it would therefore usually be erroneous—as here—to order a mistrial over his objection. But if the conduct was such as to prejudice the state, or to prejudice both the accused and the state, it would be for the court to determine what action he should take under the peculiar facts. It is impossible to lay down a rule. It must be left to the sound legal discretion of the trial judge acting under his oath of office, and having due regard to the rights of the accused and of the state, and subject to review as in all other cases. The principle is probably as accurately stated as it is possible to do in Thompson's Case, 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146, where it was said: "Courts of justice are invested with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and a defendant is not thereby twice put in jeopardy, within the meaning of the fifth amendment of the Constitution of the United States." If such language was not too broad under the Constitution of the United States, which contains nothing about mistrials, it is certainly not too broad under ours, which expressly saves the right to a second arraignment after a mistrial. Civ. Code 1895, § 5705.

I am authorized to state that Justice CANDLER concurs in the foregoing.

(120 Ga. 20)

ROBERT PORTNER BREWING CO. v. COOPER.

(Supreme Court of Georgia. May 11, 1904.)

**MASTER AND SERVANT—PERSONAL INJURIES—
DEFECTIVE HARNESS—EVIDENCE—
INSTRUCTIONS.**

1. The charge of the court below was in substantial accord with the law governing this case as announced by this court in 38 S. E. 91, 112 Ga. 894. There is no merit in any of the assignments of error touching the admissibility of evidence offered by the plaintiff, and the verdict returned in his favor was fully warranted by the evidence, and not excessive.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by J. Cooper against the Robert Portner Brewing Company. Judgment for

plaintiff, and defendant brings error. Affirmed.

See 38 S. E. 91, 42 S. E. 408.

Salem Dutcher, for plaintiff in error. W. K. Miller and Boykin Wright, for defendant in error.

EVANS, J. When this case was here at the October term, 1900, this court laid down the test to be applied in determining whether or not Cooper, the plaintiff, was entitled to recover damages on account of the injuries sustained by him through the alleged negligence of his master, the Portner Brewing Company. See 112 Ga. 894, 38 S. E. 91. At the trial now under review the presiding judge fully, fairly, and clearly charged the jury in accordance with the law as announced by this court. The trial resulted in a verdict for \$5,000 in favor of the plaintiff, and the defendant company is again here, this time complaining of the admission of certain evidence, as well as of various instructions given to the jury, and also insisting that the verdict was excessive and without evidence to support it.

It appeared from the testimony of Cooper that he was employed by the brewing company in the capacity of a salesman, and that he was furnished with a horse and wagon which he used in calling upon its patrons and soliciting orders for and delivering beer and soda water manufactured by that company. He stated that the company employed a stableman, who harnessed the horse to the wagon and drove up to the platform of the brewery, where he turned over the equipment to the plaintiff, whose duty it was "to get on the wagon and go out with the beer." Counsel for the plaintiff asked him if he "had anything to do with inspecting the harness," and the plaintiff was permitted, over the objection of the company, to testify that it was not his duty to inspect the harness, nor to look "after any of the wagons or outfits that were used for delivering" the company's beer. The objection urged to this testimony was that it was not competent for the witness to state his opinion that he was under no duty to inspect the harness, inasmuch as, "under the law, it was his duty to use ordinary care and diligence to ascertain the condition of the appliances he used." This objection was not well taken. It clearly was permissible for the plaintiff to state, as matter of fact, that under the terms of his employment he was not required or expected by his master to perform the service of looking after and caring for the horse and wagon, or inspecting the harness with a view to seeing that it was kept in repair and in a safe and sound condition. The duty of so doing was, according to the plaintiff's testimony, imposed by the company upon another of its employes, its stableman, upon whose diligence and attention to duty the plaintiff was invited to rely. It follows that the testimony objected to was not inadmissible as

being the expression of a bare conclusion by the witness regarding the care and diligence he was, under the law, bound to exercise in performing the duties assigned to him by his master. What were such duties was a proper subject-matter of proof, and could be shown by any one who had knowledge of plaintiff's duties according to the terms of his employment.

One of the controlling issues in the case was whether or not the brewing company had provided the plaintiff with a harness which was reasonably safe and suitable, taking into consideration the vicious disposition of the horse he was called on to drive. The plaintiff introduced a witness who swore that a short time before the injury occurred he was employed by the company as its stableman, and during the course of his examination he said: "As far as I know about the harness, the double harness and the harness what the gray horse used was the only harness I could see in good trim; at least, wasn't none of them hardly in good trim." Counsel for the company made a motion to rule out this testimony, on the ground that it was "irrelevant, as not bearing on the condition of the particular set of harness used by the plaintiff at the time of his injury." We think it had at least some relevancy. It appears that the harness "the gray horse used" was not the set furnished the plaintiff, and, accordingly, he must have been given one not "in good trim" at a time shortly before he was injured. The evidence also discloses that no attempt to put the harness in good condition was made by the company until a few days prior to the plaintiff's injury, and up to that time the set of harness assigned to him had not been overhauled, notwithstanding the horse he drove was wild and difficult to handle. The length of time this harness was allowed to remain not "in good trim" tended to illustrate the question whether the defendant complied with its duty as master to provide the plaintiff with a harness which he could with safety use in driving the vicious animal by which he was injured, and the fact that one of its stablemen knew that only "the double harness and the harness what the gray horse used" were in good condition had an important bearing on that question.

In one of the grounds of the motion for a new trial error is assigned upon the refusal of the court "to rule out so much of the testimony" of another of the plaintiff's witnesses "as related to a general insufficiency of defendant's harness." But as the testimony referred to is not, either literally or in substance, set forth in this ground of the motion, we cannot undertake to pass upon this complaint. *Graham v. Baxley*, 117 Ga. 42, 43 S. E. 405.

The charge of the court is assailed by many assignments of error. Some of these set forth the complaint that certain instructions excepted to were incorrect, in that the court

should in the same connection have charged other propositions of law applicable to the case. This is not the proper way to bring under review a complaint that the court omitted to instruct the jury as to pertinent matters to be considered by them. *Lucas v. State*, 110 Ga. 756, 36 S. E. 87; *Roberts v. State*, 114 Ga. 450, 40 S. E. 297; *Jenkins v. National Union*, 118 Ga. 587, 45 S. E. 449. A number of the instructions complained of were precisely in accord with the law as laid down in the Civil Code, and as announced by this court when the case made its first appearance here. Only two of the charges excepted to seem to require special notice. One of these, given at the request of the plaintiff's counsel, was as follows: "In order to recover, it is true that Cooper must prove that the master knew or the alleged defects in the harness, or by the use of ordinary care could have known of them, and that he (Cooper) did not know, or by the use of ordinary care could not have known the same." The criticism made upon this instruction is that the court erroneously charged the jury that Cooper could recover "in two specified events: First, if plaintiff did not know of such defects; or, secondly, if plaintiff by the exercise of ordinary care could not have known thereof." In other words, the complaint is that the court made use of the disjunctive "or," instead of charging in the conjunctive that it was incumbent upon Cooper to show that he "did not know, 'and' by the use of ordinary care could not have known," of the alleged defects. While the charge was not altogether free from error, we do not think it was calculated to mislead the jury into the belief that, although Cooper did in fact know the harness was defective, he could nevertheless recover if the defects were not such as could have been discovered by the exercise of ordinary care. Furthermore, the defendant did not even contend that Cooper knew the harness was defective, nor was there any evidence to warrant the conclusion that he did. This being so, the defendant could not have been prejudiced by the slight inaccuracy in the charge pointed out by its counsel.

The other charge with which we feel called on to specially deal was in the following language: "If, upon reviewing the testimony, you find that the plaintiff had equal opportunities—equal means—of ascertaining the defect that the master had, then the plaintiff could not recover, and your verdict would be for the defendant." The objection made to this charge is that it "intimates, or would naturally be understood by the jury as intimating, that the testimony showed that a defect did exist in the appliances in question." When considered with reference to the connection in which this instruction was given, it is not, we think, open to the criticism made upon it. The court was charging the jury as to the right of the plaintiff to recover "if the evidence [disclosed] that the

harness was not reasonably safe and suited—that it was defective”—and “the defect was known to the master, or by the exercise of ordinary care could have been ascertained”; and the instruction excepted to amounted to no more than a caution to the jury that, even though the evidence showed that the harness was defective, as claimed by the plaintiff, he would not be entitled to recover if his means of ascertaining this fact were equal to those of his master. Besides, the court in another portion of its charge distinctly instructed the jury that the burden was on the plaintiff to prove that the harness was defective.

The plaintiff proved his case as laid, and, though the testimony was conflicting upon the controlling issues involved, a finding in his favor was fully warranted. Nor was the verdict excessive. At the time the plaintiff was injured he was but 20 years of age, and according to his testimony was earning between \$12 and \$15 per week, he being allowed, in addition to a fixed weekly wage, commissions on sales made by him. His injuries consisted of “a very serious fracture of both bones of his right leg, * * * a compound comminuted fracture, * * * the bones [being] broken in several places and the flesh lacerated.” The attending surgeon set the limb shortly after it was broken, but at the end of two or three weeks noticed that the bones had not united. “The wound was opened and the bones freshened at the ends, * * * to see if they would not unite,” the limb being then incased in plaster. This second operation did not, however, prove successful; so, after the lapse of some time, the surgeon again opened the wound, and “sawed off the ends of the bones for probably half or three-quarters of an inch; then put them together,” and placed the limb in a plaster cast, “with the result of getting a good bony union the third time.” In consequence of the bones of his right leg being shortened, the plaintiff necessarily has a permanent “limp in his walk,” the length of that limb being “practically three-quarters of an inch” shorter than his left leg. After the last operation, the plaintiff spent some months in the hospital, suffering from this injury. He testified at the trial that he continued to suffer therefrom, especially at night, when there was a kind of throbbing in his right leg, which caused him to take morphine, and that, while the bones were knitted, the strength of his injured limb was not equal to that of the other; that he could not turn on his right leg as he could on his left, and in bearing his weight on his injured limb “it feels like it is crushed inside—like it is going to give in.” In view of this evidence as to the permanent character of the injury received, and as to the suffering the plaintiff has endured and may continue to experience, we are inclined to the opinion that \$5,000 was not an excessive amount to award him as damages, taking

into consideration his earning capacity, his age, and his expectancy of life at the time of the injury.

Judgment affirmed. All the Justices concurring.

(120 Ga. 80)

CONE v. CITY COUNCIL OF AUGUSTA.

(Supreme Court of Georgia. May 13, 1904.)

TRIAL—ARGUMENT OF COUNSEL—AMENDMENT.

1. It is not error to prevent plaintiff's counsel from arguing that the defendant is liable because of an act of negligence not set out in the petition.

2. If the amendment was germane, the refusal to allow the same was harmless; it not having been offered as a basis to authorize the admission of testimony, or to make available that already introduced, but during the concluding argument, and when in fact there was no evidence to sustain the allegations in the proposed amendment.

3. There was no error in any of the rulings complained of, and the evidence was sufficient to support the verdict for the defendant.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Stephen Cone against the city council of Augusta. Judgment for defendant, and plaintiff brings error. Affirmed.

Stephen Cone sued the city council of Augusta for personal injuries. He claimed that on a dark, rainy night, while driving along McKennie street, he saw a lantern on the surface of the street, inquired of a watchman whether it was safe to proceed, and, receiving a reply that it was all right, drove near the center and along the driveway of the street; that, without fault on plaintiff's part, his horse suddenly plunged into a deep washout in the street, throwing plaintiff out of the cab and inflicting upon him serious bodily injuries; that the city knew of the defect, and was negligent in permitting the defect to remain in the street. The witnesses for the city denied the statement that a watchman called out, “All right, go ahead;” admitted that one side of the street was not in passable condition, owing to the fact that an archway was being built across the street, and that on this account the lanterns were on the ground; that one side of the street was safe and passable, and had been used during the previous day and night; that the existence of the chasm or washout on the street was unknown to the city, and was caused by the bursting of a six-inch main, the water in which was under an 80-pound pressure, and that, when the pipe burst, the hole or chasm was almost instantly created; that the plaintiff was either at the spot at the time of the bursting, or arrived immediately thereafter. There was testimony of experts as to the enormous power of a stream of such size, and under such pressure. There was no evidence contradictory of the statement that, under the circumstances proved,

a hole of the size of the washout would have been washed out in less than a minute. After all of the evidence had been introduced, and during the concluding argument of counsel for the plaintiff, he insisted that the city was negligent, in that it maintained a cracked pipe, of which defect it knew or ought to have known. The attorney for the city objected to this argument on the ground that the notice of the injury and claim for damages required to be served upon the city authorities, as well as the petition in the case, were silent as to any negligence in the maintenance of the pipe or knowledge of its defective condition. The court ruled that counsel for the plaintiff could refer to any evidence on the subject of the defect in the pipe for the purpose of showing that the city might be charged with notice as to the existence or probable existence of the hole in the street, but not for the purpose of showing negligence as to the maintenance of the pipe as a ground for recovery by itself, since that would be a cause of action not referred to in the pleadings. Thereupon the plaintiff offered to amend his petition by alleging "that the said hole or chasm in said street [was] due to the fracture of a water main, of whose defectiveness the defendant knew, or might have known by the exercise of ordinary care." This amendment was disallowed. The plaintiff filed a bill of exceptions pendente lite, and assigns error thereon. There was a verdict for the defendant, and a motion for a new trial, which was overruled, to which judgment the plaintiff also excepts.

F. W. Capers and J. S. & N. M. Reynolds, for plaintiff in error. Wm. H. Barrett, C. H. Cohen, and E. H. Callaway, for defendant in error.

LAMAR, J. 1. The negligence charged in the petition was the maintenance of a defective street. During the trial it developed that this defect had been suddenly caused by the bursting of a large water main, which almost instantly washed a hole in the street. There were no allegations in the petition charging that the city was negligent in maintaining the water pipe, and the judge therefore properly ruled that the counsel for the plaintiff could not argue that the city was liable because of its negligence in respect of the water main.

2. To meet this ruling, made during the concluding argument, plaintiff offered an amendment charging that the city knew or ought to have known of the defect in the pipe. This the court disallowed. If this amendment had been offered as the basis for the introduction of testimony, or if there had been a request to allow the case to be reopened for introducing evidence in support of the new allegations, the question would have arisen as to whether the amendment was germane. But, in the then state of the record, whether or not it introduced a new cause

of action was immaterial, and the ruling was harmless. There was no evidence to sustain the charge in the amendment that the city knew, or by the exercise of ordinary care could have known, of the defect. There was therefore nothing in the record to sustain the new averment. Had it been allowed, it could not have helped the plaintiff. Its disallowance did not harm him.

Judgment affirmed. All the Justices concurring.

(120 Ga. 123)

CHATHAM COUNTY v. GAUDRY et al.

(Supreme Court of Georgia. May 14, 1904.)

COMMITTEE TO EXAMINE COUNTY BOOKS—APPOINTMENT—COMPENSATION.

1. It does not render section 837 of the Penal Code of 1895 unconstitutional to hold that it contemplates that a committee of citizens of a county, appointed by the grand jury to inspect and examine the offices, papers, books, records, accounts, and vouchers of county officers, and to make a full and complete report of the result of such investigation to the next succeeding grand jury, shall be paid for such services from the treasury of the county, as compensation therefor would be an expense of the superior court.

2. As the intention of the Legislature was that, when necessary, the services of competent citizens should be secured for this purpose, and the appointees are not compelled to serve, and, from the nature of the services required, are not likely to do so, without compensation, the statute necessarily implies that the judge of the superior court may provide for the payment of compensation from the county treasury, as part of the contingent expenses of the court.

3. While the grand jury is authorized to make the appointment, the amount of compensation for the services rendered must be determined by the judge of the superior court, and paid, as other contingent expenses of the court, upon his certificate, from the county treasury.

4. Under the statute, a committee of citizens, appointed by the grand jury for the purpose, may make the required inspection and examination during the term of the court at which they were appointed.

5. The "exclusive and original jurisdiction" of the county commissioners of Chatham county "in examining and auditing the accounts of all officers having the care, management, keeping, collecting or disbursement of money belonging to the county or appropriated for its use and benefit, and in bringing them to a settlement," does not prevent the grand jury of that county from exercising the power conferred, and discharging the duty imposed, upon grand jurors by Pen. Code 1895, §§ 836, 837.

Simmons, C. J., dissenting.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by J. J. Gaudry and others against Chatham county. Judgment for plaintiffs, and defendant brings error. Affirmed.

Geo. T. Cann and Robt. L. Colding, for plaintiff in error. Osborne & Lawrence, for defendants in error.

FISH, P. J. From the record in this case it appears that at the June term, 1902, of the superior court of Chatham county, the grand jury appointed Gaudry and Tison

citizens of that county, to examine the offices, books, papers, accounts, etc., of the sheriff, tax collector, county treasurer, and county commissioners of the county, and to make a full and complete report of the result of such examination to the grand jury at the next succeeding term; agreeing with such citizens to pay them the sum of \$300 for such services. The June term, 1902, continued until within a few days of the time for the December term, 1902, to begin, and the appointees made the examination during its existence, and submitted their report both to the grand jury which appointed them, and to the grand jury impaneled at the succeeding term. Subsequently they made out a bill for \$300 against the county for their services, and the judge of the superior court approved the same and ordered it paid. They presented this bill to the county commissioners of Chatham county for payment, who refused to pay the same, whereupon Gaudry and Tison brought suit in the city court of Savannah against the county of Chatham for the amount of the bill. The county demurred to the plaintiffs' petition, the judge of the city court overruled the demurrer, and the county excepted.

1. The grounds of the demurrer which are insisted upon here are those which are stated or indicated in this opinion. The main ground is that the statute embraced in the Penal Code of 1895, § 837, if construed as providing for any payment by the county for the services rendered, is violative of that provision of the Constitution which specifies for what purposes a county may levy taxes. Article 7, § 6, par. 2, of the Constitution, limits the taxing powers of counties to the raising of revenues for specified purposes, one of which is "expenses of courts." Unless the claim of the plaintiffs in this suit can be considered as an expense of the superior court, the contention of the county now under consideration is sound. We will assume, for the present, that it was the intention of the Legislature that citizens appointed by the grand jury for the purposes above indicated, and discharging the duties imposed upon them, should be compensated for their services. Assuming this to be true, would such compensation be an expense of the court? It seems to us clear that any expense lawfully incurred is necessarily an expense of holding court. We apprehend also that the court is held for the discharge of every duty or public service which the Legislature has devolved upon it as a whole, or upon any of its component parts. A grand jury is a component part, and a very important one, of the superior court, and the discharge of any duty which the law imposes upon the grand jury is one of the purposes for which a term of the superior court is held, for the grand jury has no existence apart from the court. The law declares that it shall be the special duty of the grand jury, "from term to term of the superior court, to inspect and examine

the offices, papers, books, and records of the clerks of the superior courts and ordinary, and also the books, papers, records, accounts, and vouchers of the county treasurer, and cause any such clerk or county treasurer who shall have failed or neglected to do his duty as required by law, to be presented for non-performance of official duty." Pen. Code 1895, § 836. Can there be any doubt that among the purposes for which a term of the superior court is held is the discharge of these duties by the grand jury? We think not. If, then, any expense is lawfully incurred in the discharge of these duties, is it not a part of the expenses of holding the court? It seems clear to us that it is.

But the authority and duty of the grand jury in reference to county matters are not confined to the inspection and examination of the affairs of the offices mentioned in this section, and to presenting the incumbents of such offices for nonperformance of official duties. The next section provides: "The grand jury may, when they deem it necessary, appoint any one or more of the citizens of the county, to inspect and examine, during vacation, the offices, papers, books, records, accounts, and vouchers of the court of ordinary for county purposes, clerk of the superior court, county treasurer, tax-collector, tax-receiver, county school commissioners, sheriff, and all other county officers; * * * and to make a full and complete report of the finances, disbursements, and conditions of the several offices to the grand jury at the succeeding term of the superior court." Clearly, under this section, it is the duty of the grand jury, at least when they deem it necessary, to inspect and examine the affairs of all these county offices for the benefit and protection of the public; and it is equally clear that this is one of the purposes for which a term of the superior court is held. But if the grand jury, in the discharge of this duty of inspection and examination, deem it necessary that the inspection and examination should be made, in vacation, by a committee of citizens of the county, they may appoint such committee for such purpose. If it is necessary for the affairs of these county offices to be examined and reported on by such a committee which originates in one term of the court, and terminates in another, is not this one of the purposes for which the terms of the court are held? If any expense is lawfully incurred in having the inspection and examination thus made, is it not a part of the contingent expenses of holding the court? It seems to us that both these questions must be answered in the affirmative. Again, when all the provisions of the law upon the subject are considered, we think it is clear that the members of such a committee, while performing the duties for which they have been appointed, are officers of the court, and, being officers appointed only upon the happening of a contingency which renders their appoint-

ment necessary, the expense involved in their services is a contingent expense. That the members of such a committee act under the authority and are officers of the court is evident from the provisions of the law in reference to their duties, the powers with which they are clothed for the purpose of effectually discharging them, and the power of the court which the law provides shall, if necessary, be exercised in order that they may so discharge them. The section authorizing the appointment of such a committee provides that "if any of said officers be the custodian of the county funds by virtue of their office, or have in their possession funds belonging to the county, they shall exhibit them to said committee, and it shall be the duty of the committee to count the same, and to make a full and complete report of the finances, disbursements, and conditions of the several offices to the grand jury at the succeeding term of the superior court; and should any of said officers fail or refuse to exhibit to the committee the funds on hand or claimed by them to be on hand, upon notice of that fact to the judge of the superior court by the committee it shall be his duty to compel the delivery of the funds to the committee for the purpose of counting the same, by mandamus or attachment." The next section provides: "The person or persons so appointed to inspect and examine shall have power to take full control of the offices, papers, books, records, accounts, and vouchers of the several different offices, to compel the attendance of witnesses, hear evidence in regard to fraud, and the non-performance of official duty, and the improper disbursement of the county funds." Section 839 provides: "If any of such officers refuses to produce the papers, books, records, accounts, and vouchers, it shall be the duty of the judge of the superior court of the county, upon evidence being adduced, to enforce the provisions of this and the two sections that precede it, by mandamus or attachment, as the case may require." These provisions, taken in connection with the manner of the appointment of the members of the investigating committee, the purpose for which they are appointed, and the fact that they must make their report to the grand jury which succeeds the one which appoints them, show the persons appointed as such committee are officers of the court. Why should the mandatory and punitive powers of the court be exercised for the purpose of assisting them in the discharge of their duties, if they are not, while engaged in discharging them, officers of the court? That they are, for the time being, public officers, is clear, for no mere private citizens could be clothed with the authority and powers which are conferred upon them. That they are officers of the superior court is equally clear, for, in the language of counsel for the defendants in error, "they cannot be classified as any other kind of officers than court officers, because

their appointment comes from the court, they work under and with the assistance of the court, and report back to the court. Their origin and end as public officers is in the court, and, as they are not permanent officers, as the necessity for their appointment is a contingency upon which their appointment depends, they become contingent officers of the court"; and, if there is expense attending their employment, it must be part of the contingent expenses of the court.

2. Another ground of the demurrer is that "no compensation is provided by law for citizens appointed by a grand jury to examine books of county officers, and such provision must be shown to entitle the petitioners to maintain their said action." The law authorizes their appointment, and, from the nature of the services for which they are appointed, evidently contemplates the appointment of persons peculiarly fitted for the important and responsible duties which they are called upon to discharge; and, as the appointees are not compelled to serve, it seems unreasonable to suppose that the law does not contemplate that they shall be paid for their services. We apprehend that one—probably the main—object of the statute is to secure the services of experts for the examination of the books, papers, accounts, and vouchers of county officers, and that this salutary purpose would doubtless be defeated if the court were powerless to provide compensation for the services when rendered. To hold that persons appointed, but not compellable, to perform, for the public benefit, services of such a character, are not entitled to compensation for rendering the services, would, in our opinion, be equivalent to declaring the law a nullity. We think the law necessarily implies that the court may provide for the payment of reasonable compensation from the county treasury to citizens who, under its appointment, perform these services. We have reached this conclusion for the following reasons: (1) The law intends that, when necessary, the services of competent citizens shall be secured for this purpose; (2) as the appointees are not compelled to serve, and the character of the services to be performed is such that they are not likely to be performed without compensation, the law must contemplate compensation, if there is any general provision under which it can be paid; (3) compensation for such services can be paid as part of the contingent expenses of the court. Civ. Code 1895, § 4341, provides: "Any contingent expenses incurred in holding any session of the superior court, including lights, fuel, stationery, rent, publication of the grand jury presentments when ordered published, and similar items, such as taking down testimony in felony cases," etc., "shall be paid out of the county treasury, * * * upon the certificate of the judge of the superior court, and without further order." This section clearly provides for the payment of all contingent expenses incurred in holding

any session of the superior court, for it declares that any such contingent expenses shall be paid, and how it shall be paid. It enumerates certain contingent expenses which may be incurred in holding a session of the superior court, but the expression "any contingent expenses," with which the section begins, and the general clause "and similar items," following those enumerated, show that the enumeration is not intended to be exhaustive, but is only intended to indicate, in a general way, what are contingent expenses. The items enumerated are not all similar items. Lights and fuel may be similar items, but neither is similar to the publication of the grand jury presentments, nor to the taking down of testimony in felony cases. Hence, if we consider the expression "and similar items" to be restrictive, the restriction cannot exclude any item of contingent expense which is similar to any one of those mentioned in this section, for it is clear that an item similar to either of those mentioned is included in the general and indefinite clause "and similar items." Certainly there is as much similarity between expense incurred in investigating and reporting to the grand jury the condition of the various offices involving the fiscal affairs of the county, and the expense incurred in publishing the grand jury presentments, as there is between the latter and the expense for lights and fuel. An investigation instituted by one grand jury, the result of which is to be reported to another grand jury, and to become a part of the presentments of the latter, may well, as an item of contingent expenses, be deemed similar to the publication of the grand jury presentments. Both the investigation and the publication originate with the grand jury, they both concern the work of the grand jury, and the expenses for either are grand jury expenses. The decisions of this court to the effect that "before an officer can be required to pay out public money, or be justified in doing so, those who demand its payment should be able to show a clear provision of the law which entitles them to receive it," are not in conflict with the conclusion which we have reached in this case. There is a clear provision of law for the payment of the contingent expenses of any term of the superior court, and, as we have seen, the claim of the plaintiffs was a contingent expense of the superior court of Chatham county.

3. The contention of counsel for the plaintiff in error that the grand jury is authorized to appoint, but not to employ, the member or members of the committee of investigation may be granted, without affecting the question as to whether the members of such committee can be lawfully paid for their services from the county treasury, for if, as we hold, the compensation of such persons is a part of the contingent expenses of the court, it is the judge of the court who must determine what amount shall be paid for the serv-

ices rendered. He must approve the bill and order it paid, as the judge did in the present instance, before it can be paid, and any action by the grand jury in reference thereto amounts simply to a recommendation on their part as to the amount of compensation to be allowed.

4. While there is some force in the contention that the law only authorizes the appointment of an investigating committee to serve during the vacation of the court, we do not think, when the purpose which the statute had in view is considered, the fact that a committee appointed may make the investigation during a prolonged term of the court at which the committee was appointed renders the appointment of the committee invalid, or deprives its members of the right to compensation. The purpose of the statute evidently is to have the investigation and examination made by competent citizens of the county, other than the grand jurors, whenever it is impracticable for the grand jury, through a committee of its own members, to make a satisfactory inspection and examination during the term of their service as grand jurors; and as the law looks to a careful and thorough, and not a superficial and hurried, examination, the provision is made for an examination in vacation, when in most counties there will be much more time for such purpose than there could be in the limited time during which a term of the court is held. But if the wise provision of the law for an examination during vacation is wrested from its manifest purpose, and construed to prevent an examination by a committee of citizens during a prolonged term of the court, the effect would be that the very counties which stand in most need of the benefits which this statute is intended to secure would be prevented from securing them. These are the counties which, owing to their large population, great wealth, large fiscal affairs, the amount of public funds handled by their officers, the great volume of separate items involved in the digests and accounts to be gone over and carefully considered, etc., most often require a careful, painstaking, and complete examination of the conditions of the offices through which their revenues are raised and disbursed. In some such counties the terms of the superior court are held so often or are so prolonged that the interval elapsing between the adjournment of one term and the beginning of another is too short to afford time for such an examination to be satisfactorily made during a vacation of the court. The present case well illustrates this fact, for, as stated by counsel for the plaintiff in error, "the petition shows that the services in question were rendered during the June term of the court, and the bill was approved on November 25, 1902, by four members of the grand jury, including the foreman, while said court was still in session, and before the grand jury for the June term had been discharged. The report of

their labors was submitted to the grand jury for the December term, 1902," and the judge presiding at that term passed an order, dated December 1, 1902, approving the bill and ordering it paid. Here it will be seen that the term at which the committee of experts was appointed was still in session on November 25th, and the next term began on December 1st. Evidently the vacation of the court, in this instance, could hardly have been long enough in a county so populous, wealthy, and of such large fiscal affairs as Chatham, for the inspection and investigation required to be carefully and thoroughly made. We think the purpose of the words "in vacation," in the statute, is simply to allow the examination to be made in vacation, and not to prevent its being made during a term of the court by a committee of citizens appointed for the purpose by the grand jury.

5. Another contention is that the county commissioners of Chatham county "have original and exclusive jurisdiction of the auditing of the books of the officers of Chatham county * * * and the grand jury have no authority in this county to encroach upon the powers and duties of the county commissioners." In support of this contention, section 5 of the act of February 21, 1873 (Acts 1873, p. 235), creating commissioners for that county, is cited. That section of the act provides that the county commissioners "shall have power and authority to exercise exclusive and original jurisdiction" over various subject-matters specified therein, one of which is, "in examining and auditing the accounts of all officers having the care, management, keeping, collecting, or disbursement of money belonging to the county or appropriated for its use and benefit, and in bringing them to a settlement." This was simply a transfer, so far as Chatham county was concerned, to the county commissioners, of the "original and exclusive jurisdiction" in this matter of the ordinary, to whom it had been given when the old inferior court was abolished by the Constitution of 1868. Code 1868, § 346; Const. 1868, art. 11, § 7; Code 1873, § 337 (7). The ordinaries of all the counties in this state, except those in which jurisdiction over county matters has been conferred upon county commissioners by a special act, when sitting for county purposes, have the same "original and exclusive jurisdiction" as that conferred upon the county commissioners of Chatham county in the above-quoted language from the special act for that county. Civ. Code 1895, § 4238, par. 7. Yet it can hardly be seriously contended that because this is true the grand jurors cannot exercise the power in reference to the inspection and examination of county offices which is conferred upon them in the Code. The fact that the provision in reference to the ordinaries and the provision in reference to the grand juries are found in the same Code shows conclusively that the jurisdiction conferred upon the one does not inter-

fere with the powers and duties conferred upon the other. To hold that the provision in reference to the examination by the ordinary is in irreconcilable conflict with the provision in reference to the examination by the grand jury would be equivalent to holding that there was no law at all upon the subject, for, no matter whence these provisions respectively came originally, they were simultaneously enacted when the Code was adopted, and hence must stand or fall together. The conflict would have to be clear, unmistakable, and absolutely unavoidable before a court would come to so disastrous a conclusion. Fortunately such is not the case. The law, for wise purposes, has made it the duty of both the ordinary and the grand jury to examine. The ordinary, or county commissioners, as the case may be, has "original and exclusive jurisdiction," when sitting for county purposes, "in examining and auditing the accounts of all officers having the care, management, keeping, collecting, or disbursement of money belonging to the county or appropriated for its use and benefit," for the purpose of "bringing them to a settlement." In order to bring them to a settlement with the county, he may issue execution against them and their bondsmen. *Jones v. Collier*, 65 Ga. 553; *Arthur v. Commissioners of Gordon County*, 67 Ga. 220. But the grand jury has the power, and it is its duty, to inspect and examine the various county offices mentioned in Pen. Code 1895, §§ 837, 838, including that of the ordinary for county purposes, for the public information, and in order that the grand jury may ascertain whether it is their duty to present any of such officers for "non-performance of official duty." The inclusion of "the court of ordinary for county purposes" in the enumeration of the offices which the grand jury shall inspect and examine, we think, indicates that, independently of the jurisdiction of the ordinary or county commissioners, the law intends that the grand jury shall make these investigations of all these county offices for the benefit of the taxpayers and in furtherance of public justice.

The demurrer was properly overruled.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., who dissents.

SIMMONS, C. J. (dissenting). Before an officer can be required to pay out public money, or be justified in doing so, those who demand its payment should be able to show a clear provision of the law which entitles them to receive it. *Kennedy v. Seamans*, 60 Ga. 612. Such a clear provision of law cannot be shown by analogizing the services rendered the public to a law authorizing payment for other and different services. Where the law authorizes a grand jury to appoint a committee of citizens to investigate the books, etc., of the county officers, and makes no provision for the compensation of such committee, the persons so appointed are not entitled

to compensation as jurors, nor can they be legally paid under the item of "court expenses." Court expenses include only such items or charges as are necessary for conducting the court, and such others as the Legislature may determine are proper to be paid under the words "court expenses," as used in the Constitution. *Houston County v. Kersh*, 82 Ga. 252, 10 S. E. 199; *Adair v. Ellis*, 83 Ga. 464, 10 S. E. 117; *Howard v. Early County*, 104 Ga. 669, 30 S. E. 890.

(120 Ga. 115)

BOURQUIN v. BOURQUIN.

(Supreme Court of Georgia. May 14, 1904.)

TRUSTS—TRUSTEE'S DUTY TO PAY TAXES—PURCHASE AT TAX SALE—VALIDITY—REDEMPTION.

1. A fiduciary is bound to exercise the diligence of a prudent man in preventing trust property in his charge from being sold for taxes.

2. If he advances the money for this purpose, he will be entitled to a lien for reimbursement.

3. If a trustee is unable to make such advance, or otherwise to obtain funds, by which to prevent a sale under a superior lien, he may apply to the chancellor for an order to sell or mortgage, so as to save at least a part of the corpus for the beneficiaries.

4. One who is under the obligation to pay taxes cannot directly or indirectly purchase at a sale caused by his own default.

5. Where, in consequence of a trustee's breach of duty, the estate is sold for taxes, he cannot, even after the expiration of the redemption period, acquire a title from the purchaser at the tax sale, good as against his cestui que trust. In equity the reconveyance will be treated as a correction of the wrong, leaving the property impressed with the original trust.

6. The principle that one without notice can convey to one with notice is subject to an exception where the transfer is back to him who was first guilty of the wrong in selling or permitting a sale to an innocent purchaser. When the property again vests in such wrongdoer, the original equity reattaches to it in his hands.

7. Pending the action of ejectment, the property sued for was again sold at tax sale, and purchased by the defendant. Plaintiff within 12 months made a tender in compliance with the provisions of Pol. Code, § 909:

(a) If the plaintiff at the time of the second tax sale was in fact owner of the property, he had the right to redeem it.

(b) Upon the owner making the proper tender, the purchaser's interest in the land was at an end.

8. The verdict finding the land to be the property of the plaintiff was demanded by the evidence, but the defendant was not liable for rents or mesne profits during the four years the property was in the hands of the receiver.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Action by Gugie Bourquin against Polignac Bourquin. There was judgment for plaintiff, and defendant brings error. Modified.

By an ordinary warranty deed imposing no duty and conferring no powers, Ketchum and Hartridge, on September 2, 1872, conveyed vacant lot No. 15 Elliott Ward in the city of Savannah, to Gugie Bourquin, as trustee for Polignac Bourquin, a minor. Subsequently, at a date which does not appear in the record, Gugie Bourquin, out of his individual funds, erected thereon a house, and resided therein with his family, paying no rent to himself as trustee. Under a tax *fi. fa.* the lot was sold for city taxes in July, 1891, Polignac Bourquin being then still a minor. The property was purchased by Kaufman, who was requested so to do by the marshal, in order to protect Gugie Bourquin. According to the testimony, there had been no previous conference between Gugie Bourquin and Kaufman, but on the day after the expiration of the 12 months allowed for redemption Kaufman conveyed the lot to Gugie Bourquin individually, the consideration named being the amount of the bid and the 10 per cent. allowed by the statute. There was evidence that besides this Gugie Bourquin also paid to Kaufman the amount of certain tax *fi. fas.* against the same lot, which had been taken up and were then held by Kaufman, aggregating about \$30. It appears that at the time of this reconveyance Polignac Bourquin was, and for some months had been, of age, but that he was absent from Savannah. On February 1, 1896, Polignac Bourquin, having reached majority, brought an action against Gugie Bourquin, his former trustee, for the recovery of the land and the rents since 1872. The defendant answered, setting up the tax sale to Kaufman and Kaufman's conveyance to him. He prayed that if, for any reason, his title was defective, he be allowed compensation for the improvements put by him on the property. On April 4, 1898, Gugie Bourquin conveyed to his son Guillemain the property in dispute and other property, the expressed consideration being \$400. Subsequently lot No. 15 was levied on under tax *fi. fas.* against Gugie Bourquin, and at the sale thereunder on July 5, 1898, was purchased by Guillemain Bourquin. It appears that this tax *fi. fa.* represented taxes on lot 15 standing in the name of Gugie Bourquin. Within the year Polignac Bourquin's attorney tendered to Guillemain Bourquin the amount of the bid and 10 per cent. interest, and demanded a reconveyance. Guillemain declined to receive the money or to make the deed, whereupon the property, on a petition filed and served on May 12, 1899, was placed in the hands of a receiver, since which time the property has been in the receiver's possession. Guillemain was made "the party defendant" to the original action, having assented thereto in open court. It appears that there have been five previous trials, though what the verdicts in them were does not appear. 110 Ga. 440, 35 S. E. 710. The verdict on this, the sixth, trial, was in favor of the plaintiff for the land and \$185 per annum from February 1, 1892, to the date of the verdict (June 5, 1903), \$1,530, less claim for improvements, taxes, and repairs \$1,239. The defendant made a motion for a

new trial on the general grounds and on many special grounds which involve the proposition that, inasmuch as the evidence falls to show any collusion or fraud between Gule Bourquin and Kaufman in bringing about a sale, in bidding, or in redeeming, a verdict could not be sustained on that branch of the case, nor was there evidence to warrant charges in reference to fraud. As to the second sale it is contended that, while there was a tender made by Polignac's attorney to Guillemain Bourquin, for the purpose of redeeming from the second tax sale, the tender was not kept good; and that the verdict shows that the jury allowed the plaintiff mesne profits for the period during which the property was in the hands of the receiver.

Travis & Edwards, for plaintiff in error.
Geo. W. Owens, for defendant in error.

LAMAR, J. The trustee, Bourquin, failed to pay the taxes. The land was bought at tax sale by Kaufman. Immediately after the expiration of the redemption year Kaufman conveyed to Bourquin in his individual capacity. The latter and his representative now insist that, as Kaufman was an innocent purchaser, he acquired a valid title to the trust property at tax sale, and could convey as good a title to Bourquin as he could have made to any one else. A fiduciary is bound to exercise the diligence of a prudent man in protecting the property committed to his care. He is liable for negligence or bad faith in permitting its total destruction by a sheriff's sale on the same principle that he is responsible for its partial destruction by waste or mismanagement. Civ. Code 1895, §§ 3170, 3200. If the property is incumbered by a lien, he cannot sit idly by and allow the estate to be sacrificed, but is bound to the exercise of diligence to prevent an improper foreclosure, or an improper or disadvantageous sale. The trustee here could have advanced the taxes, and would have been entitled to a lien for his reimbursement. Or if, as claimed, he had no individual or trust funds which could have been applied to that purpose, and if in the exercise of proper efforts he had been unable to borrow or to make other arrangements to pay or carry the taxes (*Printup v. Trammell*, 25 Ga. 240; *Thompson v. Thompson*, 77 Ga. 699 [4], 3 S. E. 261; *Harrison v. Mock*, 16 Ala. 616; *Fischbeck v. Gross*, 112 Ill. 208 [3]; *King v. Cushman*, 41 Ill. 81 [4], 89 Am. Dec. 366; *Freeman v. Tompkins*, 1 Strobh. Eq. [S. C.] 53; *Burr v. McEwen*, 1 Baldwin, 154, 162, Fed. Cas. No. 2,193), no reason appears why he could not have applied to the chancellor for an order to sell a portion of the lot, or to mortgage the entire property, so as to save at least a part of the corpus for the beneficiary (Civ. Code 1895, §§ 4863, 3172). And if, in spite of all his efforts, it had been brought to the block, he was bound to have

made like diligent efforts to redeem within the year. Good faith was his duty, and that alone is his protection. *Rogers v. Dickey*, 117 Ga. 821, 45 S. E. 71. He could not buy at his own lawful sale. For a stronger reason he could not buy at a sale brought about by his own unlawful conduct. He cannot make a personal profit in dealing with the trust property either by act of omission or of commission. Civ. Code 1895, §§ 3010, 3183. One who is under the obligation to pay taxes cannot directly or indirectly purchase at a sale caused by his own default. Such attempted purchase will be treated as payment. Pol. Code, § 904. When, therefore, Bourquin individually took a deed to the trust property from Kaufman, he unintentionally corrected the wrong of which he had previously been guilty, and the original status was restored; and whether this deed is treated as a redemption before the expiration of the 12 months, or as an independent purchase after the redemption year, the title to the land wrongfully allowed to be sold for taxes was thereafter held by him under the trust as it existed prior to his breach of duty. "It would be a gross fraud in him to suffer the land to be sold for these very taxes he was bound to pay lie by until the day of redemption was gone, buy in at the price of redemption the title of the purchaser, and then set up that title against that which he had undertaken to guard." *Coxe v. Walcott*, 27 Pa. 159; *Dubois v. Campau*, 24 Mich. 370. Nor would the result be changed by the fact that, in addition to the bid and 10 per cent. he paid Kaufman \$30, the amount of other tax liens against the estate. In both cases he holds the redeemed property in trust for his son Polignac, but with a right to reimbursement for all sums expended in the protection of the property. If there was no collusion in the bidding or redemption, and if Kaufman was an innocent purchaser, this makes no difference. The principle that one without notice can convey to one with notice (Civ. Code 1895, § 3938) is subject to an exception where the transfer is back to him who was guilty of the actual or constructive fraud in first transferring, or in permitting the property to be transferred, to an innocent purchaser. When the title reverts in the wrongdoer, the original equity will reattach to it in his hands. It has been so held in reference to the transfer of negotiable papers, and the same exception applies in regard to real property. *Kennedy v. Daly, Sch. & Lef.* 379; *Clark v. McNeal*, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638. See *Andrews v. Robertson*, 87 N. W. 190, 54 L. R. A. 673, 87 Am. St. Rep. 870, and note. Compare Civ. Code 1895, § 3184. Were this not the rule, nothing would be easier than for a trustee to take advantage of his own wrong. It would only be necessary for him to make or permit a wrongful sale, in his individual capacity buy from the innocent purchaser, and then rely on the conveyance back as a

shield with which to protect himself when sued for the very property which in the first instance, through a breach of duty, he allowed to be sold.

Pending suit there was a second tax sale, but we find it unnecessary to pass on the question as to whether, since the adoption of Code 1895, § 778, trust property, or property belonging to Polignac Bourquin, could lawfully be sold under an execution against Gugie Bourquin as an individual, if aided by parol evidence that the execution was intended to represent taxes on that lot. *Fleming v. Kille*, 78 Ga. 5; *McLendon v. Horton*, 95 Ga. 60, 22 S. E. 45; *Burns v. Lewis*, 86 Ga. 599, 13 S. E. 123. Nor is it necessary to consider whether, in view of its recitals, it might be treated as an execution in rem; nor to determine whether the sale was void because the levy was excessive. For whether the sale was valid or not, the tender by Polignac Bourquin of the bid and 10 per cent. defeated whatever interest Guillemain Bourquin acquired by virtue of the tax sale. Where a creditor refuses to accept a proper tender, the claim is not extinguished, nor is the debtor harmed by the refusal. He still has his money. He may lend it or use it in business. If, however, he wishes to stop the running of interest, or to prevent the accrual of costs, he must keep the tender good. Civ. Code 1895, § 3728. But where the creditor has collateral, mortgage, or other form of security upon the property of the debtor, the failure to accept a lawful tender discharges the lien which was intended to secure payment. When it has accomplished its purpose, it ought not longer to be effective against him who has done all required by the law or the contract to cancel the mortgage or to regain possession of the pledge. The debtor offers the money for the twofold purpose of paying his debt and redeeming his property. The creditor may, indeed, decline to receive what is due, but he cannot couple with his declination a refusal to cancel the lien or surrender that which thereafter belongs to the debtor free from the incumbrance. The debtor may wish to use the property pledged. He may wish to sell that which is incumbered, and by the act of the creditor in refusing proper tender he is prevented from having and using his own. It is evident that to allow such results would often work manifest hardship; and hence the rule, recognized by most of the authorities, is that, upon proper tender being made, while the original debt may continue, the lienor is entitled to a satisfaction of the lien, or to be restored to possession of the property. One of the ways for enforcing this right is the provision that the refusal of a proper tender discharges the lien. The debt continues, "but the tender is equivalent to payment as to all things which are incidental or accessory to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered [money], but he does

lose all collateral benefits or securities." *Tiffany v. St. John*, 5 Lans. 153; *McCalla v. Clark*, 55 Ga. 53. The same principle is applicable to a tender made by the owner for the purpose of redeeming from a tax sale under Pol. Code, § 909. Thereafter the purchaser's inchoate, qualified, or defeasible estate terminates. *Lamar v. Sheppard*, 84 Ga. 561 (2), 10 S. E. 1084; *Burden v. Bean* (Ark.) 12 S. W. 241; *Legro v. Lord*, 10 Me. 161; *Poindexter v. Greenhow*, 114 U. S. 270 (3), 5 Sup. Ct. 903, 29 L. Ed. 185. Here, therefore, when Polignac tendered to Guillemain the amount of the latter's bid and 10 per cent. added thereto, the plaintiff was entitled to possession of the land. The defeasible title of the purchaser was at an end, and, whatever might be his rights as to the amount of the bid and penalty, he could no longer rely on the sheriff's deed as against him who offered to redeem and made the tender required by law. The two tax deeds having been nullified in the one case by the conveyance from Kaufman to the trustee, and in the other by the offer of the plaintiff to pay the redemption money within the time allowed by law, the defendant was without title, the plaintiff had made out a perfect paper title, and the verdict in his favor was demanded by the evidence.

The verdict against the defendant for mesne profits shows on its face that it included rent for the period that the land was in the hands of the receiver. Presumably he collected whatever rents accrued during that term. At any rate, there is nothing to suggest that the defendant was in possession. A new trial must therefore be granted on the ground of the motion assigning error as to the improper allowance for mesne profits. But, as there have already been six trials of this case, and there should be an end of litigation, we direct that the issue on the next trial be confined exclusively to a consideration of the question of mesne profits and the claim of set-off by the defendant.

Judgment affirmed in part, and reversed in part, with direction. All the Justices concurring.

(120 Ga. 83)

CENTRAL OF GEORGIA RY. CO. v. GOODWIN.

(Supreme Court of Georgia. May 13, 1904.)

EVIDENCE — OPINION — MASTER AND SERVANT — PERSONAL INJURIES — ABROGATION OF RULES — EVIDENCE — RELEASE — FRAUD — BURDEN OF PROOF — INSTRUCTIONS.

1. The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described, so that the jurors may be able readily to form correct conclusions therefrom.

2. On an issue whether a rule of a railway company, which it claimed an employé had expressly contracted to observe, had been rescinded or abrogated by general nonobservance on the part of its employés, with knowledge or acquiescence of the company, it was error for the court to refuse to instruct the jury, when

July requested by the company so to do, that they should not consider such nonobservance occurring prior to the date of the contract.

3. The charge of the court upon the subject of fraudulent misrepresentations was not subject to the criticism that there was no evidence to support it.

4. On an issue as to whether a party had been induced to sign a contract by fraudulent misrepresentations, the mere failure to specifically instruct the jury that the burden was on him who attacked the contract to show that it was so procured was no cause for a new trial, when the court charged generally that the burden of proof lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential.

5. The charge as to the presumption arising from the failure of a party to produce evidence in his power and within his reach was not applicable to the facts of this case.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by W. J. Goodwin against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham and H. W. Johnson, for plaintiff in error. R. R. Richards and W. W. Gordon, Jr., for defendant in error.

FISH, P. J. W. J. Goodwin sued the Central of Georgia Railway Company for damages for personal injuries sustained by him while coupling cars as a yard switchman in the employ of the defendant. There was a verdict for the plaintiff, and, defendant's motion for a new trial being overruled, it excepted.

1. A witness for the defendant testified that he was the general yardmaster of the defendant's yard, where the plaintiff was injured, during the time he worked there, and for some eight years previously; that witness had been in the yardmaster's business for some 10 years; that "lumber properly loaded in the manner I have described will often shift by the momentum, so that in the end it might project over the end of the cars; and I have seen many cars down there with the lumber projecting." He was asked by counsel for the defendant, "Could, or not, a man work down there for 30 days in the yard without seeing lumber in that way?" He answered, "No, sir; I know he couldn't." The court ruled out the question and answer, and in the motion for a new trial error was assigned upon this ruling. The point is clearly without merit, as the general rule is well established that opinion evidence is not competent when all the facts and circumstances upon which the opinion is founded are capable of being clearly detailed and described, so that the jury may be able readily to form correct conclusions therefrom. *Mayor of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239; *Southern Mutual Ins. Co. v. Hudson*, 115 Ga. 638, 42 S. E. 60. This rule was applicable to the evidence excluded.

2. At the time of entering upon his work for the defendant company, the plaintiff signed the following agreement, which was presented to him by the company: "Central of Georgia Railway Company. First Division. November 30, 1898. I fully understand that the rules of C. of Ga. Ry. Co. positively prohibit brakemen from coupling or uncoupling cars, except with a stick, and that brakemen, or others, must not go between cars, under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and, in consideration of being employed by said Company, I hereby agree to be bound by said rule, and waive all or any liability of said Company to me for any results of disobedience or infraction thereof. I have read the above carefully and fully understand it. W. J. Goodwin. Witness: John Coleman." It appears that all of this agreement was printed matter, except the sentence immediately preceding Goodwin's signature, which last sentence was in writing. On December 27, 1898, the plaintiff's left hand was badly mutilated, while he was coupling with his hand, and without the use of a coupling stick, and was between the cars for the purpose of making the coupling, and while an engine was attached to one end of the train. The defendant pleaded, as a defense to the action, that the plaintiff was guilty of contributory negligence in violating the provisions of his contract. One of the grounds upon which the plaintiff sought to avoid the obligation of the coupling-stick rule was that such rule, if it ever existed, had been abrogated by reason of its long and continued nonobservance, known and acquiesced in by the defendant company. Counsel for the defendant duly requested the court to instruct the jury as follows: "If you find from the evidence that the use of the coupling stick was customarily disregarded by the plaintiff and other employes of the company, I charge you that the plaintiff would not be excused from carrying out his contract—if you find that an agreement was made—unless you should find from the evidence in this case that the nonobservance of the rule as to the use of the coupling stick had been so general, and had continued for such a length of time, after his employment, as to justify the conclusion that there had been a mutual rescission and abrogation of the contract." The court struck out of this request the words "after his employment," and then gave the remainder in charge to the jury. In the motion for a new trial, error was assigned upon the refusal to charge as requested, and in leaving out the words above quoted. The effect of giving this request, with these words omitted therefrom, was to authorize the jury to find that the custom of disregarding the coupling-stick rule by other employes of the defendant, prior to the making of the alleged contract of the plaintiff with the defendant,

would be sufficient to relieve him of its terms. So construed, was the ruling of the court erroneous? This is the sole question presented by the assignment of error. There was evidence of the nonobservance of the coupling-stick rule prior to the employment of the plaintiff by the defendant. If the plaintiff and the defendant entered into an express contract at the time of his employment, whereby he specifically agreed, in consideration of such employment, to be bound by the rule not to couple cars except with a stick, and not to go between cars under any circumstances, for the purpose of coupling, when an engine was attached to them, then we think it is clear that the jury would not be authorized to consider what the custom with reference to the observance or non-observance of such rule was prior to the plaintiff's employment and to the making of that agreement. If the plaintiff was justified in believing that there had been a "mutual rescission and abrogation" of the contract, such belief must have been based upon mutual disregard of the rule subsequent to the date of the contract. It would not be possible to have a mutual rescission of a contract based upon a custom existing prior to the making of the agreement. Otherwise there would be the anomaly of parties having a mutual rescission in advance of the execution of their contract. So far as the plaintiff was concerned, it may have been the intention of the railroad company, at the time the contract was entered into, to specifically enforce the rule referred to in the agreement from its date, regardless of any custom which may have existed prior to that time. In the case of *Richmond & Danville Railroad Company v. Hisson*, 97 Ala. 187, 13 South. 209, it appeared that the plaintiff, when he entered the employment of the defendant as a switchman, signed one of its regular applications for service, which contained rule No. 20, providing that: "Cars must not be coupled by hand. Sticks for the purpose, long enough to prevent going between cars, will be furnished on application to yardmaster's office at end of each division. Any employé going in between cars while in motion, to uncouple them, does so at his own risk, and against the rule of the company." The plaintiff was injured in going between cars to couple them. It was held that, as plaintiff had entered into an express stipulation with defendant to abide by such rule, evidence that there was a custom for brakemen, when they found it impossible to couple with a stick, to go between the cars, after having signaled the engineer to stop the train, was not admissible to vary the terms of the rule. The court, through Haralson, J., said: "If rule 20, by long non-observance, had gone into disuse, and was a regulation of the company in name only, and no longer binding, we know of no law which, notwithstanding, prevented the parties from making it the basis of their con-

tract for plaintiff's service, and, if bona fide entered into, how proof of any custom theretofore existing to the contrary might set aside and annul the deliberate engagements of the parties. Surely this would be making their contract for them, and denying them the privilege. We must hold, therefore, that, when a contract of the kind we are construing has been entered into between the parties, no proof of custom can be made, to the contrary of its stipulations, to vary its binding force, and that it must be held binding between the parties, unless it be shown by their acts and conduct they have mutually altered and rescinded it." What was said on the subject in the *Hisson* case was quoted, approved, and followed in *Louisville & Nashville Railroad Company v. Mothershead*, 110 Ala. 143, 20 South. 67. We think we can safely conclude that the court erred in not instructing the jury in the language of the request. This ruling covers two other grounds of the motion for a new trial, where in the same point was made, but in different ways.

3, 4. The court charged the jury: "If you find from the evidence that Goodwin was induced to sign the release contract by fraudulent misrepresentations of the defendant's agent, Coleman—that is to say, a contract the terms of which he did not understand, and voluntarily assented to, on account of the fraudulent misrepresentations—the same would not be legally binding upon him." The error assigned, in the motion for a new trial, on this charge, was that there was no evidence that the company's agent, Coleman, had used any fraudulent misrepresentations which induced Goodwin to sign the contract, and that the charge erroneously authorized the jury to find that there had been such fraudulent misrepresentations. Goodwin testified that he signed the instrument which purported to be a contract, a copy of which we have hereinbefore set out, but that he did not write the words, "I have read the above carefully and fully understand it," which immediately precede his signature; that, at the time he was employed, the company's yardmaster said: "Run up here and sign a receipt for a coupling stick, and go down and work with that man. I have got a man out there working by himself." He further testified: "I went up there, and Mr. Coleman [the yardmaster's clerk] had that same thing, what defendant calls 'coupling-stick contract,' right there, and he says, 'Sign this here right quick.' He says, 'It is nothing but a receipt for a coupling stick,' * * * and says, 'I will get you a coupling stick after a while.' Upon that I signed it. I never knew it was a contract or anything else except that it was a receipt for a coupling stick, as it was represented to me to be." He further testified that he was in the office not more than a minute, just long enough to sign the instrument, and then ran down the steps and went to work with the man who was working by

himself, and that in about 15 minutes Coleman gave him a coupling stick. As we have seen, the only question raised by the assignment of error is, was there any evidence that Coleman made any fraudulent misrepresentations which induced Goodwin to sign the instrument? According to Goodwin's positive testimony, Coleman explicitly told him that the instrument he was requested to sign was "nothing but a receipt for a coupling stick." If made, this statement was a misrepresentation—a misstatement of fact—as the instrument was not a mere receipt for a coupling stick, but was in form an express contract binding the employé who signed it to observe the rules of the company as therein stated. Was there any evidence tending to show that the alleged misrepresentation was fraudulent? "Misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, constitutes legal fraud." Civ. Code 1895, § 4026. See, also, section 3533. The alleged misrepresentation was of a material fact. Coleman, if he made it, must have known of its falsity, as it was his duty to have such an instrument signed by Goodwin; and, if Coleman misrepresented the character of the instrument, the jury would be authorized to find that he did so intentionally and willfully. Goodwin testified, in effect, that he was deceived by it, and that he was induced by it to sign the instrument, and it is evident that if he should be bound by his signature he would be injured. Under these circumstances, the jury might infer that the misrepresentation was made to deceive. In 14 American & English Encyclopædia of Law, p. 103 (b), the rule is thus stated: "If a representation has been made with actual knowledge of its falsity, or what the law regards as equivalent to actual knowledge, an intention that it should be acted upon and should deceive will be presumed." We think it clear, from what has been said, that the charge under consideration is not open to the criticism made on it. We are not to be understood as holding that the charge, without qualification, was sound. As was said in *Wood v. Cincinnati Safe Co.*, 96 Ga. 120, 22 S. E. 909, "fraud in its procurement voids a contract. * * * If one, apparently consenting by the execution of a written contract, can show that he did not in fact consent to its terms as therein expressed, but that his apparent consent was induced by false and fraudulent practices, by means of which he was overreached by the other party, and, without negligence upon his part, really deceived as to the terms of the contract, he would be entitled to be relieved from its apparent obligations. A negligent omission to inform himself as to the truth of the representations, when he had an opportunity so to do, or might, by the exercise of reasonable diligence, have done, would amount to a waiver upon his part, and he would thereafter be estopped to impeach the contract upon

grounds against which the exercise of reasonable care would, in the first instance, have protected him."

5. Exception was taken to the court's charge, in the language of section 5163 of the Civil Code of 1895, that "where a party has evidence in his power and within his reach by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." After carefully studying the brief of evidence, we do not think this charge was applicable to the facts of the case. It does not appear that the railway company had any evidence in its power and within its reach, on any contested issue in the case, which it failed to produce. While we do not rule that the giving of this correct, abstract principle in charge was cause for a new trial, we do say that it was inapplicable. The questions made in the grounds of the motion for a new trial upon which we have not ruled are not such as will likely arise on another trial, so we deem it unnecessary to pass on them.

Judgment reversed. All the Justices concurring.

(120 Ga. 95)

SALAS v. DAVIS.

(Supreme Court of Georgia. May 13, 1904.)

LANDLORD AND TENANT—TENANCY AT SUFFERANCE—EVIDENCE—HOLDING OVER.

1. Under the undisputed evidence in this case, the defendant was a tenant by sufferance, and not at will, and the verdict in his favor in the proceeding to dispossess him as a tenant holding over was unwarranted.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Action by M. T. Salas against E. E. Davis. Judgment for defendant, and plaintiff brings error. Reversed.

Lawton & Cunningham, for plaintiff in error. Travis & Edwards and Adams & Adams, for defendant in error.

CANDLER, J. This was an action to dispossess a tenant holding over. Pending the suit the tenant vacated the premises, making a continuing tender to the landlord of the rent which had accrued, at the rate fixed in the expired lease contract. This was refused, and the action continued to recover double rent under the provisions of the Civil Code of 1895, § 4817. The jury found for the defendant, and, the plaintiff's motion for a new trial being overruled, she excepted. There was no material conflict in the evidence, and it seems to be admitted that the only question for decision by this court is whether, under the evidence, the defendant was a tenant at will or a tenant by sufferance. If the for-

mer, the verdict in his favor was demanded; if the latter, the plaintiff should have had a verdict for double rent.

It appears that Davis rented the property in dispute from Mrs. Salas under a lease which expired January 15, 1902. In October, 1901, Salas, the husband and agent of the plaintiff, had a conversation with Davis, in which he asked the question: "Are you going to continue in the same place?" Davis replied that he was. On December 2, 1901, Salas wrote Davis a letter notifying him of the approaching expiration of the lease, and saying: "Kindly advise if you desire to vacate or to remain longer. In the latter case a new lease will have to be entered into." Apparently, Davis did not reply to this letter, for he testified that on January 10, 1902, Salas called him over the telephone and asked him if it had been received. He replied in the affirmative, whereupon Salas asked him if he intended to call on him, and he answered: "Yes; next week." On January 13, 1902, Salas again called Davis over the telephone, and, according to a memorandum made by Davis at the time, asked the latter if he intended to continue on at the same place. Davis replied: "Yes; I will bring up duplicate lease." Salas answered: "Come up and see me." On January 17, 1902, Salas and Davis met, and the former refused to renew the lease at the rate of rental fixed in the one which had just expired. On January 25, 1902, 10 days after the expiration of the old lease, Davis' attorney wrote a letter to Salas in which he said: "I enclose herewith lease made in duplicate under the same terms as the former, which Mr. Davis has signed. Will you kindly sign both copies of lease, keeping one for yourself and returning the other to me." On January 27, 1902, Salas replied to this letter, returning the duplicate copies of the lease, and saying: "As soon as Mr. Davis and myself have agreed upon terms and conditions I will be pleased to advise you. Unless this can be done without delay I ask that Mr. Davis vacate, as I desire to negotiate with others if he does not wish the place." On February 18, 1902, Salas made a written demand upon Davis for possession of the property, which was refused, and on February 25, 1902, the present suit was commenced.

We are clear that the facts which have been recited make out a case of tenancy by sufferance, and not at will. There is not a line of evidence to indicate that the tenancy of Davis after the expiration of the lease was by the permission of the landlord. On the contrary, more than a month before the lease expired, Salas wrote to Davis, reminding him of the fact that his tenancy under the lease would soon end, and notifying him that, in the event he desired to retain the premises, it would be necessary to execute a new lease. In the different conversations between the parties over the telephone, Salas gave no intimation of a willingness to

continue the tenancy under the terms of the then existing lease, but on each occasion invited Davis to confer with him as to the terms on which a new lease should be executed. The decision of this court in the case of *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794, is, in our opinion, controlling of the question now under consideration, and the facts of that case are closely analogous to those of the case at bar. We deem it unnecessary to enter into a more extended discussion at this time as to what is necessary to constitute a tenancy at will and one by sufferance. It is sufficient to refer to the admirable opinion of Mr. Justice Cobb in the case cited for a full and exhaustive exposition of the law bearing on this subject.

The necessary conclusion from the foregoing is that the verdict for the defendant was unwarranted, and should have been set aside on motion for new trial.

Judgment reversed. All the Justices concurring.

(120 Ga. 101)

GORDON COUNTY et al. v. PYRON et al.
(Supreme Court of Georgia. May 14, 1904.)

INJUNCTION—CONTINUANCE—DISCRETION.

1. It appearing that the question at issue is not so much whether an injunction should have been granted, as whether or not the order passed was in proper form, and it not appearing that there was any abuse of discretion on the part of the trial court, the judgment will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by T. J. Pyron and others against Gordon county and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. J. & J. McCamy, for plaintiffs in error.
Geo. A. Coffee and Geo. A. H. Harris & Son, for defendants in error.

CANDLER, J. Pyron and others brought suit to enjoin the county authorities of Gordon county from letting a contract to build a bridge over the Oostanaula river at a designated point in the county, the grounds of the petition being that no provision had been made by the county authorities to pay for the bridge; that the Oostanaula river is a navigable river, opened up to navigation and kept in a navigable condition by the United States government, and no permission has been obtained from the United States authorities to erect such a bridge, as is required by law; and that there is no public road on either side of the river to the place where it is contemplated that the bridge shall be erected. The petition also alleged that the county authorities had grossly abused their discretion in the selection of the place where the bridge was to be built. The answer of the defendants admitted that no direct provision had as yet been made for

defraying the expenses of building the bridge, but averred that, so soon as the cost of its erection could be ascertained, a tax would be levied to cover that amount. It was also admitted that no permission had been obtained from the United States authorities to build the bridge, and that at the point where the bridge was to be built there was no road on either side of the river, though it was averred that the parties owning the land in the vicinity through which it was proposed to build a road to the new bridge had declared their willingness to donate the land necessary for the road without any cost to the county. The defendants denied that they had abused their discretion, and claimed in their answer that no court had any power to control their discretion in the matter. The judge of the court below seems to have passed upon the case entirely from an inspection of the pleadings, as no evidence for either side was brought up with the record. The bill of exceptions recites that "defendants requested the court to frame the injunction so as to enjoin them only until such time as they could get the consent and approval of the Secretary of War for the United States, and the chief of engineers thereof, for the building of said bridge"; that "plaintiffs' counsel moved the court to grant the usual order restraining the defendants till the further order of the court"; and that "the court passed the order moved by plaintiffs, enjoining the defendants until the further order of the court, to which decision of the court granting plaintiffs' motion and overruling that of the defendants the said defendants then and there excepted, and now assign the same as error." It will thus be seen that the plaintiffs in error practically admit the propriety of an injunction restraining them from letting a contract for the erection of the proposed bridge until such time as will be required for them to obtain the consent of the United States authorities for the completion of their project, and that practically the only question at issue is whether the court erred in not framing the injunction so as to make it continue until that specific time, rather than until "the further order of the court." In this view of the case, the judgment must, of course, be affirmed. It being apparently admitted that the bridge could not be legally erected without the consent of the United States authorities, and that in the absence of that consent the grant of an injunction was proper, it cannot be said that the court abused its discretion in making the injunction binding until its further order, rather than until the necessary consent could be obtained. It is also to be borne in mind that the court had before it no evidence, and was compelled to rely on the pleadings for the facts upon which to base its rulings. The defendants themselves admitted that no road led to the site of the proposed bridge on either side of the river; and, while it was claimed that

such a road was projected, it does not seem to have gotten any further than the minds of the projectors. Relying, as we must, solely on the pleadings for the facts, we cannot say that the court erred in granting an injunction.

We do not lose sight of the request contained in the brief of counsel for the plaintiffs in error that this court decide "what we have to do to be enabled to build this bridge"; but, consistently with our uniform practice, we must decline to pass on any question not legally presented for our decision.

Judgment affirmed. All the Justices concur.

MILLER v. BROOKS.

(120 Ga. 263)

(Supreme Court of Georgia. May 13, 1904.)

TAXATION—EXECUTION—DESCRIPTION OF PROPERTY—APPEAL—PRACTICE—CROSS-BILL OF EXCEPTIONS—NECESSITY.

1. An execution for municipal taxes, not describing any particular property, but simply directing the seizure of the goods and chattels, lands and tenements, of "the estate of A. J. Miller," is void, and a purchaser at a sale under the levy of such an execution obtains no title.

2. A levy upon a lot of land, which identifies it only by reference to a given number in a named city, will be *held* to be void for uncertainty when there are several lots of that number in the city.

3. An entry on a tax execution of a levy on land, actually written by a deputy sheriff, but signed by the sheriff, is the official entry of the sheriff; and, if amendable at all, it cannot, after the death of the sheriff, and the deputy has gone out of office, be amended by the deputy.

4. A case involving several issues was submitted to a jury, with instructions to find against the plaintiff on one of them. The plaintiff secured a verdict on another issue. The defendant's motion for a new trial was overruled, and the case brought to the Supreme Court. *Held*, that the defendant in error might, without filing a cross-bill of exceptions for that purpose, contend in that court that the evidence demanded a finding in his favor on the issue which the judge instructed against him, and that for this reason the motion for a new trial was properly overruled, notwithstanding the judge may have committed error in charging upon the other issues in the case.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by J. I. Brooks, as administrator of the estate of one Mousseau, deceased, against the executors of the will of A. J. Miller, deceased, in which G. H. Miller intervened. Judgment for plaintiff, and the intervener brings error. Affirmed.

R. R. Richards and Saussey & Saussey, for plaintiff in error. Adams & Adams, for defendant in error.

COBB, J. A mortgage execution in favor of Brooks, as administrator of Mousseau, against the executors of the will of A. J. Miller, and the western half of lot No. 37, Jackson Ward, and improvements, in the

city of Savannah, Ga., was levied upon the property described therein, and a claim was interposed by G. H. Miller. The case was tried before Judge Barrow, and resulted in a verdict finding the property subject. Judge Barrow having died on the day that the verdict was rendered, a motion for a new trial was made before his successor, Judge Cann, who refused to set aside the verdict finding the property subject. The claimant excepted.

1. The motion for a new trial contains numerous grounds, but, under the view we have taken of the case, it becomes unnecessary to deal with many of them. The claimant's title depended upon two tax sales—one under an execution in favor of the city of Savannah, and the other under an execution in favor of the state and county. We have reached the conclusion that the evidence demanded a finding that both sales were void, and that therefore there was no error in overruling the motion for a new trial. Real estate in Savannah is assessed for taxation by official assessors, and not by returns made to the tax receiver. The property in controversy was assessed for city taxes as the property of "the estate of A. J. Miller," and the city treasurer issued an execution which did not describe any particular property, but commanded the marshal generally that "of the goods and chattels, lands and tenements, of the estate of A. J. Miller, he cause to be made and levied" the amount claimed for taxes; the execution reciting that "the said estate of said A. J. Miller" had refused and neglected to pay the taxes in the time prescribed by the ordinance. This execution was levied upon the property in controversy, and after due advertisement the property was sold at the time and place fixed by law, and the claimant became the purchaser. The time for redemption expired without an effort to redeem from any one interested in the property. The Code provides: "Taxes are to be charged against the owner of the property if known, and against the specific property itself if the owner is not known." Pol. Code 1895, § 778. This rule did not appear in any of the earlier Codes. It was taken from the decision in *Burns v. Lewis*, 86 Ga. 602, 13 S. E. 126, where Mr. Chief Justice Bleckley uses the following language: "In this state the universal rule, unless some statute can be shown to vary it in particular instances, is that taxes are to be charged upon the owners of property. Owners therefore have an interest in being properly designated in executions which issue for the collection of taxes upon their property, or, if they cannot be designated with reasonable certainty, that the property shall be pointed out in the executions as authority for seizing it irrespective of ownership, or as the property of some particular person. In all cases of doubt the execution should specify the particular realty on which the tax accrued, and direct the officer to

seize it, or so much of it as is necessary to pay its own taxes. This is especially true where the system of assessment, as in Atlanta, is by official assessors, and not by returns made to a tax receiver." The owner of property must be a natural person, a corporation, or a quasi person or entity, such as a partnership. The law recognizes no other owners of property. "The estate of A. J. Miller" is not the name of a natural person, and does not import either a partnership or a corporation. Consequently on the face of the assessment and execution the name of no owner appears. They are therefore prima facie void. The general rule seems to be that, in the absence of a statute permitting the contrary, the tax assessment must disclose either the name of a person as owner, or use such descriptive words as would indicate ownership in some person. An assessment against "the widow and heirs of A. B., deceased," has been held good, because it was by description against certain persons. *Wheeler v. Anthony*, 10 Wend. 346. An assessment against "Henry Toland's heirs" seems to have been held sufficient in *Ronkendorff v. Taylor*, 4 Pet. 849, 7 L. Ed. 882. "A's heirs" was held sufficient in *Noble v. Indianapolis*, 18 Ind. 506. A sale under an assessment against "the estate of Andrew King, deceased," was, in *Jackson v. King* (Ala.) 3 South. 232, held to convey no title. As also an assessment to the "estate of Parkhurst." *L'Engle v. Wilson*, 21 Fla. 461. And also an assessment to the "Estate of Orrin Woodman." *Inhabitants of Fairfield v. Woodman*, 76 Me. 549. See, also, *Cook v. Leland*, 5 Pick. 236; *Vaughan v. Commissioners*, 154 Mass. 145, 28 N. E. 144; *Fowler v. Campbell* (Mich.) 59 N. W. 185; *Trowbridge v. Horan*, 78 N. Y. 440; *Sawyer v. Mackie* (Mass.) 21 N. E. 807. The only case which has been called to our attention which, on general principles, takes a contrary view, is that of *Kingman v. Glover*, 8 Rich. Law, 27, 45 Am. Dec. 756, where the Supreme Court of South Carolina held that a tax warrant issued against "the est. of Mrs. E. A. Hammond," properly construed, was an execution against the estate of the person named, and, so construed, was valid. In Louisiana it has been held that a tax assessment against the estate of a deceased person was, in substance, an assessment against his "succession," and that as under the civil law, which there prevails, the succession of a deceased person was an entity, the assessment was valid. *New Orleans v. Estate of Stewart*, 28 La. Ann. 180; *Carter v. New Orleans*, 33 La. Ann. 816. In *Dickison v. Reynolds*, 48 Mich. 158, 12 N. W. 24, an assessment against the estate of a deceased person was held to be the legal equivalent of an assessment against the heirs or devisees of such person, and valid under a statute authorizing an assessment of the latter character. In *State v. Platt*, 24 N. J. Law, 108, an assessment against "the es-

tate of J. B. Coles, deceased," was held to be not such an error as would authorize the court to set aside the same on certiorari, but doubt was expressed as to whether a sale of lands under such an assessment would convey title. In the cases of *Douglas Company v. Com.* (Va.) 34 S. E. 52, *Moale v. Baltimore*, 61 Md. 224, and *State v. Corson* (N. J. Sup.) 13 Atl. 265, assessments against the estates of deceased persons, as such, seem to have been upheld under peculiar local laws regulating the matter of tax assessments. Under the provisions of the Code above quoted, as well as under the general principles of law applicable to such cases, the assessment and execution in the present case were void, because the assessment was not made, nor the execution issued, against any person. This view of the matter is strengthened when we take into consideration the provisions of the charter of Savannah, where the power of the municipality to levy taxes is distinctly limited to assessments and taxes "on the inhabitants of said city, and those who hold taxable property within the same, and those who transact or offer to transact business therein." Code 1882, § 4847. The scheme of the charter is in accord with the general principles of law requiring, in the absence of a statute to the contrary, taxes and assessments to be, as a general rule, against persons, and only against property when the owner or person subject to the assessment is unknown.

2. The claimant was also the purchaser at a tax sale had under an execution issued for state and county taxes for the years 1894 and 1895. The tax executions were issued against Mrs. Elizabeth Miller, and each contained a levy in the following words: "Under and by virtue of the above *f. fa.* I have levied upon the following described property of the defendant, and I will sell the same in terms of the law to satisfy this *f. fa.*: west half ($\frac{1}{2}$) lot (37) thirty-seven and improvements, City of Savannah." The levies were signed by John T. Ronan, sheriff of Chatham county, Ga. It was admitted in open court that there were a large number of lots 37 in the city of Savannah, and only one lot 37 in Jackson Ward. In the light of this admission, the levy does not identify any particular lot of land, and was therefore void. *Brown v. Moughon*, 70 Ga. 756; *Ansley v. Wilson*, 50 Ga. 418; *Collins v. Dixon*, 72 Ga. 475; *O'Kelley v. Gholston*, 89 Ga. 1, 15 S. E. 123; *Brinson v. Lassiter*, 81 Ga. 41, 6 S. E. 468. In the case of *Morgan v. Burks*, 90 Ga. 287, 15 S. E. 821, the description was far more definite than in the present; the property there being described as "the west half of city lot number 79 on the corner of Broad street in the city of Albany, Ga." While in the case of *Studstill v. Willcox*, 94 Ga. 692, 20 S. E. 120, it was apparently held that a levy on real estate might

be aided by parol evidence, it must be kept in mind that in that case the levy was being relied on as color, and not as a muniment, of title. If the ruling went any further than this, the decision must yield to former rulings with which it is in conflict, such as *Brown v. Moughon*, supra.

3. Complaint is made because the court refused to allow the sheriff's levy to be amended by inserting the words "Jackson Ward" after the lot number. It appeared that Ronan, the sheriff, was dead; that the body of the levy was actually written by Humphries, Ronan's deputy; and that Humphries, who was still in life, but no longer in office, was in court, and willing to make the amendment. There was no error in this ruling. The case of *Hudspeth v. Scarborough*, 69 Ga. 777, is controlling in principle, although the facts are not exactly the same. In that case the sheriff who made the entry was dead, and it was sought to have the same amended by his successor, who had been his deputy. See, also, *Ansley v. Wilson*, 50 Ga. 418.

4. Judge Barrow charged the jury that the city tax sale was valid. The jury evidently based their verdict as to this sale upon the ground that the sale, though valid as a tax sale, was void for other reasons which are not necessary to be referred to now. It is contended by counsel for the plaintiff in error that the defendant in error cannot in this court claim that the evidence demanded a verdict in his favor as to the city tax sale, when he has not by cross-bill of exceptions assigned error upon the instruction that it was valid. We cannot concur in this view. Of course, the defendant in error cannot invoke any decision on any ruling made by the judge, either in admitting evidence or in charging the jury, in the absence of a cross-bill of exceptions; but, when the case is here upon the bill of exceptions of his adversary, complaining that the court erred in refusing to grant a new trial, the defendant in error can set up any sufficient reason that may exist which would authorize this court to hold that the judgment refusing a new trial was proper. If it can be shown that no other verdict than the one rendered could have been rendered consistently with the law and the evidence, then this court will not reverse the trial judge for refusing to grant a new trial. A new trial will never be granted if the evidence demanded the verdict rendered, even though the judge may have committed errors in his charge. If the only possible legal result has been reached by the jury, the judgment of the trial judge will not be reversed at the instance of the losing party merely for the purpose of allowing the case to be heard again, that the same result may be brought about.

Judgment affirmed. All the Justices concurring.

(56 W. Va. 223)

WM. JAMES' SONS & CO. v. GOTT & BALL.*

(Supreme Court of Appeals of West Virginia.
March 8, 1904.)

APPEAL — RECORD — AMENDMENT — OFFICE JUDGMENT — CONTINUANCE — SETTING ASIDE.

1. Amendments of the records of the circuit court in pending appeal cases cannot be made in this court, but application for such amendments must be made to the circuit court. Omissions of the clerk in copying such records may be supplied by certiorari, and papers not parts of such record, by mistake copied therein, will be disregarded, if apparent from the record or on his certificate of the fact.

2. At the term at which an office judgment would become final by operation of the statute, if the plaintiff agrees with the defendant to continue the case until the next term, and such agreement and continuance is entered of record, they will prevent the office judgment becoming final by operation of the statute, and it cannot thereafter become final until it is entered up as the judgment.

3. Before such office judgment becomes final by such entry, the defendant may have the same set aside by filing his counter affidavit and pleading to issue.

(Syllabus by the Court.)

Error to Circuit Court, Summers County;
J. M. McWhorter, Judge.

Action by Wm. James' Sons & Co. against Gott & Ball. Judgment for plaintiffs. Defendants bring error. Reversed.

R. F. Dunlap and Heffen & Liveley, for plaintiffs in error. Miller & Read, for defendants in error.

DENT, J. Gott & Ball, plaintiffs in error, complain of a judgment of the circuit court of Summers county against them, in favor of Wm. James' Sons & Co., defendants in error, for \$753.71, rendered on the 25th day of May, 1903.

The defendant in error moved to amend the record in this case by expunging therefrom the words: "May 30, 1896, Mr. Cook gave us his note for \$150.00, but only \$100.00 of it to be applied on this acceptance, and the other \$50.00 credit on book, etc. Explanatory and also a further indorsement appears, through which a pen line has been drawn, to wit: Received on the within May 30, 1896, as above [this being the same credit \$100.00]" — being an indorsement on the order sued on, and which the defendant in error claims was erased and improperly copied by the clerk. It files an affidavit for this purpose, and plaintiff files a counter affidavit and resists the motion. If it is true that the clerk improperly copied such memorandum as a part of record, when it had been erased, a certificate from the clerk would make its expungement necessary; but affidavits cannot be received in this court to correct the record as certified by the clerk. If the clerk has omitted papers from the record he should have copied, a certiorari will lie to bring up such omitted portions, or if the clerk has copied

papers in the record that are not properly parts of it, if such fact appears from the record, the court will disregard them; otherwise, the clerk's certificate must be obtained, showing why he copied such papers. If they were properly copied by him, and ought not to be in the record, and are apparently true parts thereof, the record cannot be amended in this court; but the party injured thereby must appeal to the circuit court for the amendment of its record, and then have the same certified to this court. This court acts on the record as made by the circuit court, and will not entertain motions to amend it as so made; but such motions must be addressed to the circuit court, and such amendments, if proper, made in such court. McClure-Mable Lumber Co. v. Brooks, 46 W. Va. 732, 34 S. E. 921.

The plaintiff brought its suit and filed with its declaration an affidavit, in accordance with section 46, c. 125, Code 1899. At the next term, before the office judgment became final, the parties to the suit agreed to a continuance. At the next term no order was made. At the third term the plaintiff moved for judgment. The defendants then appeared and tendered their affidavit and pleas, and asked that the office judgment be set aside and that they be permitted to file the same. The court refused to permit defendants to plead, but entered up judgment for the plaintiff. This is claimed by the plaintiff to be in accordance with the rule established by this court in the case of Marsteller v. Ward, 52 W. Va. 74, 43 S. E. 178. This holding by the court is undoubtedly right, unless the agreement to a continuance had the effect of preventing the office judgment from becoming final by law. The object of these provisions of the statute is to allow the plaintiff to have a judgment without unreasonable delay. The plaintiff may waive the benefit thereof, and agree that the office judgment shall not become final in accordance with the statute. Its agreement to a continuance is, in effect, such agreement; for the case is carried over to the next term in the same condition that it was in when the agreement became part of the record by consent of the parties. 9 Cyc. 150. The court could not have, on its own motion, entered a continuance to have such effect; nor could the defendants have had a continuance, without filing their affidavit and pleading to issue. But the plaintiff had the right to grant to the defendants time until next term to file their affidavit and plead to issue, and thereby the operation of the law is interrupted, and the finality of the office judgment prevented, and such office judgment cannot thereafter become final until it is entered as the judgment of the court. King v. Hicks, 32 Md. 460. If such was not the purpose of the continuance, why was it agreed to by the plaintiff? It had the law in its own hands. All it had to do was to wait and let it take its course. It agreed that it should not take its course, by matter entered of rec-

*Rehearing denied June 2, 1904.

ord. If it was not sincere in this agreement, it should not have entered it, but required the defendants to plead to issue. Now, to claim that it does not have any effect would permit the plaintiff to take an unjust advantage of the defendants. A party may waive a statutory right when such waiver is not contrary to public policy (28 En. Plead. & Prac. 535). Such waiver prevents the office judgment from becoming final, and the defendant may afterwards, until it becomes final by order of court, file his affidavit and plead to issue. If a party agrees his legal rights away when he may, he must accept the consequences thereof. In 1 Black on Judgments, § 86, the law is stated to be: "When a default has actually been entered against the defendant, he cannot escape its consequences by filing a plea or answer, unless by consent of the plaintiff or leave of the court. But a default may be waived; and it will be considered that this is done if the plaintiff subsequently permits the defendant, without objection, to participate in the proceedings, as by filing an answer or demurrer." *Cornell University v. The Denny Hotel Co.*, 15 Wash. 433, 46 Pac. 654. Any appearance under our statute is an appearance to the action, but will not authorize setting aside the office judgment, unless by plea properly filed, although, with the consent of the plaintiff, it will prevent the office judgment becoming final by operation of law, so that judgment may not thereafter be taken by default. But the office judgment may be entered up in court for want of a proper plea.

The circuit court, therefore, erred in not permitting defendants to file their affidavits and plead to issue at the May term, 1903. This makes it unnecessary to consider the various minor objections urged by the defendants as to the insufficiency of the declaration and the necessity for a writ of inquiry, which appear, however, to have no substantial foundation, as the only object of the defendants appears to be to have a bearing on the merits of the controversy as raised by the pleas. The judgment is reversed, and the case is remanded, with leave to the defendants to file their affidavit and pleas, and for further proceedings.

(54 W. Va. 696)

STATE v. McELDOWNEY et al.*

(Supreme Court of Appeals of West Virginia.
Feb. 9, 1904.)

TAX SALE—DEFECTS—CURATIVE ACT—PURCHASES BY STATE—RES JUDICATA—DISMISSAL OF BILL—TAX DEED—SETTING ASIDE—REPAYMENT TO PURCHASER.

1. The failure to return a list of delinquent lands sold for taxes by the first Monday in June is not, under chapter 31, § 25, Code 1899, ground for setting aside a sale, either to the state or an individual. The defect is cured by that section. Expressions to the contrary in

McGhee v. Sampselle, 34 S. E. 815, 47 W. Va. 352, disapproved.

2. The curative provisions as to tax sales in section 25, c. 31, Code 1899, apply to purchases by the state of land sold for taxes. Point 3 of the syllabus in *McGhee v. Sampselle*, 34 S. E. 815, 47 W. Va. 352, to the contrary, is overruled.

3. A sale for delinquent taxes, of land purchased by the state for taxes for a year previous to the year for the taxes of which the land is sold to an individual, is illegal and void, and a deed under such sale is void.

4. To render a former decree a bar as res judicata in a second suit about the same matter, not mere matter of defense, the matter of the second suit must have been actually in issue in the first. The pleadings of the first suit must be such that the party could have proven and had it passed on.

5. Where a bill in a suit does not present facts which call for relief, and it is dismissed, the decree will not bar a subsequent bill on the same cause of action, which states additional or other facts not in the first bill, which make the second bill good, for the same relief called for in the first suit.

6. If a material fact touching a matter of controversy is such that it must be stated in a bill, a decree dismissing a bill not stating it will not bar a second bill properly stating such fact.

7. To render a former decree a bar to a second suit, the demand must not only be the same, but the cause of that demand must be the same.

8. Where the record leads to the ground of decision, that decision is no farther a bar to a second suit than as to that ground, except as to defense which the party is bound to plead.

9. A bill to set aside a tax deed for defects in the proceedings under which it was sold must point out those defects.

10. Where a tax deed is set aside by decree, not for a mistake or irregularity in the record of the proceedings under which it was sold, referred to in section 25, c. 31, Code 1899, but because the sale was unauthorized by law, and so the deed void, the former owner, suing to clear his title of such deed, will not be required to repay the tax purchaser his outlay in his purchase or taxes paid by him.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by the state against John C. McEldowney and others. Decree for defendants, and plaintiff appeals. Reversed.

W. N. Miller, R. F. Fleming, and B. T. Bowers, for the State. E. B. Snodgrass, for appellees.

BRANNON, J. Levi Shuman was taxed with a lot of land, on which is a mill, in Wetzel county, for the year 1890, and it was sold for delinquency for said tax in 1891, and purchased by the state. It was again taxed for the year 1891, returned delinquent, sold for such taxes in 1893, and purchased by John C. McEldowney, who obtained a deed under such tax sale. The lot was sold from Shuman under a decree for purchase money, and purchased in June, 1891, by Cassie L. Nuzum, and it was conveyed to her, under such judicial sale, 14th November, 1891. Mrs. Nuzum attacked McEldowney's tax purchase by a suit in Wetzel county to set it aside for irregularity in the tax sale, but her suit was decided against her by this court, as will be seen in 46 W. Va. 207, 32 S. E. 1024. After

*Rehearing denied June 2, 1904.

this the state of West Virginia, claiming that the said lot was vested in it under its said tax purchase, in a chancery suit in the circuit court of Wetzel county, sought to sell the lot for the benefit of the school fund. The bill in this suit made McEldowney a defendant, set up his said tax title, alleged the invalidity of the tax sale to him, and sought to set it aside as null and void. The bill also made Mrs. Nuzum a defendant, alleging that she had acquired the lot under said judicial sale. McEldowney answered this bill, relying upon his tax title. Mrs. Nuzum filed an answer in the nature of a cross-bill attacking and seeking to annul McEldowney's tax deed as void, and admitting the right of the state, and offering to redeem the land under the statute by payment to the state of the requisite amount. McEldowney answered, and resisted the relief sought by Mrs. Nuzum in her answer. Upon the hearing a decree was pronounced declaring the state's purchase for taxes void, but declaring the taxes a lien on the lot, and allowing McEldowney to remove the lien by payment, and dismissing the state suit, and holding valid McEldowney's tax deed, and refusing to set it aside as prayed by Mrs. Nuzum in her answer, and dismissing that answer. From this decree Mrs. Nuzum took an appeal.

Take the case as between the state and McEldowney. The state attacks McEldowney's deed for irregularity, and he attacks the state's purchase for taxes. McEldowney says that the state's purchase is invalid by reason of the fact that the delinquent list under which the sale to the state was made was not returned until 27th July, 1901, when the law required it to be returned by the first Monday in June, and according to *McGhee v. Sampsele*, 47 W. Va. 352, 34 S. E. 815, holding that this would render the state's purchase bad, and that the curative provisions of section 25, c. 31, Code 1899 (chapter 130, p. 387, Acts 1882), do not apply to heal defects in purchases by the state, the sale to the state would be void. The court now disapproves and overrules such holdings of that case. We hold that such curative provisions apply to purchases by the state the same as to individual tax deeds. Section 32 says that the state purchases shall be listed, and that "all such estate, right, title and interest * * * as would have vested in an individual purchaser shall be by the sale and purchase on behalf of the state vested in the state without deed." Why does not this give the state right to the cure of the statute? Really the case of *McGhee v. Sampsele* as to this point is obiter, as the trees were not owned by Nancy Brown, and not taxable in her name. It was not necessary to pass on the tax deed to decide the case.

We further hold that the fact that the delinquent list was not returned within the time specified by law does not render the state's purchase void, and this because section 25, c. 31, Code 1899, says that "no ir-

regularity, error or mistake in the delinquent list, or the return thereof, or in the affidavit thereto, * * * shall, after the deed is made, invalidate the sale or deed." Of course, the state title is subject to redemption by a party entitled to redeem. In this case the state is entitled to a decree to sell the lot on failure of redemption.

As between McEldowney and Mrs. Nuzum. She says in her answer that McEldowney's tax deed is void for the reason that the delinquent list was not returned by the first Monday in June, 1892, and not until 25th July. This defect is cured by provisions in Code 1899, c. 31, as just stated. Mrs. Nuzum's answer charges that, as the lot was sold to the state for taxes for 1890, the assessment for 1891 was contrary to law, for the reason that chapter 31, Code 1899, prohibits its assessment, while it is vested in the state, until it is redeemed. This point cannot prevail, because on 1st April, 1891, Shuman was still owner, and the assessment relates to that date, and the delinquent list was not returned until July, and the state did not purchase until 14th December, 1891.

But there is another objection to the sale to McEldowney. It is that he purchased for taxes in December, 1893, and before that the fact that the lot had been sold to the state was apparent in the auditor's office, and Code 1899, c. 31, § 4, directs him to send out for sale lists of land, delinquent for taxes, "not previously sold therefor," and does not allow him to send out for sale lands owned by the state by tax purchase. There was no law allowing the Auditor to send out this lot for sale in 1893, because it was state property, and there was no law to authorize its sale, and that sale was simply void. Section 23, c. 29, Code 1899, forbids the assessment of land vested in the state by tax sale, and the two statutes plainly make such sale to McEldowney illegal. *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627, so holds. There is no provision of law curing this void sale. A question arose with me whether the answer specifies this vice in the sale. It does not clearly do so, but it states the fact of the sale, and that it was not redeemed, and that it was for 1891 charged and was delinquent for taxes for that year, and sold to McEldowney therefor, and that the sale was void. Under these facts it results, as matter of law, that the Auditor did send out, and the sheriff sold, the lot without authority of law, and we think the answer may be regarded as sufficient to present this defect.

After preparing this opinion, I notice that in *Sayers v. Burkhardt*, 85 Fed. 246, 29 C. C. A. 137, the Circuit Court of Appeals, in an opinion by Judge Goff, holds that it is against law to assess land purchased by the state. It thence plainly follows that the assessment and sale are void.

But McEldowney pleads that the decree of this court upon the bill of Mrs. Nuzum against him is a bar to any relief upon her

said answer in this suit as *res judicata*. In the former suit Mrs. Nuzum's bill assailed McEldowney's tax deed on certain grounds, namely, defect in the sheriff's affidavit to the sales list and defect in the heading of the list, but did not impeach the deed on the ground that there was no authority to sell by reason of the fact that the land was vested in the state under its purchase for taxes. The fact that it had been purchased by the state for taxes before 1891 was not mentioned in the pleadings, and was not in issue, and therefore the decree is no bar as to this. A judgment will bar "only upon the matter actually at issue and determined in the original action, and such matter when not disclosed by the pleadings must be shown by extrinsic evidence." *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204. It must have been directly in issue. *Western Mining Co. v. Va. Cannel Coal Co.*, 10 W. Va. 250; *Doonan v. Glynn*, 28 W. Va. 715; *Cleaton v. Chambliss*, 6 Rand. 86; 1 Greenl. Ev. 528.

It is old law, oft repeated, that estoppels are odious because they shut out the truth. We cannot say that this is applied in the same sense as once it was, but we can say that the principle yet prevails to deny the right to bar matters never in fact involved in a former trial; at least, where it was not admissible under the pleadings. I do not forget the rule given by many cases, among them *Blern v. Ray*, 49 W. Va. 129, 38 S. E. 530, that a judgment or decree upon the merits is a bar or estoppel upon the same demand, not only as to every matter which was offered and received to sustain or defeat the claim, but also any other "admissible matter" which might have been used for that purpose. This has reference to evidence. But notice, the rule says "admissible matter." Was this matter that the lot had been purchased by the state, and therefore was unlawfully sent out for sale by the Auditor and sold by the sheriff in December, 1893, admissible on Mrs. Nuzum's bill? It was not mentioned in that bill, nor in the cause. The bill of Mrs. Nuzum did make the general charge that the tax sale was irregular and void, specifying as grounds only certain facts, they being that there was no property on the lot out of which the tax could have been made, that the affidavit to the sales list had specific defects, and that the heading of that list was not such as the law required. There was no mention of the sale to the state, or of illegality of the sale to McEldowney for that reason. This important fact was omitted from the bill. That bill was held not sufficient to avoid McEldowney's deed, but it did not hold that a bill with that in it was insufficient. True, gravamen or demand of suit is the same in both the original bill in Mrs. Nuzum's suit and in her answer in this suit—the demand that the tax deed be held invalid; but the cause for so holding is not the same; the facts touching it are not the same. To bar, the

demand must be the same, and the cause of that demand the same. 7 Rob. Prac. 160. It is just the case of one declaration wanting facts essential to recovery, and a second declaration for the same cause of action giving additional facts making the case good. Often has it been held that a judgment on the first declaration on demurrer or verdict does not bar the second suit. "If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration, which is supplied in the second suit, the judgment in the first suit is not a bar to the second." *Gould v. Evansville Co.*, 91 U. S. 526, 23 L. Ed. 416. "A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment on the merits." *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432; *Bigelow on Estop.*, 53. As Judge Carr said in *Cleaton v. Chambliss*, 6 Rand. 86: "The record must show that issue was taken on the same allegation. In this case the record is the only test. There is no possibility that the decree was upon any ground or reason than that manifested by the record. If a case is dismissed on demurrer, the decision is that the facts do not call for relief. So, though the case is not so dismissed, but judgment for defendant is on verdict, yet if the facts in the declaration show that no recovery could be had, why shall it bar a second declaration, giving more facts touching the cause of action, which call for relief?" The record shows on just what facts the first decree went. Where the record leads to the ground of decision, it is no farther a bar than as to that ground, for that is all that has been decided, and so, no farther, it is a bar." In *Sanders v. Marshall*, 4 Hen. & M. 458. To bar, "it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined." *Russel v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Packet Co. v. Sickel*, 5 Wall, 580, 18 L. Ed. 550. It does not in this case necessarily appear that the same matter was decided, but that it was not. *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809. The same evidence to support the issue raised by the record in the first suit does not support that raised in this suit. Proof of the state's purchase had nothing to do with the defects presented in the first suit, nor would the evidence to show those defects presented in the first suit bear on the defect presented in this suit. This is a test. 24 Am. & Eng. Ency. L. (2d Ed.) 781.

To constitute a judgment in the former a bar in the latter action, it must be shown that the plaintiff could, but for his fault, have recovered in the former action. 7 Rob. Prac. 170. Mrs. Nuzum could not have presented in her own suit the fact that the land had before been sold to the state, because

her bill did not state that fact. It did charge that the sale and deed were illegal, but only stated certain facts to show it. A pleading must have certainty; must state facts to build up and sustain the demand—the relief asked. "The bill should state the plaintiff's case with reasonable certainty—that is, the right he claims, the injury complained of, and the relief he asks, with the facts to justify it—with such accuracy and clearness, and with such detail of essential circumstances of time, place, and manner, as will make his case, so as to inform the defendant of what he has to meet; stating, not conclusions of law, but the facts out of which arises his right to some specified relief." *Zell Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. For instance, a bill to annul a deed for fraud must specify facts constituting the fraud. Same case. A bill to avoid a fraudulent conveyance must state facts entering into the fraud, a general charge not being enough. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 28 S. E. 553; *Billingsley v. Meneer*, 44 W. Va. 651, 30 S. E. 61. And specifically as to tax sales, *Blackwell on Tax Titles*, § 1084, says: "An averment that the proceedings of the officer were 'regular,' 'legal,' etc., is a mere legal conclusion, without giving the facts from which that conclusion is drawn. Therefore, in all such cases, the pleader must show with reasonable certainty the particular facts upon which the regularity or legality of the proceeding depends." If such the law in pleading a tax title, it must be equally so in assaulting it. Where there is no pleading, there can be no recovery. Allegation and proof must correspond. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366. Every fact necessary to make out a case must be positively and certainly alleged, as the court bases its decree upon allegations. *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911. The plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it. *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42. Her bill did not charge the fact. Therefore Mrs. Nuzum could not have proven or gotten relief from the fact that the lot had been sold to the state, and she is not barred by the first decree. But when a party is sued he must put in all his defenses, else he is barred of any defenses omitted, because he could have presented them. 24 Am. & Eng. Ency. L. (2d Ed.) 782; *Blern v. Ray*, 49 W. Va. 129, 38 S. E. 530. "A recovery by the plaintiff necessarily adjudicates that there is no defense. Hence the cases all agree that a judgment bars all defenses which the defendant had opportunity to make." *Van Fleet*, Former Adjud. § 159. But not so with the plaintiff. He may file a declaration, and if its facts do not call for judgment, and he loses, he may try again upon facts which do so. He ought to have put all facts in at first, but,

not doing so, what is the result? He is not barred by *res judicata*, as his second case, differing from the first, has never been tried.

Mrs. Nuzum did not in her bill offer to repay McEldowney the purchase money and taxes paid by him. Where a defect on the record in the proceeding in which a tax deed originates is such as to justify a court in setting it aside on bill, chapter 31, § 25, requires the former owner, before relief, to repay the purchaser the money therein prescribed. That is generally the case; the bill must tender and bring in the money. *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509. But the vice in McEldowney's title is not a mere "irregularity in the proceedings under which the same was sold," and the Code does not require such repayment except where the irregularity appears in the record under which the tax deed is made. Here the fact that the lot had been before sold to the state did not appear in that record, but only the delinquent and sale list; it was not apparent in that record. And it is not a mere "irregularity" in that record. It is a fact making the deed void, not voidable; the sale was unauthorized by and against law; it was a nullity. Therefore, Mrs. Nuzum is not required to refund to McEldowney, but she, not McEldowney, must pay the state what is going to it to redeem the title from the state, and McEldowney has right to withdraw the money which he paid into the court for that purpose.

Our conclusion is to reverse the decree of 13th June, 1901, and remand the cause with direction to the circuit court to enter a decree canceling and setting aside the deed made January 9, 1896, by Henry R. Thompson, clerk, to John C. McEldowney, and allowing Cassie C. Nuzum to redeem her title from the state by payment of the proper sum, and, in default of such payment, selling the lot upon the state's bill.

(55 W. Va. 1)

STATE v. McELDOWNEY et al.

(Supreme Court of Appeals of West Virginia.
Feb. 9, 1904.)

TAX SALE—AFFIDAVIT OF SHERIFF.

1. No defect in a sheriff's affidavit to a list of sales of land for taxes will invalidate a tax deed made under chapter 31, Code 1899. *Phillips v. Minear*, 20 S. E. 924, 40 W. Va. 58, and *McClain v. Batton*, 40 S. E. 509, 50 W. Va. 121, so far as they hold to the contrary, are overruled.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill of review by the state of West Virginia, for Cassie C. Nuzum, against John C. McEldowney and others. Decree for defendants, and plaintiff appeals. Affirmed.

W. N. Miller, R. F. Fleming, and B. T. Bowers, for appellant. E. B. Snodgrass, for appellees.

BRANNON, J. This case involves the correctness of a decree of the circuit court of Wetzel county in refusing a bill of review presented by the state and Cassie O. Nuzum to reverse a decree made in the case of State v. John C. McElDowney, 47 S. E. 650. The facts up to that decree are given in the decision in that case. After that decree the state and Cassie O. Nuzum united in a bill of review based on both matter of law and newly discovered evidence. The matter of law is decided in the decision referred to, made this term, and in this case we consider only the new matter. The new matter is this: The affidavit of the sheriff to the list of delinquent tax sales filed in the county clerk's office is irregular in this, that it omitted the words "nor have I at any time been," preceding the words "directly or indirectly interested in the purchase of said real estate"; whereas, as lately discovered, the original list of sales on file in the Auditor's office was free of such defect. This defect in the sheriff's affidavit as it appeared in the clerk's office was held by this court not to invalidate a tax deed, because of the fact that the original in the Auditor's office was the true affidavit, and it, being the original one and good under the statute, must prevail. *Winning v. Eakin*, 44 W. Va. 19, 28 S. E. 757; *Nuzum v. McElDowney*, 46 W. Va. 207, 32 S. E. 1024. But the bill of review says that it had been discovered that the original affidavit to the sale return in the Auditor's office was at first defective, just the same as that in the clerk's office, but had been changed so as to cure the defect and conform to the statute. Grant that this change was wrongfully made after the filing of the sales list in the Auditor's office; would the defective affidavit destroy McElDowney's tax deed? We hold that it would not, because of the cure of the defect by section 25, c. 31, Code 1899. It provides that "no irregularity, error, mistake . . . in the list of sales filed with the clerk of the county court, or in the affidavit thereto . . . shall, after the deed is made, invalidate or affect the sale or deed." It also provides that "no sale or deed of any such real estate under the provisions of this chapter shall be set aside, or in any manner affected by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty herein required to be done or performed by him after such sale is made, or by the illegal or defective performance, or attempt at the performance, of any such act or duty after such sale." We hold also that such defect is cured by this language: that the tax deed shall vest in the purchaser the former owner's title, "notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings, of record in the office of the clerk of the county court, and be such

as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was so sold, or the name of the purchaser thereof." If other clauses did not heal this defect, this would. How could this defect in the affidavit mislead the owner at all? How could it mislead him in the respects specified in the statute; that is, as to what portion of his land was sold, or the name of its purchaser, or when and for what years sold? It might be different with failure to return the list within the time required by law, because there the purchaser might be misled, as held in *Barton v. Gilchrist*, 19 W. Va. 223. But that would not avail now. It is true this vice in the affidavit would nullify the deed under *Phillips v. Minear*, 40 W. Va. 58, 20 S. E. 924, and *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509. In *Winning v. Eakin*, 44 W. Va. 19, 28 S. E. 757, for reasons there given, the case of *Phillips v. Minear* was doubted, and in *Gerke Brewing Co. v. St. Clair*, 46 W. Va. 93, 33 S. E. 122, it was logically or virtually overruled; and in *Boggees v. Scott*, 48 W. Va. 316, 37 S. E. 661, it was actually overruled in the opinion and point 8 of the syllabus. This fact was by inadvertence overlooked in *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509. So we overrule *Phillips v. Minear* and *McClain v. Batton* as to this point. And so this defect in the affidavit is ineffectual to affect McElDowney's tax deed.

There is another reason why the bill of review cannot avail Cassie O. Nuzum. When McElDowney filed his answer to Cassie O. Nuzum's original bill, he filed a copy of the sheriff's affidavit as it appeared in the Auditor's office. That told her that there was a difference between it and the affidavit in the clerk's office. This was long before she filed her answer or cross-bill in the cases of the state against her. She should have put that matter in her answer, as she was advised of it, and cannot say it was newly discovered since the decree, and could not have been sooner discovered by due diligence. The state knew it also.

We must affirm the decree of 6th June, 1903, rejecting the bill of review.

(125 N. C. 535)

CURRIE et al. v. RALBIGH & A. AIR LINE R. CO.

(Supreme Court of North Carolina. May 27, 1904.)

CARRIERS—TRANSPORTATION OF MERCHANDISE—FAILURE TO RECEIVE—PENALTIES—INTERSTATE COMMERCE—TENDER—EVIDENCE—APPEAL—RIGHT TO ALLEGE ERROR.

1. Code 1888, § 1964, as amended by Laws 1903, p. 788, c. 444, imposing a penalty of \$50

§ 1. See Penalties, vol. 39, Cent. Dig. § 25.

a day on railroad companies for refusal to receive merchandise for transportation, is a public statute, and therefore need not be pleaded in order to be enforced.

2. In an action against a carrier to recover a statutory penalty for refusal to receive merchandise for transportation, a complaint alleging a tender at defendant's regular depot at a specified place on May 2, 1903, and that the defendant for two successive days, to wit, "on May 8 and 9, 1903, failed and refused to receive the same," contained a sufficient allegation of tender.

3. Where a car of lumber tendered to a railroad company for transportation was found to have been properly loaded, the carrier was liable for the penalty imposed by Code 1883, § 1864, as amended by Laws 1903, p. 788, c. 444, for refusal to receive the same for transportation, notwithstanding the car was to be shipped out of the state.

Appeal from Superior Court, Moore County; C. M. Cooke, Judge.

Action by J. L. Currie and others against the Raleigh & Augusta Air Line Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John D. Shaw, for appellant. J. D. McIver and H. F. Seawell, for appellees.

OLARK, C. J. This is an action for the penalty (\$50 per day) incurred under Code 1883, § 1864, as amended by chapter 444, p. 788, Laws 1903, for refusal by the defendant to receive for transportation a car load of lumber, tendered 7th May, 1903, and which remained unshipped the two succeeding days, 8th and 9th May.

The defendant moved to dismiss because the complaint did not state a cause of action. This is predicated, we understand, upon the ground that the statute giving the penalty was not pleaded, and that a renewal of the tender on 8th and again on 9th May was not specifically alleged. Being a public statute, it was not requisite to plead it. It is enough to set out the facts. *Commissioners v. Commissioners*, 101 N. C. 520, 8 S. E. 176. The complaint alleged a tender, at the defendant's regular depot, at Cameron, N. C., on 7th May, 1903, and that "the defendant for two successive days, to wit, on 8th and 9th May, 1903, failed and refused to receive the same." The answer admits this averment to be true, and avers that the defendant refused to receive said car load of lumber for transportation, because that, when tendered, it was not in proper condition for transportation, but was loaded contrary to the rules of the defendant company, of which the plaintiff had notice, and, as loaded, was at the time of said tender in unsafe and dangerous condition, and in such condition as to insure its rejection by connecting lines when tendered. There was sufficient averment of tender, and, if any defect therein, it was cured by the answer. The penalty is "fifty dollars for each day said company refuses to receive said shipment," which refusal is

admitted in the answer. There was conflicting evidence as to whether the car of lumber was "properly loaded and safely secured for its transportation," which issue was found by the jury in favor of the plaintiff.

The only point in the defendant's brief necessary to be considered is the refusal to instruct the jury that upon all the evidence the plaintiff is not entitled to recover. This is placed upon the ground that, the car being tendered for transportation to Pittsburg, Pa., "the imposition by the state of a penalty for refusing to receive the car, because not loaded in such a manner as to be received by connecting carriers, was an interference with interstate commerce." There was no issue tendered by the defendant to that effect, and the jury found, upon the issues submitted, that the car "was properly loaded and safely secured for its transportation to Pittsburg, Pa." That in such case the state can impose a penalty for refusal to receive, or delay in beginning, the shipment, is fully discussed and decided in *Bagg v. Railroad*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 28 Am. St. Rep. 569, and the defendant offers us no good reason and no precedent to the contrary.

There were other exceptions taken, but they are without merit, or are not set up in the defendant's brief. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

No error.

(185 N. C. 583)

EEKHOUT v. COLE.

(Supreme Court of North Carolina. May 27, 1904.)

CONTRACTS — MONEY LOANED — FORFEITURES — EVIDENCE — SUFFICIENCY — ATTORNEY — PRIVILEGED COMMUNICATIONS.

1. Where an attorney had completed his services in one case, and the client wished him to take up another, which the attorney refused to do till he should be paid for his past services, the client's statement that he had procured money to make the payment from a certain person as a loan was not a privileged communication, so as to render it inadmissible in evidence.

2. Where an objection to a question was overruled, and before an answer was given the attorney told the witness to stand aside, it was not error for the court to repeat the question and require the witness to answer it.

3. Where plaintiff and defendant's intestate entered into a contract, and plaintiff deposited \$500 in a bank as security for his performance of its terms, but this sum was withdrawn by mutual consent and loaned to the intestate and never repaid, it constituted a valid claim against his estate.

4. Where defendant's intestate agreed to procure stock of a corporation for plaintiff at a certain price, and plaintiff deposited \$500 in a bank, to be forfeited in case of nonperformance by him, the withdrawal of this sum by mutual consent and loaning it to defendant's intestate was not conclusive evidence that the forfeiture should no longer be a part of the original contract, but presented a question for the jury.

Appeal from Superior Court, Cherokee County; Hoke, Judge.

Action by W. B. Eekhout against C. W. Cole, administrator. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The plaintiff prosecutes this action for the recovery of \$500, alleged to have been "advanced and loaned" to defendant's intestate, A. G. Kinsey, on November 4, 1901. The plaintiff averred a demand and refusal to pay. Defendant denied each of the allegations of the complaint, except the demand and refusal to pay, which he admitted. By way of further defense and counterclaim, he averred that on the 27th July, 1901, the plaintiff entered into a contract with the defendant's intestate by which it was agreed that said Kinsey should secure control of at least a majority of all the stock of the Notla Consolidated Marble, Iron & Talc Company, to be sold to the plaintiff for \$5.80 per share. Said stock was to be deposited in escrow in the Bank of Murphy, provided a certain contract of same date between the stockholders of said company and said Eekhout in regard to the sale of their holdings in said company be entered into. The agreement contained the following provision: "And in order to show good faith said W. B. Eekhout has deposited Five Hundred Dollars in the Bank of Murphy to be forfeited to the said A. G. Kinsey, or assign, if I, the said W. B. Eekhout, fail to comply with the contract referred to. In the event the said A. G. Kinsey fails to get a majority of stock subscribed to said contract of even date, said amount of Five Hundred Dollars shall be subject to the order of W. B. Eekhout by the 15th August, 1901, and shall not be forfeited in any event if contract of even date be carried out." Exhibit A attached to the answer is a contract entered into between W. B. Eekhout and certain shareholders of said iron and talc company, the purport of which is that the shareholders agreed to sell their stock to said Eekhout upon certain terms and conditions, fully set out therein. The time fixed for performance of said contract is August 1, 1901. The defendant alleged that his intestate, pursuant to said contract, procured at great outlay and expense a majority of said stock, and deposited the same in the Bank of Murphy for said Eekhout. That said Eekhout failed in every respect and in every particular to comply with his contract. That by reason of such failure said Eekhout became indebted to the defendant's intestate in the sum of \$500. The plaintiff, replying to the new matter and counterclaim, denied each and every allegation in regard thereto.

The court, without objection, submitted the following issues to the jury: (1) Is defendant indebted to plaintiff, and, if so, how much? (2) Is plaintiff indebted to defendant on counterclaim, and, if so, how much? Plaintiff introduced Ben Posey, who testified to the handwriting of A. G. Kinsey and his

signature to the receipt, which was in the following words: "Murphy, N. C. 4 Nov., 1901. Received of W. B. Eekhout the sum of Five Hundred Dollars, being the money lodged in the Bank of Murphy in escrow with a certain contract between the said Eekhout and myself and now withdrawn by mutual consent. [Signed] A. G. Kinsey." The plaintiff thereupon testified that he deposited \$500 in the bank, and that he drew the same out November 4, 1901. He admitted the execution of the contract of July 27, 1901, and the writing of certain letters put in evidence. Mr. Posey was recalled, and testified that he was attorney for A. G. Kinsey on November 4, 1901. That Judge Ferguson and himself had appeared as counsel for him in a suit between Kinsey and Emerson. That the suit was concluded, and Kinsey wished to employ them in another suit with one Oliver Kinsey. That witness told Kinsey that they wished payment of their fees. Kinsey replied that he had no money at that time, when witness insisted on payment of fees for himself and Judge Ferguson. Counsel asked witness what Kinsey said to him about borrowing the money from Eekhout. Defendant's counsel objected on the ground that witness, being at that time Kinsey's attorney, could not testify to a transaction between them. Objection overruled; defendant excepted. Upon the court's announcing its ruling, the counsel for plaintiff stated that he had no further question to ask witness, and told him to stand aside. "The court, perceiving that no answer had been made to the question, and thinking this was an inadvertence of counsel, and, moreover, desiring to have the facts about the matter before the jury, asked the witness what Kinsey did say about the money—about borrowing the \$500 fee. Counsel for defendant objected on same ground—that it was a transaction between attorney and client; (2) because counsel for plaintiff, having directed witness to stand aside, the court had no right to interpose and request an answer from witness. (Objections overruled, and defendant again excepted.) The witness then stated that, when he told Kinsey he must have his fee of \$500, Kinsey stepped out, remained awhile, and then came back in the room and said that he had gotten the money; that he and Eekhout had agreed to withdraw from the bank the \$500 on deposit, and Eekhout had agreed to lend it to him. The next morning Kinsey came in and said that he had arranged the matter with Eekhout; that the money had been withdrawn by mutual consent, and put in the bank to his (Kinsey's) own credit, and subject to his check, and Kinsey then gave witness his check for \$250; also drew a check for Ferguson for \$250, the amount of attorney's fees, and the bank paid them. Plaintiff rested."

Defendant introduced contracts herein referred to, a letter from Eekhout to Kenyon.

cashier of bank, inclosing agreement between Kinsey and himself, and check for \$500, also stockholders' contract, Exhibit A.

Plaintiff then introduced J. H. Carter, vice president of the bank, who testified that he had a package containing certificates of stock of the iron and talc company, Exhibit 209; that the indorsement upon the envelope was made by himself, except certain words which are not material. Defendant then introduced the envelope, containing the following indorsement: "This envelope contains the following shares of stock of the Notia Cons. M. I. & Talc Co., to wit." Then follows a list of the certificates, aggregating 3,721 shares, deposited with Bank of Murphy subject to contract between stockholders and W. B. Eekhout, dated July 17, 1901. It was admitted that the envelope contained the stock which constituted a majority of the stock issued by said company. The defendant asked the court to charge the jury that there is no evidence that the money paid Mr. Posey is the money deposited with Eekhout under said agreement; (2) that the jury must be satisfied that the money received by Mr. Posey was a part of the identical \$500 deposited by Eekhout; (3) that there is no evidence of any abandonment of the forfeiture feature of the contract. All of said prayers were denied, and the court, in part, charged the jury that plaintiff and A. G. Kinsey, the intestate of the defendant, entered into a contract that Kinsey was to procure for Eekhout a majority of stock in the marble company, and Eekhout was to pay for it \$5.80 per share. To show good faith in the matter, Eekhout put in the bank \$500, as a forfeit in case of failure on his part to comply with his offer. That, if the evidence was believed, Kinsey did procure the stock, and Eekhout had failed to take the stock; and if the money had remained in the bank, under the original agreement, or if a forfeiture to that amount continued to be a part of the stipulation, then there was nothing due from defendant to plaintiff. If, however, Kinsey and Eekhout mutually contracted and agreed to withdraw the money from the bank, and the forfeiture should no longer be a part of the stipulation, and, after drawing out the money, Eekhout lent the money to Kinsey, and same had never been paid, then the defendant was indebted to plaintiff in the sum of \$500, with interest thereon from time same had been demanded, and nothing would be due on counterclaim. The court here stated the evidence and the arguments of counsel pertinent to the issues. The jury returned a verdict, and answered the first issue "Yes," \$500, with interest from date of demand, August 15, 1902, and had not answered the second issue. The court told the jury that, if such was their finding of fact and verdict on the first issue, it should answer the next issue "No." If they believed the testimony, there was nothing due on counterclaim, and they

would answer the second issue "No." The jury so answered the second issue. Defendant objected and excepted.

From a judgment on the verdict the defendant appealed.

E. B. Norvell, for appellant. Axley & Axley, for appellee.

CONNOR, J. We find no valid objection to the question asked Mr. Posey. It seems that, at the time of the transaction had by him with Mr. Kinsey, his employment in the suit with Emerson was at an end, and the employment in the other suit had not commenced. However this may be, the communication was not in any legal sense in regard to the business or employment in respect to which the privilege may be invoked. We think the testimony of Mr. Posey comes neither within the letter or spirit of the law. Greenleaf, Ev. vol. 1 (16th Ed.) p. 380. We find no suggestion that Mr. Posey was or had been Kinsey's attorney in regard to the purchase of the stock or the contract made respecting it. The exception must be overruled. We see no objection to the course pursued by his honor in asking the question of the witness. The reason assigned by him fully explains his action. It has been frequently said by this court that judges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the "truth, the whole truth, and nothing but the truth" be laid before the jury. The trial of causes must not be permitted to degenerate into a mere game of chance or trial of skill, the victory going not to him whose cause is just, but to the most skillful player. Learned and just judges are appointed to see that suitors have judgment accordingly as they have the right of the controversy. The exception to his honor's question cannot be sustained.

There is no reversible error in his honor's charge upon the first issue. If the jury found that, by mutual consent of the plaintiff and the defendant's intestate, the \$500 deposited in the bank, to be forfeited if the plaintiff failed to comply with the contract, was withdrawn and the amount loaned to the defendant's intestate, we see no good reason why it was not a valid contract and enforceable against the defendant's intestate. It is unfortunate that the parties left the matter in so much uncertainty. One of them is dead, and by the law the lips of the other are sealed. In this condition of the matter, the jury had nothing to guide them except the receipt and the testimony of Mr. Posey. The conclusion to be drawn from this evidence was for them.

We do not concur with his honor's view upon the second issue. He charged the jury that, if they believed the evidence, Kinsey did procure the stock, and Eekhout failed to

take it; that if the money had remained in the bank under the original agreement, or if a forfeiture to that amount continued to be a part of the stipulation, there was nothing due from the defendant to the plaintiff; but that if they mutually agreed to withdraw the money from the bank, and that the forfeiture should no longer be a part of the stipulation, nothing would be due on the counterclaim. We do not think the agreement to withdraw the money from the bank constituted conclusive evidence that the forfeiture should no longer be a part of the stipulation. It may well be that Kinsey, being in need of money, agreed to the withdrawal of the amount deposited, upon condition that it be loaned to him, without releasing his rights under the contract. If the entire contract, with all the rights and liabilities accruing therefrom, was to be canceled, it is strange that the stock was not withdrawn from the custody of the bank and returned to the shareholders. The giving of the receipt, instead of a note, indicates that the transaction was not closed. So far as appears upon the surface, the \$500 had been forfeited to Kinsey, and he was entitled to demand and receive it. It may well be that he, to supply his immediate needs, consented to the withdrawal, leaving his rights under the contract open for adjustment. His honor was of the opinion that if the agreement was "that the forfeiture should no longer be a part of the contract," then Kinsey had no other or further rights thereunder. We think he should have left the answer to the second issue to the jury to say whether, notwithstanding the agreement to withdraw the \$500, the defendant was not entitled to recover of the plaintiff the damage sustained by the breach of the contract, and to fix the amount of such damage. He alleges that his intestate, at great expense and outlay of money, procured the stock, and the plaintiff failed to take it in accordance with his contract. We see no reason why he may not recover, by way of counterclaim, such amount, and other damages within the contemplation of the parties and proximately resulting from such breach of contract.

The evidence sent up is meager, and we can do no more than direct a new trial upon the second issue. It is so ordered.

New trial.

(135 N. C. 506)

WROUGHT IRON RANGE CO. v. CAMPEN,
Sheriff.

(Supreme Court of North Carolina. May 27, 1904.)

TAXATION—INTERSTATE COMMERCE—SALES AND DELIVERIES—ORIGINAL PACKAGES—CONSTITUTIONAL LAW—PEDDLERS—DEFINITION—STATUTE—LICENSE.

1. The license tax imposed by Revenue Act 1903, § 36 (Pub. Laws 1903, p. 833, c. 247), on every itinerant person or company peddling stoves or ranges in the state, levied for purely revenue purposes, is void in so far as sales by

sample of goods manufactured in another state, shipped into the state, and delivered in their original packages, are concerned, as a restriction on interstate commerce, in violation of Const. U. S. art. 1, § 8, par. 3, granting to Congress power to regulate commerce between the states.

2. Where ranges are manufactured in one state, and sold by sample in another, neither the persons exhibiting the samples, nor those making deliveries thereof in the original packages, are peddlers, within Revenue Act 1903, § 44 (Pub. Laws 1903, p. 836, c. 247), providing that "any person carrying a wagon, cart or buggy or traveling on foot for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler," and section 36, imposing on such itinerant person or company peddling ranges a license tax of \$100 per annum for each county in which peddling is done.

Appeal from Superior Court, Pamlico County; Moore, Judge.

Action by the Wrought Iron Range Company against A. B. Campen, sheriff of Pamlico county. From a judgment for defendant, plaintiff appeals. Reversed.

This action was brought to restrain the collection of a license tax, and to recover the property levied upon and seized by the sheriff to enforce the payment of it. The case was heard upon the complaint, treated as a case agreed, the facts alleged therein being admitted. The complaint is as follows:

"The plaintiff complains of the defendant, and alleges:

"(1) That the Wrought Iron Range Company, the plaintiff in this case, is a corporation duly organized and created under the laws of the state of Missouri, with its general offices located in the city of St. Louis, Mo., in which city and state it also has a factory, in which are manufactured all the ranges sold by its traveling salesmen throughout the United States, and the plaintiff has been engaged during the year 1903 in selling ranges in Pamlico county, North Carolina, as is hereinafter set out.

"(2) That the defendant is the duly qualified and acting sheriff of Pamlico County, North Carolina.

"(3) That the manner in which said company has sold all its ranges and transacted all its business in Pamlico County, North Carolina, during the year 1903, prior to the filing of this suit, and the manner in which it proposes to hereinafter sell its ranges and conduct its business so long as it remains in said county and state, is as follows: The agents employed by plaintiff in the sale of its ranges and the transaction of its business in said county and state are as follows: S. H. Dew, officially designated by plaintiff as division superintendent; —, officially designated by plaintiff as traveling salesman; and —, officially designated by plaintiff as deliveryman. Plaintiff has other salesmen and deliverymen operating in North Carolina, but the names only of those operating in Pamlico county in 1903 are hereinafter set out.

"(4) That each and every one of said

agents of said plaintiff in said county of Pamlico, state of North Carolina, is paid by the plaintiff for his services to said plaintiff a stipulated and contractual compensation, together with his necessary expenses, while engaged in the sale or delivery of plaintiff's ranges, or any other services rendered by them for said plaintiff in said county and state. Further than this stipulated compensation, no one of said agents has any monetary or financial interest whatever in the sales, proceeds of sales, or business transacted by plaintiff in said county and state.

"(5) That each of said agents hereinbefore referred to as traveling salesmen was furnished by plaintiff with a wagon, team, and sample range, all of which were and are the sole and undivided property of plaintiff, and each of said salesmen was assigned to a certain and determinate territory in said Pamlico county by the agent hereinbefore referred to as division superintendent.

"(6) That each of said traveling salesmen, in his appropriate territory within the limits of said Pamlico county, exhibited his sample range to prospective purchasers, and solicited their orders for ranges similar in all respects to the samples exhibited, to be delivered to purchasers within thirty days from date of said orders. In no instance in said county and state did said traveling salesmen solicit orders for, sell or deliver to any purchaser, the sample ranges intrusted to them by plaintiff, nor did either of said salesmen deliver any ranges to purchasers in said county and state, the orders for which had been obtained either by himself or the other traveling salesmen hereinbefore referred to.

"(7) That, in all cases in said county and state where orders were obtained by said traveling salesmen, purchasers were required to sign and did sign and deliver to said salesmen two promissory notes, of equal amount, and of the same tenor and date, one of which was made payable in November, 1904, and the other in November, 1905, conditioned for the delivery at the premises of the purchaser within thirty days from date of a No. 1,900 range, same as sample exhibited, and to be void only upon the condition that said plaintiff refused to deliver said range as specified in notes, and for no other cause whatever.

"(8) That all orders obtained by said salesmen for the future delivery of ranges under the terms and conditions aforesaid were by the respective salesmen who obtained or secured said orders turned over to plaintiff's agent hereinbefore referred to as division superintendent.

"(9) That said division superintendent, after investigating the financial conditions of said purchaser, selected such as he regarded as responsible for their contracts, turned their orders over to the deliverymen hereinbefore mentioned, delivered to said deliverymen the ranges ordered by said pur-

chasers, whereupon said agents proceeded to deliver to said purchasers the ranges according to the terms and conditions specified in the promissory notes hereinbefore mentioned.

"(10) That, for the purpose of making such deliveries, each said deliveryman was furnished with a wagon and team, which were and are the exclusive property of the plaintiff, and said deliverymen, for their services in making said deliveries of ranges, were and are paid a stipulated compensation and their necessary expenses by said plaintiff. Further than the said compensation, said deliverymen have no monetary or financial interest in the sale, proceeds of sales, or business of said plaintiff.

"(11) That all ranges sold by the plaintiff or its agents in said county and state were sold and delivered to its customers in the original form or packages in which they were shipped into the state of North Carolina from plaintiff's factory in St. Louis, Missouri. All of said ranges were shipped in car-load lots, each car containing sixty separate and distinct ranges, and consigned to plaintiff at New Bern, in Craven county, North Carolina, in care of its said agent, S. H. Dew.

"(12) That, upon the arrival of said ranges at said New Bern, they were unloaded by plaintiff's agents aforesaid and stored in the warehouse of the Atlantic & North Carolina Railroad Company, the common carrier by which they were delivered at said New Bern, and held subject to plaintiff's order.

"(13) That no ranges were sold or offered for sale at said warehouse, but were taken therefrom only, as hereinbefore mentioned, for the purpose of filling orders obtained by the salesmen aforesaid.

"(14) That all of said ranges used in the transaction of plaintiff's business in Pamlico county, North Carolina, were unloaded from the cars of the common carrier at said New Bern in the precise form or package in which they were placed in the cars of the common carrier at St. Louis, Missouri, and placed in said warehouse in the same form or packages, and were taken from said warehouse and loaded upon plaintiff's delivery wagons in the same form or packages in which they were shipped from St. Louis, and delivered to plaintiff's customers in Pamlico county in the identical and original form or packages in which they were shipped into the state of North Carolina.

"(15) That the defendant, claiming the right to do so under section 36, c. 247, p. 333, North Carolina Public Laws of 1903, demanded from plaintiff a license tax of \$100 for the business of peddling ranges in said county and state for one year, ending May 31, 1904, and levied on and seized the property of plaintiff for the purpose of satisfying said tax, and still has the property in his possession sufficient to satisfy said tax, and will sell and dispose of said property to

satisfy said tax unless restrained by this court.

"(16) That section 36, c. 247, p. 333, Public Laws of 1903, in so far as it applied to plaintiff, and the business transacted by it in Pamlico county, North Carolina, is in conflict with article 1, § 8, par. 3, of the Constitution of the United States, and therefore, as to the plaintiff and its said business, illegal and unconstitutional, absolutely null, void, and invalid.

"(17) That all ranges sold by its traveling salesmen in said county and state were shipped into said city of New Bern, Craven county, and state, before any of said ranges had been sold, or orders for their sale had been solicited, by its salesmen aforesaid. Plaintiff has no place of business in Pamlico county, or elsewhere in the state of North Carolina, except as hereinbefore stated.

"(18) That the said seizure of plaintiff's property is for the purpose of collecting a tax levied for an illegal and unconstitutional purpose, and said levy and seizure is illegal, void, and wrongful, and the defendant is threatening to sell plaintiff's property, and will sell it, to pay said illegal tax, unless restrained by this court, and the plaintiff will be irreparably injured and damaged by said illegal and wrongful acts of defendant.

"(19) That a summons has been issued in this action."

Wherefore the plaintiff demands judgment that the defendant be restrained and enjoined from collecting said tax; that he be restrained from selling or disposing of the property now in his hands belonging to the plaintiff; that the defendant return to the plaintiff the property now in his hands; for costs and for general relief.

The following entries appear on the record: "(1) The parties waive a jury trial, and agree that the court may hear the case out of term, as of the fall term, 1903, of the superior court of Pamlico county, and render a final judgment herein. (2) The parties agree that the facts alleged in the complaint are true, and also agree that the court may enter a final judgment on them. Whereupon argument is heard upon both sides, and it is therefore considered by the court and adjudged that the restraining order and injunction heretofore issued be, and the same is hereby, dissolved, and that the defendant go without day, and recover his costs of action of the plaintiff and the surety to his prosecution bond." Plaintiff excepted and appealed.

Simmons & Ward and Shepherd & Shepherd, for appellant. The Attorney General, for appellee.

WALKER, J. (after stating the case). This appeal presents for our consideration the question whether the imposition of a license tax required of the plaintiff under section 36 of the revenue act (Acts 1903, p. 333, c. 247) is a valid exercise of the taxing pow-

er of the state with reference to the plaintiff's particular business, as described in the case agreed; and the decision of that question depends upon whether the exaction of the license tax, as a prerequisite to the exercise of the right to sell its ranges in this state, is a regulation of interstate trade, or an interference with its free and unrestricted enjoyment, within the meaning of the commerce clause of the Constitution of the United States. It will enable us the better to understand the limitations which have been placed by that clause of the Constitution upon the right of one state to impose taxes upon the sale of goods brought from another state if we first ascertain what principles have been settled by the adjudications of the court of last resort having jurisdiction to pass upon that question.

In *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, the following propositions were established: (1) The Constitution having given to Congress the power to regulate commerce among the several states, that power is necessarily exclusive; (2) that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions, and that any regulation of the subject by the states is repugnant to such freedom; (3) the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power and its jurisdiction over persons and property within its limits, it provides for the security of life and property, or imposes taxes upon persons residing within the state or belonging to its population, or upon avocations pursued therein, not directly connected with foreign or interstate commerce. But in making such internal regulations a state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce, nor can it impose such taxes upon property imported into the state from abroad or from another state, and not yet become part of the common mass of property therein; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject. It seems, therefore, with respect to the importation from other states of goods already sold, no license tax can be levied upon them by the state into which they are brought for delivery to the purchaser until they have been mingled with, and form a part of, the common mass of the property therein; and, even when they are thus commingled, they are still protected against any discriminating tax laid upon them directly or indirectly as imports, or by reason of their having been imported into the state, simply because this would be a regulation of

interstate commerce inconsistent with that perfect freedom of trade between the states which Congress, by not legislating otherwise, has clearly indicated should exist. We may concede, for the purpose of this discussion, that there is no discrimination under section 36 of the revenue act, against goods imported from another state, but that all goods of the classes described in that section, whether imported into the state, or originally forming a part of the general mass of property therein, are alike subject to the tax, without any distinction whatever, so that persons who sell goods which are brought into the state stand upon a basis of equality with those who sell goods already in the state, and forming part of the general mass of its property. Assuming, then, that there has been no discriminating legislation against the sale of imported goods, the question arises as to the time when goods brought into a state for the purpose of sale cease to be articles of interstate commerce, so as to become subject to the free and untrammelled exercise of the taxing power of the state.

This question was considered and decided in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, with reference to a tax imposed upon the right to sell goods imported from foreign countries. But the same principle, says Marshall, C. J., applies with equal force to commerce between the states. Referring to the extent of the power, he says: "The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. If the power reaches the interior of a state, and may be there exercised, it must be capable of authorizing a sale of those articles which it introduced. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the subject of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell. We think, then, that, if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable. If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling

the article in his character of importer must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation." Discussing the particular question as to the time when the goods become incorporated with the common mass of property in the state, he says: "This indictment is against the importer for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the state by breaking up his packages, and traveling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the state. In the last case the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

We have quoted at some length from this important case, because we understand that the principles therein established have been accepted as authoritative in all subsequent decisions upon this subject. And they have not been in the least changed since they were first announced, except in so far as it was therein intimated that a state could not tax directly and as property imports from another state, as in this respect the rule in regard to the taxation of imports from foreign countries and the rule in regard to imports from another state are not the same, as the Constitution expressly prohibits the taxation in any form of imports from foreign countries. *Woodruff v. Parham*, 8 Wall. 138, 19 L. Ed. 382. But in all other respects the decision in the case of *Brown v. Maryland* has remained intact. This will appear by reference to the very recent case of *Railroad v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. —. In that case the court, at page 449, 191 U. S., page 153, 24 Sup. Ct., 48 L. Ed. —, says: "Upon the other hand, for the past seventy-five years, and ever since the original case of *Brown v. Maryland*, 12 Wheat. 419 [6 L. Ed. 678], we have uniformly held that states have no power to tax directly, or by license upon the importer goods imported from foreign countries or other states, while in their original

packages, or before they have become commingled with the general property of the state, and lost their distinctive character as imports. In that case a law of Maryland required importers to take out a license before they could be permitted to sell their imported goods. That was declared to be void, not only as a tax upon imports, but as an infringement upon the power of Congress to regulate commerce. The case is one of the most important decided by this court, and has been adhered to by a uniform series of decisions since that time."

Questions relating to the interference by state regulations with interstate commerce have frequently been before the Supreme Court of the United States, whose decisions upon them are, of course, controlling with us. It will suffice to examine only a few of the cases decided by that court, in order to determine whether the law under which the license tax has been imposed upon the plaintiff is in conflict with the commerce clause of the Constitution, and therefore invalid. It requires, we think, only a careful consideration of these cases, and a correct understanding of their distinguishing features, to fix the limit of the state's power of taxing goods imported from other states.

Some general principles have been settled by actual adjudication which enable us to classify the cases arising out of the power asserted by a state to prohibit the importation of goods from other states. This importation may be prohibited either directly, by forbidding the goods to be brought into the state, or indirectly, by imposing a tax in such a way as to restrict the enjoyment of the right to import them—such as a license tax which is required to be paid before the goods are either delivered, under a contract of sale made before the importation began, or sold after the transit is completed and they have reached their destination in the state.

1. When the goods are imported from a foreign country into one of the states, the state may not levy a tax upon them either directly or indirectly. No tax can be assessed against them as property *ad valorem*, or according to any other principle, nor can any license tax be imposed upon the right to sell them; and this exemption continues so long as they remain in the original packages, and after the packages are broken and they become a part of the common mass of property they are still protected against unfriendly legislation which results in any discrimination against them and in favor of the property which has not been imported into the state. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165.

2. The Constitution of the United States declares that "no state shall, without the consent of the Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing

its inspection laws," and that Congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." It will be seen, from a slight comparison of the two provisions, that the exemption from taxation is more extensive in the case of foreign imports than it is in the case of goods imported from one state into another. In the former case all state taxation on importation is prohibited, while in the latter case it is only forbidden by implication in so far as it may interfere with the regulation of commerce over which Congress is given exclusive power and jurisdiction. This is clearly pointed out by Justice Miller in *Woodruff v. Parham*, supra. If the tax does not fetter commerce, although it may remotely affect it, it may be levied by the state, even if the goods have come from another state. A tax laid directly on the imported goods as property, in like manner and by the same rule as upon other property produced in the state, would be valid, if the levy is made after the goods have reached their destination and are at rest in the state. In such a case, and for the purpose of direct taxation, or of such taxation as does not restrict the right of interstate traffic, the imported goods are considered as a part of the general mass of property in the state as soon as they have reached their final destination and are at rest within the state. This principle was restated and applied in the case of *Brown v. Houston*, 114 U. S. 662, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Am. S. & W. Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 865, 48 L. Ed. —.

3. We see therefore that the state cannot tax imports from foreign countries at all, and can tax goods from other states only when no discrimination against them and no regulation of commerce results therefrom. In no form of legislation can one state prohibit the importation of goods from another state, provided the commodity, the importation of which is forbidden, is a legitimate subject of commerce; and this right of importation which is thus protected against hostile state legislation includes the right to sell the goods in the original packages after they have arrived in the state, and not until such a sale is made do they cease to be articles of interstate commerce, and become a part of the general mass of the property in the state. This doctrine was announced in *Brown v. Maryland*, supra, as to foreign imports, and it has been extended by subsequent decisions to imports as between the states, because in this respect both kinds of commerce stand upon the same footing, and are protected by the same clause of the Constitution. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Lyng v. Mich.*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150.

4. The doctrine that one state cannot directly prohibit the importation into its territory of goods from another state has been extended, or rather applied, to a case where

the prohibition was attempted not directly, but by means of a license tax exacted of the importer. In the cases to which we will presently refer, the goods were sold in one state to a person residing in another state, and were to be delivered to the purchaser in the latter state. If the importer cannot sell the goods until he has paid for and received a license, the right of importation is in principle as much restricted, and interstate commerce as much regulated, though perhaps not in the same degree as in the case of an absolute prohibition. *Brown v. Maryland*, supra; *Robbins v. Shelby Taxing Dist.* 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 363; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Schollenberger v. Pa.*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; *Caldwell v. N. C.*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Railroad v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. —; *Ex parte Hough (C. C.)* 69 Fed. 330. The case of *State v. Gorkman*, 115 N. C. 721, 20 S. E. 179, 25 L. R. A. 810, 44 Am. St. Rep. 494, is clearly distinguishable from our case, though the reasoning of the court in that case seems to sustain our decision in this case.

5. The only question remaining for us to consider is whether the principle of *Brown v. Maryland*, *Robbins v. Shelby Taxing Dist.*, and the other cases just cited, applies to a case like the one at bar, where there is no direct prohibition against the importation of goods from another state, nor any license tax exacted of the importer, who by himself or through his agents solicits orders by sample for goods to be brought into the state and then delivered, but where the goods are brought into the state, and, having reached their destination and being at rest in the state, are sold from a warehouse of the carrier in the original packages; orders for the goods being first obtained by agents of the importer, who solicit the same by exhibiting samples of the goods, which are carried from place to place in a wagon; the orders being afterwards filled and deliveries made from the warehouse.

A license tax was required of the plaintiff under section 36 of the revenue act of 1908 (Pub. Laws 1908, p. 333, c. 247), which is as follows: "On every itinerant person or company peddling clocks, stoves or ranges, one hundred dollars per annum for each county in which he or they may peddle the same. The license to be issued by the sheriff of the county, who shall collect said tax and pay the same to the State Treasurer." Section 44 (page 347) provides that "any person carrying a wagon, cart or buggy, or traveling on foot for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler." Sections 36 and 44 are a part of Schedule B, and section 28 of the revenue act, which is the first section of Schedule B, reads as follows: "Taxes in this schedule shall be imposed as license tax-

es for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule. The license issued under this schedule shall be for twelve months, and shall expire on the 31st day of May of each year." It will be seen, therefore, that no person or corporation has the right to carry on any business taxed under Schedules B and C until the license tax is paid, and every such person or corporation is required to exhibit the license when demanded by the sheriff of the county in which the business is conducted (section 80), and the sheriff is required to demand payment of the license tax from any person or corporation liable for the same, and a failure to pay the same is made a misdemeanor (section 87). It must be admitted that the right to sell is an important and valuable part of the right to import. The right to bring goods into a state for the purpose of selling them there would be of no value if when they arrive at their destination the right to sell them is prohibited, and, even though there may be no absolute prohibition, any restriction placed upon the right to dispose of the goods is as much an interference with the right to import or interstate commerce, though not perhaps in the same degree, as if the sale of the goods had been altogether forbidden. There is no difference in principle between the two cases. The proposition, as is said in *Brennan v. Titusville*, 153 U. S. 287, 14 Sup. Ct. 829, 38 L. Ed. 719, that a license tax is a direct burden on interstate commerce, is not open to question. "It is clear, therefore, says the court, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and, if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it." In referring to the case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, the court says: "Neither license nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce, and all acts of legislation producing any such result are to that extent unconstitutional and void." Numerous authorities are cited and commented on by the court in *Brennan v. Titusville*, which is a very important and instructive case. The conclusion reached was that, within the reasoning of the cases cited, the license tax imposed upon the defendant for selling by sample goods to be shipped into the state was

a direct burden on interstate commerce, and was therefore beyond the power of the state. If the right to sell the imported article is an integral part of the right to import, and an essential element of it, without which it would not be complete, what difference can there be between a sale of the article when it is not in the state, and a sale of it after it has been brought within the state, provided it remains in the original package of commerce? A license tax was required of the defendant in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, who was an importer. He resisted the payment of the tax, and his contention was sustained. It will be observed that the tax in that case was declared invalid not only as being an impost or duty laid on imports from a foreign country, but as being an interference with the regulation of commerce. The question is discussed in both aspects, and the tax declared illegal upon both grounds. The words which we have already quoted from the masterly and unanswerable opinion of the great chief justice will be found in that part of it where he is discussing the second objection to the tax urged by the plaintiff in error, *Brown*, the defendant below, which was based solely upon the ground of its repugnance to that clause of the Constitution committing to Congress the power to regulate commerce with foreign nations and among the several states. It was also settled by *Brown v. Maryland* that imported goods preserved their character as imports as long as they remained unsold and in the original packages in which they were imported. "This indictment," it is said in that case, "is against the importer for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the state by breaking up his packages and traveling with them as an itinerant peddler." 12 Wheat. 443, 6 L. Ed. 678. If, therefore, as said in *Brown v. Maryland*, and reiterated in subsequent cases, a state cannot impose a license tax on the importer, or on his agent who represents him, and who would be protected by the same principle, because it is a restriction upon interstate commerce and a regulation thereof, and if the goods continue to be articles of interstate commerce so long as they remain in the original packages and are unsold, it follows that the tax required to be paid by the plaintiff in this case before selling its ranges in the original packages was an unlawful restraint upon its right to import, which included the right to sell in the manner described in the case agreed, and is therefore void.

When we once concede, as we must, that the power of Congress to regulate commerce among the several states does not stop at the external boundary of a state, but must enter its interior and operate there, and that, being "coextensive with the subject on which

it acts," its full force is not spent until there is a sale of the article which is imported, and not then if there is any discrimination against the goods because of their foreign character, the conclusion we have reached would seem to be inevitable. We do not think the cases holding that the goods may be taxed as property as soon as they have come to the end of the transit and are at rest in the state conflict with our view of the case. Nor do the *Peddler Cases* (*Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430) have that effect. It does not appear in those two cases that the goods were sold in the original packages, and furthermore the court bases its decision of them upon the ground that the state was exercising its police power, and the tax was laid in the exercise of that power, and not merely for the purpose of raising revenue, as in our case. In *Emert v. Missouri*, Justice Gray, for the court, says: "There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time." And again: "So far as appears, the only goods in which he was dealing had become part of the mass of property within the state." *Emert* was taxed strictly as a peddler. In the case we have in hand, the plaintiff, acting by its agents, was not a peddler, within the meaning of that word as fixed by the common law; that is, a person who sold the very goods he carried with him, in his pack or cart, when traveling about from place to place. This court has defined "peddling" to be "the occupation of an itinerant vender of goods, who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered, and to be paid for, wholly or in part, upon their subsequent delivery." *State v. Lee*, 113 N. C. 681, 18 S. E. 713, 37 Am. St. Rep. 649; *State v. Frank*, 130 N. C. 724, 41 S. E. 785, 89 Am. St. Rep. 885. It has also held that an occupation similar to plaintiff's is not that "of a peddler, in the ordinary meaning of the word." *State v. Ninestein*, 132 N. C. 1039, 43 S. E. 936. The mere calling the plaintiff a peddler does not make it a peddler, for the purpose of laying a tax upon its business as an importer which interferes with interstate commerce, and is in its essence a regulation of the same. In the language of the court in *Stockard v. Morgan*, 185 U. S., at page 36, 22 Sup. Ct. 580, 46 L. Ed. 785, "The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce." It is undoubtedly true that the Legislature may define who are peddlers, and in the same act tax them, as this "is equivalent to imposing a tax upon all persons engaged in the occupations therein specified," or whose occupation may come within the definition given in the statute.

State v. Ninesteln, 182 N. C., at page 1042, 43 S. E. 938. The word is there used as a mere designation of the person who carries on the business described, but it does not enlarge a class of persons before well known, and having a certain and well-defined calling, so as to confer upon the state a power with reference to the regulation of interstate commerce that it did not before have. The law regards not the name, but the substance, of the thing, and will look at the real character of the business in determining whether or not the state's power of taxation has been rightfully exercised. In *Range Co. v. Carver*, 118 N. C., at page 335, 24 S. E. 353, it is said that in *Emert v. Missouri*, supra, the court sustained the right of the Legislature to define who shall be a peddler for the purpose of taxation. That is true, but the court was referring to taxation by the state within its rightful authority, and not to taxation which substantially interferes with the power of Congress to regulate commerce, though nominally it may not do so. We think the decision in that case (*Range Co. v. Carver*) proceeded upon a misconception of the true principle which governs in such cases, and especially did the court fail to advert to the distinction between the class of cases cited in the opinion and the class to which this case belongs. In the cases of the former class the court dealt with the power to tax imported goods as property, or with the right to tax generally, when the goods have been once sold, or the packages broken, and they have been mingled with the mass of property in the state, or with the right of the state to exercise its police power in the particular case, while our case comes within the principle settled by the court in *Brown v. Maryland*, supra; *Robbins v. Taxing District*, supra; *Brennan v. Titusville*, supra; and other cases involving the same question as we have in this case.

We cannot better close this part of the discussion than by referring to the recent case of *Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. —, in which Justice White, for the court, delivers an exceedingly able and well-considered opinion, where the principles relating to the right of the states to tax, as affected by the commerce clause of the Constitution, are stated with great force and clearness; and the case will be found, we think, to sustain the views we have herein expressed.

In the case of *Com. v. Harmel*, 166 Pa. 89, 30 Atl. 1036, 27 L. R. A. 388, the court draws sharply the distinction between the right of the state, in the exercise of its police power, to tax a peddler or person who delivers the very article he offers for sale at the time he sells it, and a case like ours, and, in reference to a transaction such as the one described in this record, it says: "It must be conceded that these clocks may be sent into this state in manufacturer's packages, and they may be sold in the same

packages, under the authority of the interstate commerce clause; but once in this state, and the package opened by the consignee, the disposition of the separate articles at retail is intrastate traffic, and subject to the police regulations that experience may show to be necessary for the protection of citizens in the comfort of their homes and the enjoyment of their property." This is our case exactly. Though it may make no difference in this case, in the view we take of it, whether the license tax was required of the plaintiff for the purpose of revenue, or was imposed merely in the exercise of the police power of the state, it may be well to state that an examination of the revenue act will show clearly that the tax was laid as a measure for the collection of revenue. It is placed in the same category, under section "B," with license taxes upon lawyers, physicians, dentists, real estate agents, collectors of rent, and others of similar occupations, who are certainly not taxed, in the exercise of the police power, as the proper subjects of police surveillance, like "hawkers, peddlers, and petty chapmen." This is not a tax levied in the execution of any inspection law or for the purpose of enforcing any mere police regulation, but, by the express terms of the act, for the purpose of raising the necessary revenue to support the government.

If it is urged that no discrimination is made between those who sell imported and those who sell domestic goods, it will not meet the difficulty, as said in *Robbins v. Taxing District*. The law requires, of course, that there shall be entire commercial equality, and this precludes discrimination; but it also provides that interstate commerce cannot be taxed at all, as any tax which is imposed upon it is, in a constitutional sense, a regulation of it, and void for that reason, and especially so when it restrains the importer or fetters the right of importation at any stage of this commercial intercourse. In order to fix the period when interstate commerce terminates, it has been said by the highest authority upon the subject that the criterion announced in *Brown v. Maryland*, namely, a sale in the original packages at the point of destination, is applicable, and is selected as the one by which to test the validity of the power exerted in the particular case, whether by way of direct prohibition of the introduction of the goods, or of their sale after they have arrived in the state, or by way of taxation, not on the goods themselves as property, but on the importer's right to sell them, which we have seen is a part of his right to import. As such taxation necessarily operates as a restriction of his right to import, it is, to that extent, as objectionable as if the sale of the goods had been actually prohibited. *Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. —.

We think that *Leisy v. Hardin*, 135 U. S.

100, 10 Sup. Ct. 681, 34 L. Ed. 128, is exactly like our case in principle. In that case it is said: "They had the right to import the beer into the state, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become commingled with the common mass of property in the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or *nonresident* importer." (Italics ours.) Commenting on that case in *Rhodes v. Iowa*, 170 U. S., at pages 416, 417, 18 Sup. Ct. 665, 42 L. Ed. 1088, the court, by Mr. Justice White, says: "Subsequently, in *Leisy v. Hardin*, the question which was thus reserved in the *Bowman* Case arose for adjudication, and it was held that the right to sell the imported merchandise in the original package, free from interference of state laws, was protected by the Constitution of the United States, as up to such sale the goods brought into the state were not commingled with the mass of property in the state." In order to see the full force of these citations, and to furnish what we think is direct authority for our decision in this case, we need only add that the question referred to as having been reserved in *Bowman v. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700, was thus stated in *Rhodes v. Iowa*, supra: "The court in the course of its opinion adverted to the question whether goods so shipped [from one state to another] continued to be protected by the interstate commerce clause after their delivery to the consignee, and up to and including their sale in the original package by the one to whom they had been delivered, but did not decide the question, as it was not essential to do so. Referring to the subject, however, the court said: 'It might be very convenient and useful, in the execution of the policy of prohibition within the state, to extend the powers of the state beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For, if they belong to one state, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution, by its delegations of national power, to prevent. It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell unbroken packages at the place where the transit terminates, for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point

decided in the case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the states.'" As decided in *Brown v. Maryland*, sales by the importer of goods brought into the state from another state, and still in the original packages, are exempted from interference of the state by taxation, because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property in the state, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the state. This is the crucial principle, and the statement of it in *Brown v. Maryland* "contains in a nutshell the whole doctrine upon the subject of original packages." A tax on the right to sell imported goods amounts pro tanto to a prohibition of the sale, because it indirectly forbids that to be done which constitutes the most valuable part of the right to import, and "intercepts the import in the way to become incorporated with the property in the state."

In *Austin v. Tenn.*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, we find a terse and clear statement of the effect of the decision in *Leisy v. Hardin*, as follows: "It was held [in that case] that, [the goods] being articles of lawful commerce, the state could not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state, or, when imported, prohibit their sale by the importer, and that they did not become a part of the common mass of property within the state so long as they remained in the casks in which they were imported, and continued to be the property of the importer." The same view is taken in that case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, which involved the power of a state to forbid the introduction and the sale in original packages of oleomargarine.

In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, the statute of Iowa prohibited the sale of intoxicating liquors brought into that state, and, a sale having been made in violation of the statute, it was held that as to sales by the importer, and in the original packages or kegs, unbroken or unopened, of liquors manufactured in and brought from another state, the statute was unconstitutional and void. It will be observed that the prohibition was directed not against the introduction of the goods into the state, as in *Bowman v. Railroad Company*, but it had reference solely to their sale after they had arrived in the state. If, as we have shown, a sale after the arrival of the goods in the state cannot be prohibited, it is certain that it cannot be restricted by the imposition of a license tax. State prohibitions and state restrictions are equal-

ly unauthorized and invalid. As the court said in *Austin v. Tennessee*, 179 U. S. 850, 351, 21 Sup. Ct. 135, 34 L. Ed. 123, on the authority of *Brown v. Maryland*, there is "no difference between a power to prohibit the sale of an article while it was an import, and the power to prohibit its introduction into the country. The one would be the necessary consequence of the other. No goods would be imported if none could be sold."

It has been assumed in this case that the clause in section 44 of the revenue act defining a peddler applies to the occupations named in section 38, because this court, in *Range Co. v. Carver*, held that it did, though we entertain some doubt as to whether that clause does not apply exclusively to persons named in section 44, and, if the question was presented for the first time, we would perhaps so decide. The context of that section and the provisos immediately annexed to the clause defining a peddler indicate that to have been the intention. But we have accepted the construction placed upon that clause of section 44 in *Range Co. v. Carver*, at least for the purpose of this decision, as the correct one.

We have treated the question involved in this case at some length, as it is of great importance to the state that the limit of her power to tax should be definitely known. We are disposed, of course, to sustain the validity of an act of the Legislature, and will indulge every presumption in its favor. It must be clearly incompatible with constitutional provisions before we will pronounce it invalid, but, when we conclude that the Legislature has exceeded its power in the particular instance, it becomes our plain duty to so declare. As said in *Robbins v. Taxing Dist.*, the state will in the end derive just as much revenue from the goods as if they had had their origin in the state. If the provision of the Constitution regulating commerce is permitted to have its free and full operation, the goods, when they come into the state, will, by the sale of them, whether before or after their introduction, become incorporated with the property of the state, and will then be the subjects of taxation. 120 U. S., at page 497, 7 Sup. Ct. 596, 30 L. Ed. 694.

In any view we have been able to take of this case, after the most careful consideration and examination of the facts and the authorities, we are of the opinion that the tax is illegal, and that the judgment of the court below, upon the case agreed, should have been for the plaintiff. Reversed.

(124 N. C. 756; 135 N. C. 148)

CLEGG v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 13, 1904.)

CARRIERS OF FREIGHT—REFUSAL TO DELIVER—GROUNDS.

1. Where a railroad company refused to deliver a car load of fruit to the owner for the specific reason that he would not pay the amount

of freight demanded, which was in excess of that due and offered by the owner, and the fruit was injured by being frozen before the railroad company discovered its error, the fact that at the time he demanded the goods the bill of lading had not been transferred to the owner by the bank to which the goods were consigned was not fatal to his right to recover for the injury to the fruit.

Walker and Connor, JJ., dissenting.

Appeal from Superior Court, Guilford County; O. H. Allen, Judge.

Action by Z. V. Clegg against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Kimball, for appellant. C. M. Stedman and Brooks & Thompson, for appellee.

MONTGOMERY, J. The defendant company received at Greensboro on Sunday afternoon, the 15th of November, 1901, a car load of bananas from Baltimore, consigned to the Greensboro National Bank: "To order. Notify Z. V. Clegg." Clegg was notified by the bank of the arrival of the goods, and on the 16th, 17th, and 18th of November demanded of the freight agent of the defendant at Greensboro the delivery to him of the same. A dispute over the amount of the carriage due upon the shipment having arisen, the fruit was not delivered, and, before the plaintiff got possession of it, it was greatly injured by a spell of freezing weather, by which a loss was inflicted on the plaintiff. The defendant deducted from the freight charges the excess as contended for by the plaintiff, the same being erroneous. The amount demanded by defendant as dues for carriage was \$148. The amount offered by the plaintiff was \$106, which amount was afterwards found to be the amount due. The defendant introduced no evidence. The plaintiff had not received from the bank a transfer of the bill of lading at the several times when he made the demands for the delivery of the fruit, and did not receive it until the 18th of the month. If the defendant had refused to deliver the goods because the plaintiff had not received from the bank the assignment or transfer of the bill of lading, or partly for that reason, the defendant's contention, to wit, that the plaintiff had no right to make the demand for the goods until he presented the bill of lading, would rest on a solid foundation. But it is clear from the evidence of the plaintiff that the defendant made no point over the bill of lading not having been presented by the plaintiff, but rested its refusal on the ground that the plaintiff refused to pay the carriage due. The plaintiff testified that nothing was said to him by the freight agent as to his right to receive the bananas, and that nothing was said about that matter until after they had corrected the freight charges, when he was told that he would have to get an order from the bank. The defendant, having at the times of the several demands assigned no other reason for refusing to deliver the goods than the re-

fusal of the plaintiff to pay an excessive charge for carriage, ought not to be allowed to defeat the plaintiff's right to recover the amount of his loss on the ground that he did not present the bill of lading or any other order from the bank—an objection not under consideration, and not thought of. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395. He was treated by the company as if he was the consignee, and in this connection it is significant that the plaintiff, in his testimony, said he had gotten the figures on the freight from the agent of the defendant in Greensboro before he bought the fruit. So far as it appears from the evidence, the defendant would not have delivered the goods even if the plaintiff had presented the order from the bank. The defendant's purpose was to collect the bill for the freight, and not so much to see that the plaintiff paid the consignor for the bananas. It was contended for the defendant that the plaintiff should have paid the excess of carriage, received his goods, and then sued the defendant for that excess. That was one of his remedies, but he was not compelled to take that course. He might not have had the money with which to pay the excess of carriage, but, if he had, the defendant by its wrongful course could not compel the plaintiff to pay a greater amount than was due. Such a demand would place the law-abiding at the mercy of its violators. The plaintiff recovered from the defendant the difference between the amount of sales of the injured fruit as made by the plaintiff and its value when it was received at Greensboro.

Affirmed.

WALKER, J. (dissenting). My understanding of the facts and the law of this case differs so essentially from the views expressed in the opinion of the court that I am constrained to differ with the majority of the judges, not only in their reasoning, but in their conclusion. In its opinion the court says, "The plaintiff had not received from the bank a transfer of the bill of lading at the several times when he made the demands for the delivery of the fruit, and did not receive it until the 18th of the month." The court then proceeds to say that if the defendant had refused to deliver the fruit because the plaintiff had not received the assignment or transfer of the bill of lading from the bank, or partly for that reason, the defendant's contention that the plaintiff had no right to make the demand for the fruit until he presented the bill of lading would rest on a solid foundation. It seems to me that the court's deduction from the evidence that the defendant made no point about the bill of lading, but refused to deliver the goods solely upon the ground that the plaintiff would not pay the freight charges, is not a correct one. The plaintiff demanded the goods at the freight office at a time when he had no title to them, and

when consequently he had no shadow of right to make the demand. There is no evidence fit to be submitted to a jury that the plaintiff, at the time he demanded the delivery of the goods, on Monday, the 15th of November, 1902, had paid the draft or account held by the bank, and to which the bill of lading was attached, and certainly no evidence that he had received the bill of lading, or that the same had been assigned or indorsed to him (which I will presently show was necessary to vest him with the title), until Thursday, the 18th of November. The evidence is all the other way. Plaintiff was the only witness examined in regard to this matter, and he was not able to say how much money he had in the bank, and did not venture to testify that he had enough to pay the draft. He telephoned the bank that he would accept the fruit, but there is no proof reasonably sufficient to show that the bank actually charged the amount of the draft or account accompanying the bill of lading, and which it held for collection, to his account, or that it agreed to do so, and to extend credit to him for the difference between the amount of the draft and the amount, if any, already to his credit in the bank. There is affirmative evidence that he never paid the draft and got the bill of lading until the 18th, the day the goods were delivered to him, after they had been damaged by the freeze, for on the bill and draft was this indorsement: "Paid, November 18, 1901." The plaintiff admits, as the court states in its opinion, that he did not actually get the possession of the papers from the bank until the 18th. The fact therefore is established by the plaintiff's own evidence that when he made the demand on the 15th and 16th of November he did not have the bill of lading to produce. How has the defendant waived the production of the same? Is the mere fact that the plaintiff and the defendant's freight agent had a parley about the amount of the freight charges, during which nothing was said about the bill of lading, to be construed as a waiver? Surely not. The agent had the right to presume that the plaintiff had the bill of lading ready for delivery to him whenever they adjusted the difference in regard to the freight charges. He did not have the right to make the demand unless he had the bill of lading and was the rightful owner of the property, and was the agent therefore to suppose that he did not have the bill? The plaintiff knew whether he had the bill or not, and, if he chose to make a demand when he did not own the property, and had not provided himself with the bill of lading, duly indorsed or assigned, it was his own folly and his own fault; and is the defendant to suffer because its agent reasonably relied upon the plaintiff's implied representation that he had the right to make the demand? This would be a complete reversal of all legal presumptions. The agent had the right up to the very last moment before he actually delivered the goods, or

before they passed out of his possession or control, to demand the bill of lading. Even if there can be any such a thing as a waiver, upon the facts of this case, was not the plaintiff clearly negligent in not informing the agent as to the true situation? He knew that he did not have the papers, and had not paid the draft; the agent did not know this fact, and he had the right to think that no person would demand the goods who did not have the right to do so; and, in this state of the case, it was his right and his duty to hold the goods for the true owner, and to demand the bill of lading, when he acquired knowledge of the facts.

But how can a waiver, in a case like this one, confer title upon him who had no title? The doctrine of waiver is based upon the idea of estoppel. The general rule is that there can be no binding waiver of a right when there is no estoppel, and no valuable consideration received. 28 Am. & Eng. Enc. (1st Ed.) p. 531; *Wool v. Edenton*, 117 N. C. 6, 23 S. E. 40. "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party, amounting to an estoppel on his part." *Ross v. Swan*, 7 Lea (Tenn.) 467; *Diehl v. Ins. Co.*, 58 Pa. 452, 98 Am. Dec. 302. How can the plaintiff rely upon an estoppel, when all the facts were known to him, and none of them to the agent, and when the duty rested upon him to disclose those facts? Does any one suppose that the defendant's agent would have even discussed the question of freight charges with the plaintiff if he had known that plaintiff had not paid the draft, and did not have the bill of lading? Waiver cannot be predicated of the agent's conduct towards the plaintiff, who at the time had no right, so as by its mere operation to give the latter a title which he did not previously have. Such a thing would be an anomaly in the law. Who was entitled to the goods on the morning of the 18th, before the plaintiff got the bill of lading? The bank, of course. If the bank had demanded the goods of the defendant, could the latter have refused delivery? It could not, we must admit, and yet, if by the waiver the title passed to the plaintiff, it would follow that he was entitled to the property, and the bank could not recover that which was its own, and the title to which it had not in the least parted with. Can it be replied that the defendant would be compelled to deliver to the bank, and be liable to the plaintiff for a conversion of the goods? Could there be such a double liability, and this, too, when the defendant acted upon the natural and legal presumption that the plaintiff had the bill of lading when he first made his demand, as he ought to have had it, and when the plaintiff knew at the time that he did not have it, and consequently that he was not entitled to demand the delivery of the goods? How can there be any element of an estoppel, when the party relying on the estoppel has knowledge

of a material fact which he does not communicate to the other party, and of which the latter is ignorant?

Mere silence on the part of the defendant's agent did not amount to a waiver, because a waiver is not to be implied from a party's silence when he is under no obligation to say anything. *Railroad v. Rust* (C. C.) 19 Fed. 245. What obligation did the defendant owe to the plaintiff to demand the bill of lading? He had absolutely no title and no right to the goods, and, besides, if the demand had been made, the plaintiff did not have the ability to comply with it, and this is certainly necessary to be shown in order to constitute in his favor a valid waiver. Why do a vain thing? The plaintiff must have shown that all the time from his first demand for the goods he had the bill of lading ready to be delivered to the defendant upon its request for it. It seems to be an incongruity in the use of legal terms to say that a person can waive a right which he has, so that it can be availed of by a person who at the time has no right at all, when there is no fraud.

There is another objection to the claim of waiver set up by the plaintiff. The facts now alleged as 'constituting a waiver were not pleaded (*Manufacturing Co. v. Assur. Co.*, 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673; 20 Am. & Eng. Enc. p. 536), nor submitted to the jury, but the case was tried upon the theory alone that the plaintiff had actually paid the draft and received the bill of lading from the bank before the 18th. If there was no evidence to support this theory, the plaintiff must fail in the suit, especially as the defendant moved to nonsuit. Where a party alleges performance of a condition precedent to the exercise of his right, evidence of waiver of the condition is not admissible in support of such averment, because the two are inconsistent. He must amend his pleading, or in some proper way put himself in a position to rely upon the waiver. *Manufacturing Co. v. Assur. Co.*, supra; *Baldwin v. Munn*, 2 Wend. 390, 20 Am. Dec. 627. "Waiver is usually a question of intent, and knowledge of the right and an intent to waive it must be made to appear plainly, and this is to be determined usually from the declaration and conduct of the parties." 28 Am. & Eng. Enc. (1st Ed.) p. 528. It is a mixed question of law and fact, each case necessarily depending much upon its own peculiar circumstances and surroundings. It is a question of intention, and a fact to be determined by the triers of fact. *Okey v. Ins. Co.*, 29 Mo. App. 111.

Passing to the question as to the legal duty of a carrier with respect to the delivery of goods, we find it to be well settled that an obligation to deliver to the party having title under the bill of lading is imposed by law on the carrier, and is absolute and imperative, and a delivery to any other person is a conversion. *Railroad v. Barkhouse*, 100 Ala. 543, 13 South. 534. The duty of a com-

mon carrier is not only to carry safely, but to make a true delivery to the person to whom the goods are consigned. *Houston, etc., R. Co. v. Adams (Tex.)* 30 Am. Rep. 119. And a delivery to any other is made at the peril of the carrier, unless that person surrenders the bill of lading either made or indorsed to himself. *Gates v. Railroad*, 42 Neb. 379, 60 N. W. 583; *Weyand v. R. Co.*, 75 Iowa, 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504; *M., D. & T. Co. v. Merriam*, 111 Ind. 5, 11 N. E. 954; *Bank v. R. Co.*, 160 Ill. 401, 43 N. E. 756. One reason for this rule is that the bill of lading is the symbol of ownership of the property, and, though not negotiable, in the ordinary sense, is assignable. *Gates v. Railroad*, supra. The carrier can require the production or an inspection of the bill of lading at any time before delivery. *Porter on Bills of Lading*, § 379. The same right belongs to his agent, for his own security and protection, and he may exact production of the bill before he gives up the property. Until the carrier can deliver to the shipper or some one showing authority from him (the bill of lading, duly indorsed and delivered, being evidence of that authority), it is his duty to retain the goods; and, if they are delivered to one not legally entitled, the carrier will be liable to the true owner for their value. He has no right under any circumstances to deliver them to a stranger. *The Thames*, 14 Wall. 98, 20 L. Ed. 804. The carrier is bound not to deliver to any one who has not the bill or symbol of ownership. *Porter on Bills of Lading*, § 414. The pledgee of the bill of lading is not divested of his right or title by any delivery to the consignee, though that delivery was obtained upon presentation by the latter of a duplicate bill or invoice which the carrier treats as sufficient authority in him to receive the goods. Section 530. "The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsement. * * * Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow, in fact, of no excuse for a wrong delivery, except the fault of the shipper himself." *Hutchison on Carriers* (2d Ed.) §§ 130, 340, 344, et seq. It was therefore the duty of the defendant to hold the goods until the rightful owner or the holder of the bill of lading had made demand upon it for them, and the failure to do so subjects it to liability to such owner or holder for any loss or damage sustained by reason of its default. *Bass v. Glover*, 63 Ga. 745; *Bank v. Colgate*, 4 Daly, 41; *Bank v. Stewart*, 19 N. B. (P. & B.) 268; *Bank v. Hazeltine*, 78 N. Y. 104, 34 Am. Rep. 518; *Dwyer v. Ry. Co.*, 69 Tex. 707, 7 S. W. 504; *Express Co. v. Dickson*, 94 U. S. 549, 24 L. Ed. 285. If this be law, and it unquestionably is the law, the effect of

the decision in this case will be to hold that a carrier will be liable to one in damages if the latter makes a demand for the delivery to him of goods in the carrier's cars or warehouse, when the party making the demand has no claim or title to the goods, and no right, therefore, to make it, provided the amount of freight charges is tendered, and the carrier refuses to deliver the goods, but does not at the time call for the production of the bill of lading, properly indorsed to the consignee. In my opinion, this is an innovation in the law of carriers, and contravenes the well-settled rule that one who acquires title to property after it has been damaged does not acquire also the cause of action for the damage, unless it is expressly assigned to him. *Drake v. Howell*, 133 N. C. 168, 45 S. E. 539; *Liverman v. Railroad*, 114 N. C. 692, 19 S. E. 64.

The defendant is liable to the bank, if to anybody, for any damage to the goods while in the care of the defendant up to Thursday, the 18th. The right to recover upon this liability has never been transferred to the plaintiff, nor did it become his, as we have seen, by virtue of his subsequently acquired ownership of the goods. As said by the court in *Young v. Railway Co.*, 80 Ala. 100—a case very much in point—"The defendant's duty not to deal tortiously with the property of an innocent third person [a bank holding a draft with a bill of lading attached] cannot be affected by the failure of the depot agent first to tender back to the plaintiff [assignee or consignee] the amount of freight collected on the goods. The law will not compel the defendant carrier to commit a tort by delivering goods to the plaintiff, because the agent agreed to do so in consideration of the payment of freight," unless he is the holder of the bill of lading. No one shall be rebuked by the law for doing that which he is enjoined by the law to do. Much less will he be made to suffer for his correct conduct. The defendant's agent had the right to rely and act upon the principle, knowledge of which the plaintiff should have had—that according to the usual and ordinary course of business recognized by the law, the goods could not be obtained by him, except upon the production of the bill of lading—and his conduct, therefore, was not, in law or in fact, calculated to mislead the plaintiff, and thus to create an estoppel upon the company, from which a waiver of the right to call for the bill of lading would be presumed or even inferred. *Forbes v. Railroad*, 133 Mass. 157.

The motion to nonsuit, in my opinion, should have been granted, as the plaintiff showed no just or legal claim to the damages he seeks to recover, and there should at least be a new trial, in any view of the case, as the court charged the jury upon a theory which was not supported by any proof, and the question of waiver, upon which the case is now decided, if there is any evidence of it, was not submitted to the jury.

As the plaintiff is allowed to recover upon a cause of action which I do not think he owns, the defendant is practically in danger of being twice vexed for one and the same cause, or of being compelled to assume a double liability, which surely would be unjust, and the rule of law which produces such a result should be very clearly established. Indeed, if the law is to remain as in this case declared, it will be difficult for common carriers to conduct their business with any degree of safety. If the defendant is liable for any negligence to the bank, which at the time of the injury to the bananas was the true owner, as the holder of the draft and bill of lading, let the recovery be confined to the true right and title, and not go to one who has no right at all.

CONNOR, J., concurs in the dissenting opinion.

(125 N. C. 538)

DAVIS v. TOWN OF FREMONT.

(Supreme Court of North Carolina. May 24, 1904.)

MUNICIPAL CORPORATIONS—NECESSARY EXPENSES—LIGHTING PLANTS—SUBMISSION TO POPULAR VOTE.

1. Providing a system of lighting the streets of a town is a necessary expense, for which a debt may be contracted and bonds issued, without submitting the proposition to a vote of the people, where there is no limitation in the charter of the town on its power to contract for necessary expenses.

Douglas, J., dissenting.

Appeal from Superior Court, Wayne County; W. R. Allen, Judge.

Suit for injunction by J. D. Davis against the town of Fremont. From a judgment refusing to grant the injunction, plaintiff appeals. Affirmed.

M. T. Dickson, for appellant. F. A. Daniels, for appellee.

CONNOR, J. The commissioners of the town of Fremont in Wayne county, on May 18, 1904, adopted a resolution reciting that experience had demonstrated the necessity for providing a system of lighting the streets of the town, and that all experiments therefore made to do so had proved unsuccessful; that, after investigation, the board had ascertained that an electric light plant can be erected of sufficient capacity to furnish light for the town and its inhabitants at a cost of \$4,000. They proceed to declare that the establishment of an electric light plant for the town is a public necessity, and that it is necessary to contract a debt of \$4,000 for such purpose. It is thereupon resolved to issue bonds in said amount of \$4,000, each carrying interest at 6 per cent., and maturing January 1, 1919. Provision is made for a sale of the bonds at not less than par, and

that the proceeds of such sale shall not be used for any other purpose than the purchase and establishment of said plant. Provision is also made for levying a tax for the payment of the interest on the bonds, and a sinking fund to pay the principal at maturity. It appears from the pleadings that the town of Fremont was duly incorporated with all the powers conferred upon cities and towns by chapter 62 of the Code. The town had a population of 800, and the assessed value of the real and personal property is \$222,000. Its present rate of taxation is 45 cents on the \$100 worth of property and \$1.35 on each poll. Its chartered limit is 66 $\frac{2}{3}$ cents and \$2 on each poll. The plaintiff, a taxpayer in the town, seeks to enjoin the commissioners from issuing the bonds for that the proposition has not been submitted to a vote of the people of the town. The cause was heard by his honor Judge Allen upon a motion for an injunction, who found the facts above set forth, and the additional fact that there was no limitation in the charter of the town of Fremont upon the power, to contract for necessary expenses, and the further fact that the town can pay the interest on said debt and provide a sinking fund to pay the principal, without exceeding the limit of taxation in its charter, and, being of opinion that the establishment of the electric light plant is a necessary expense, refused to grant the injunction. Plaintiff appealed.

We are of the opinion that the facts set forth in the order of his honor bring the case clearly within the ruling of this court in *Fawcett v. Mt. Airy*, 134 N. C. —, 45 S. E. 1029. That case was decided after careful consideration, and with the limitation of the general principle found in *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948, and *Robinson v. Goldsboro* (at this term) 47 S. E. 462, we are content to abide by the law as therein laid down. We think the decision sound in reason, and consistent with the conditions existing in this state. The power thus recognized should be carefully exercised. The duty rests upon the people in the town to intrust it only to men of good judgment and incorruptible integrity, who recognize their responsibility to the people. If injury comes to the people, they are alone responsible for it. We see nothing in the record to cause us to doubt the power being wisely exercised.

The judgment below is affirmed.

DOUGLAS, J., dissents.

(125 N. C. 680)

CREECH v. WILMINGTON COTTON MILLS.

(Supreme Court of North Carolina. June 1, 1904.)

MASTER'S NEGLIGENCE—INJURY TO SERVANT—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

1. Where a servant operating looms went to get filling, as she was permitted, but not re-

¶ 1. See *Municipal Corporations*, vol. 24, Cent. Dig. § 1941.

quired, to do, and in bending over to take it from a box sitting in the usual place in front of unboxed cogwheels, her clothing was drawn into the wheels, and she was injured, the nonsuit of an action therefor was properly refused.

2. A master sued for injuries to a servant from having her clothing caught by unboxed cogwheels, not connected with her machine, and located at a place where she was permitted, but not required, to go, is not liable if the servant failed to exercise the care of an ordinarily prudent person.

Appeal from Superior Court, New Hanover County; Brown, Judge.

Action by M. L. Creech against the Wilmington Cotton Mills. Judgment for plaintiff, and defendant appeals. Reversed.

Iredell Meares, for appellant. J. D. Bellamy and Herbert McClammy, for appellee.

DOUGLAS, J. This is an action for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in failing to box certain cogwheels. The plaintiff was operating four looms, the filling for which was ordinarily provided by a boy, whose duty it was to bring it to the looms. When the looms got out of filling, and the boy failed to bring it around in time, the girl tending the loom sometimes went after it. She was not required to do so by the rules, but it was frequently done, and permitted to be done. On the occasion of the accident the plaintiff went to get the necessary filling from a box which had been left in its usual place in a passageway in front of certain unboxed cogwheels. In bending over to reach down into the box, her clothing was caught by the cogwheels and wound up tightly, so that she was drawn down upon the wheels and injured. This, and more, the plaintiff's evidence tends to prove; and hence there was no error in the refusal to nonsuit. In fact, as the case is now presented to us, we find but one exception that can be sustained. The defendant asked the court to charge "that if the jury find that when this plaintiff went to get the filling from the box she failed to exercise that care which an ordinarily prudent person would or should have exercised, and because of this want of care was injured, then the plaintiff contributed by her own negligence to her own injury, and cannot recover in this action." This prayer was refused by the court. In this, we think, there was error, and that the defendant's prayer, as stated above, should have been given. We are not disposed to modify in the slightest degree our decisions holding that it is the duty of the master to furnish safe machinery, for which it is not necessary to cite authorities. There was no defect in the looms tended by the plaintiff, nor was she injured by them. The cogwheels were not in her charge, nor was she compelled to work with them, or even go near them, unless she saw fit. If she preferred to go after the filling, instead of letting her looms remain idle, she should have exercised the care of an ordinarily prudent

person. A failure to do so would, under such circumstances, be contributory negligence. As there was some evidence tending to show that she did not exercise such care, the issue should have been left to the jury.

New trial.

(135 N. C. 680)

HENDERSON COUNTY COM'RS v. WILLIAMS, Treasurer.

(Supreme Court of North Carolina. May 31, 1904.)

COUNTY BONDS—PAYMENT OF INTEREST—SUIT TO ENJOIN—SUFFICIENCY OF COMPLAINT.

1. A complaint by a board of county commissioners to enjoin the treasurer from paying interest on county bonds sought to be invalidated, which fails to allege that he has any funds applicable to such purpose, or that he threatens or proposes to pay any public funds on the bonds or interest, is fatally defective.

Appeal from Superior Court, Henderson County; Hoke, Judge.

Action by the commissioners of Henderson county against J. Williams, as treasurer. On appeal from the judgment. Action dismissed.

H. G. Ewart, Anderson & Blythe, Toms & Rector, and H. D. Ray, for appellee.

PER CURIAM. This action is brought by the plaintiff board of commissioners against the defendant treasurer of the county; the relief asked being that the bonds issued by the commissioners of said county be declared invalid, and the treasurer be enjoined from paying the interest on said bonds. It is to be observed that there is no allegation that the defendant has any funds in his hands applicable to such purpose, or that he threatens or proposes to pay any public funds on such bonds, or the interest thereon. As the basis for invoking the injunctive power of the court, the complaint is fatally defective. Action dismissed.

(135 N. C. 650)

KELLY v. JOHNSON et al.

(Supreme Court of North Carolina. May 31, 1904.)

VENDOR AND PURCHASER—LAND INCLUDED IN CONTRACT—MUTUAL MISTAKE—ISSUES—ADMISSIBILITY OF EVIDENCE—HARMLESS ERROR—EXCEPTION TO INSTRUCTIONS.

1. In a suit by a vendee for specific performance, defended on the ground that certain land was included in the contract by mistake, an issue tendered by defendant which omits to direct inquiry to the mutuality of the mistake is properly rejected.

2. In an action by a vendee for specific performance, evidence of the defendant vendor as to who was living on land claimed by a prior purchaser from him under an oral contract at the time of the execution of plaintiff's contract is admissible on the issue raised by defendant of a mutual mistake in the later contract in including such land.

3. Error in excluding questions asked a witness is not ground for reversal, where the excluded questions are afterwards answered.

4. Even though an exception to the denial of a motion for a new trial be construed as an

exception to the charge, it cannot be reviewed, since it is a "broadside exception."

Appeal from Superior Court, Cumberland County; Bryan, Judge.

Suit by J. T. Kelly against W. J. Johnson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

On November 24, 1897, the defendants, W. J. Johnson, W. H. Britton, and A. M. Prince, doing business under the name and style of the Manchester Lumber Company, executed a bond for title to the plaintiff, obligating themselves to convey to him, upon the payment of the purchase price, a good and sufficient deed for three tracts of land, described by metes and bounds. Plaintiff paid several of the notes at maturity, and tendered the balance due on the purchase price, demanding the execution of a deed in accordance with the condition of the bond. W. J. Johnson, who had acquired the rights of the other obligors, tendered a deed for said land, excepting therefrom 100 acres claimed by one Martin Williams. The plaintiff refused to accept the deed as tendered, and instituted this action to compel specific performance. The defendants, admitting the execution of the bond, payment, tender, etc., averred, by way of defense, and as the basis for equitable relief, that, prior to the execution of the bond for title, the defendants had entered into a contract with Martin Williams to convey to him 100 acres of the land described in the bond; that Williams had entered into possession of the land, and had made payments on account of the purchase money, and improvements on the land; that the inclusion in the condition of the bond of said 100 acres was "by inadvertence and oversight"; that plaintiff knew of Williams' possession and interest, and that it was not intended to convey or include the said land in the bond. The defendants ask that the bond be so reformed that the said 100 acres be excepted therefrom. Martin Williams was permitted to interplead and set up his claim to the 100 acres. The cause coming on for trial, the plaintiff demurred *ore tenus* to the interplea, for that it failed to state any cause of action. The demurrer was sustained, and the interpleader excepted. The defendants tendered certain issues, which were rejected by the court, and in lieu thereof the court submitted the following issue: "Was the insertion of the one hundred acres in the bond for title by the defendants to the plaintiff a mutual mistake?" To which the jury responded, "No." From a judgment upon the verdict, the defendants appealed.

Robinson & Shaw, for appellants. D. T. Oates, Seawell, McIver & King, and N. A. Sinclair, for appellee.

CONNOR, J. The issue submitted by his honor presented the contention to the jury. The first issue tendered by the defendants was defective, in that it omitted to direct the

inquiries to the alleged mutuality of the mistake. The second issue was directed to matter which was evidentiary. The exception cannot be sustained. The defendant W. J. Johnson was asked on direct examination, "Who was living on, and who was in possession of, the land claimed by Martin Williams, at the time of the execution of the bond for title?" This was, upon objection, excluded. We think that the question was competent upon the issue as to the mutual mistake. The defendants say that it was not the intention of either party to the contract to include the 100 acres, that Martin Williams was in possession, and that plaintiff had knowledge of it. This was a fact which the jury could consider upon the issue. The error, however, seems to have been cured by the answer to the question, "At the time of the execution of the bond, who was in possession of the one hundred acres claimed by Martin Williams, and did the plaintiff in this action take the bond for title with notice that the one hundred acres was in possession of another, under contract of purchase, and did the plaintiff at that time know that the defendant did not intend to convey the one hundred acres of land?" The witness answered that he knew it was sold to Martin Williams, and he could not say whether he knew that he did not intend to convey it or not. The witness was asked whether the 100 acres was surveyed, and the lines marked. The question was excluded, but the witness was recalled, and testified, "The lines of Martin Williams' tract were distinctly marked." This cures the error in excluding the question when first asked. The other questions excluded were fully answered at other times during the examination of the witnesses. We find no reversible error in this respect. The parties were permitted to put their testimony fairly before the jury. The plaintiff denied all knowledge of the claim of Williams, and the jury found in accordance with his contention.

His honor instructed the jury: That any contract to sell or convey lands, or any interest in them, unless some memorandum or note thereof is in writing, is void. That they would not consider the contract by parol to Williams. It was void so far as Kelly is concerned. The defendants must establish mistake by clear and convincing proof—by evidence outside the bond and inconsistent with it. The mistake must be mutual. It must be a mistake both upon the part of Kelly and Johnson and Britton, and they must show it, not Kelly. A parol contract is void. They had nothing to do with Williams. The defendants' brief discusses separately six exceptions, three of which are addressed to the charge. The record contains no exception to the charge, the entry being: "The defendants move for a new trial. Motion denied, and defendants except. Judgment." If we should construe this as an exception to the charge, it will not avail the defendants, be-

ing what is termed a "broadside exception." It is settled that such an exception will not be sustained. The record contains no assignment of error.

We have examined the entire record, and find no reversible error therein. No error.

(135 N. C. 647)

KELLY v. JOHNSON et al.

(Supreme Court of North Carolina. May 31, 1904.)

OCCUPYING CLAIMANT—COMPENSATION FOR IMPROVEMENTS.

1. One who occupies land under a parol contract of purchase, and who has made valuable improvements thereon, is entitled, on interpleading in a suit by a subsequent purchaser for specific performance, to the value of his improvements, to be deducted from the balance of the purchase money due from plaintiff, who, under his contract, is entitled to a deed with full covenants of warranty.

Appeal from Superior Court, Cumberland County; Bryan, Judge.

Suit by J. T. Kelly against W. J. Johnson and others, in which Martin Williams interpleads. From a judgment sustaining a demurrer to the interplea, the interpleader appeals. Reversed.

I. A. Murchison, for appellant. Seawell, McIver & King, D. T. Oates, and N. A. Sinclair, for appellees.

CONNOR, J. Martin Williams, by permission of the court, filed his interplea, setting forth that during the month of September, 1896, he entered into a contract with the defendants for the purchase of 100 acres of the upper end of the land described in the complaint, for which he agreed to pay the sum of \$200; that defendants caused the land to be surveyed, and put him in possession thereof; that he has remained in possession ever since, and that plaintiff well knew that he was in the actual possession of said 100 acres when he made his contract with defendants; that he has made improvements, buildings, etc., at a cost of \$100; that he holds receipts for money paid by him to defendants on said land, headed, "Received of Martin Williams on land," amounting to \$98; that he is ready and anxious to pay the balance of the purchase money on receipt of a deed, etc. The plaintiff demurred *ore tenus* to the interplea. The demurrer was sustained, and the interpleader excepted and appealed.

The facts set forth in the interplea and admitted by the demurrer appeal very strongly to a court of conscience for relief. We should hesitate long and consider anxiously before concluding that no relief in such case can be found in the doctrines of equity. That the innocent, and, we presume, ignorant, man, who, relying upon the promise of his vendor, has entered upon the land improved, and partly paid for it, must go forth bereft of his money, with no pay for his im-

provements, can be permitted only in obedience to some statute, or unvarying principle of law, beyond the power of the chancellor.

It is well settled that the defendants, upon the admitted facts, cannot oust him from the land without accounting to him for his improvements and purchase money paid. To permit them to do so would, in the language of Judge Gaston in *Albea v. Griffin*, 22 N. C. 9, be "against conscience." "If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have put upon the property." *Daniel v. Crumpler*, 75 N. C. 184; *Hedgepeth v. Rose*, 95 N. C. 41; *Pitt v. Moore*, 99 N. C. 91, 5 S. E. 389, 6 Am. St. Rep. 489; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169, in which *Merrimon, J.*, said: "It seems that, having paid the money, he took possession of the land in pursuance of his supposed right under the voidable contract of purchase, and with the sanction of the vendor. It would be inequitable and against conscience to allow the latter to turn him out of possession without restoring his outlay in cash and for valuable improvements put on the land while so in possession." *Vann v. Newsom*, 110 N. C. 122, 14 S. E. 519. It would seem that the receipts set out in the interplea are too indefinite to be used as a contract to convey. *Fortescue v. Crawford*, 105 N. C. 29, 10 S. E. 910; *Harris v. Woodard*, 130 N. C. 580, 41 S. E. 790.

The question is presented whether the plaintiffs or the defendants are liable to the interpleader. Assuming the facts to be as set out in the interplea and admitted by the demurrer, the plaintiff had notice of the equity of the interpleader when he entered into the contract of purchase and paid a part of the purchase money. Having such notice, he took the equitable title subject to the equity of the interpleader, and when he acquires the legal title by the deed which the defendant is directed to execute, or using the judgment as a conveyance of the legal title, his right to oust the interpleader will be subject to the equity of the interpleader for reimbursement in the same way as the defendants would have been. As, however, it appears by the pleadings and bond for title that he is entitled to have a deed with full covenants of warranty, we can see no reason why he may not withhold the balance due defendants on the purchase money until upon an accounting it is ascertained what amount he will have to pay the interpleader to secure possession of the land. As all parties in interest are before the court, a judgment may be drawn so that their rights may be protected. This will be done by directing an accounting between defendants and the interpleader, and the payment from the balance of the purchase money of the amount due him. He will, upon such payment being made, surrender possession of the land

to the plaintiff. If the plaintiff or the defendants shall wish and shall be permitted to file an answer to the interplea, raising issues of fact, the final judgment will await the trial of such issues.

The judgment sustaining the demurrer is reversed. Let a judgment be drawn in accordance with this opinion. The plaintiff will pay the costs of this court. Reversed.

(135 N. C. 788)

WALKER v. CAROLINA CENT. R. CO.
(Supreme Court of North Carolina. June 1, 1904.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—NEGLIGENCE—PROXIMATE CAUSE OF INJURY—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—DEFECT IN FORM—ASSUMPTION OF RISK—RIGHT OF RAILWAY COMPANY TO PLEAD.

1. Evidence in an action by an employé of a railroad company for injuries from a defective sand drier examined, and *held* to entitle plaintiff to go to the jury on the questions of negligence and proximate cause.

2. While an instruction to the jury in a personal injury case to answer the issue of contributory negligence, "No," is bad in form, yet it is not ground for reversal where there is in fact an entire absence of evidence of contributory negligence.

3. Under Priv. Laws 1897, p. 83, c. 56, depriving railroad companies of the defense of assumption of risk, a railroad company cannot plead such defense to an action by an employé for injuries from a defective sand drier.

Appeal from Superior Court, Mecklenburg County; Neal, Judge.

Action by William Walker against Carolina Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action on account of personal injuries received by the plaintiff through the negligence of the defendant. The evidence tends to prove that the plaintiff's clothing caught fire from a defective sand drier which he was operating in the performance of his ordinary duties. The issues and answers thereto were as follows: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer. Yes." "Did the defendant by his own negligence contribute to his own injury? Answer." "What damage has the plaintiff sustained? Answer. \$900."

The only assignments of errors are as follows: The defendant requested the court to charge as follows: "There is no evidence of negligence of the defendant corporation, and the jury will answer the first issue, 'No.'" His honor refused to give this instruction, to which refusal the defendant excepted. The defendant further requested the court to charge as follows: "There is no evidence that the hurt done to the plaintiff was caused by the negligence of the defendant, and the jury is therefore instructed to answer the first issue, 'No.'" His honor refused to give this instruction, and to this refusal the de-

fendant excepted. Upon the second issue his honor charged the jury as follows: "There is a second issue: 'Did the plaintiff by his own negligence contribute to his own injury?' And the court charges you, upon the testimony, to answer that issue, 'No.'"

The plaintiff testified that he had been working for the defendant in the same capacity for 3 years, and had worked with the machine in bad shape for 30 days; that he had called the attention of the master machinist—the "boss man"—to the defects in the drier, and he had patched it up. Being asked to describe the machine, he did so as follows: "There was a kind of bowl or hopper, with legs to it; kinder like a stove. Hopper was in the shape of a sugar-loaf hat, and stood on a foundation. Underneath was holes the size of a silver dollar. Sand ran out of hopper through these holes. In the foundation was a door. The foundation was brickwork. There was a furnace underneath there, and above the foundation. This was made of cast iron. Hopper was made of wire, and was funnel-shaped. Don't know what kind of wire; good-sized wire. You put the fire in a door when the machine was in good order. Put the sand—wet sand—in there to be dried. When it was dry the sand came out from the edges of the door all around where the holes were. Had to get down and shovel it out where I could sift it. Took it out with a large scoop. Machine had a pipe on it when it was in good shape, a good while ago. Pipe extended out through the top of the house. The sand drier was in a house; pretty good house; one room and had a partition—a kind of sand bin. He had took and patched it. The top rim of the bowl had fallen down on the bottom. They had took some of this old sewer pipe and patched it where it had fell in, and daubed it up with mud, and left the stack off of it. There was an old piece of stack in the yard that I had used, but I couldn't manage with that. * * * When I caught on fire I was shoveling sand from underneath, where the sand run out. The hopper had squashed down. I couldn't put but a little bit of sand in at the time. Couldn't cover up the holes, because it was shallow. (Shows jury where he was standing to take sand out.) I suppose the blaze out of one of the holes caught me on fire. I don't know exactly. I was on fire, and had to do around."

Burwell & Cansler and Day & Bell, for appellant. Clarkson & Duls and T. L. Kirkpatrick, for appellee.

DOUGLAS, J. (after stating the facts). While we are not mechanical experts, we think that the fact that a cast-iron sand drier had the smoke pipe knocked off, was "squashed down," and was daubed up with mud, was some evidence of a defective machine, from which the jury might have inferred the negligence of the defendant. That

the plaintiff's clothing caught on fire, when the only fire anywhere near him was in the sand drier, would tend to show that he caught on fire from the sand drier. The further fact that he had been working with sand driers for three years, and never caught fire until this machine became defective, would, with his other testimony, also tend to prove that the defect was the cause of his being burned. Therefore the prayers to instruct the jury that there was no evidence tending to prove the negligence of the defendant, or that such negligence was the proximate cause of the injury, were properly denied. The duty of the defendant to furnish safe machinery, the failure of which constitutes continuing negligence, is too well settled to require any great degree of argument or authority. *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115; *Troxler v. Railroad*, 122 N. C. 908, 30 S. E. 117; *Id.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 818, 70 Am. St. Rep. 580; *McLamb v. Railroad*, 122 N. C. 862, 29 S. E. 894; *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817.

Upon the issue of contributory negligence the court charged as follows: "The court charges you, upon the testimony, to answer that issue, 'No.'" We cannot approve of the form of such an instruction, and yet, as it was correct, in legal effect, under the testimony in this case, we cannot set aside the verdict. What his honor evidently meant was that there was no evidence tending to prove contributory negligence, and in that we think he was correct. As his charge was, in legal effect, merely the direction of a negative verdict upon the entire absence of evidence, it comes within the rule laid down in *Wittkowsky v. Wasson*, 71 N. C. 451, and *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, cited with approval in *Lewis v. Steamship Co.*, 132 N. C., at page 912, 44 S. E. 668.

It has been suggested that the question of assumption of risk arose under the issue of contributory negligence, and should have been submitted to the jury. This is answered by reference to the act of February 23, 1897 (*Priv. Laws* 1897, p. 83, c. 56), depriving railroad companies of such a defense. *Thomas v. Railroad*, 129 N. C. 392, 40 S. E. 201; *Cogdell v. Railroad*, 129 N. C. 398, 40 S. E. 202.

The judgment of the court below is affirmed. Affirmed.

(68 S. C. 431)

STATE v. ADAMS.

(Supreme Court of South Carolina. April 11, 1904.)

HOMICIDE—EVIDENCE—DECLARATIONS AGAINST INTEREST—CODEFENDANT—PRIOR DIFFICULTY—MANSLAUGHTER—DEFINITION—INSTRUCTIONS.

1. In a criminal trial a defendant's declarations against interest are not admissible against his codefendant.

2. Where incompetent evidence has been admitted without objection, the proper procedure to correct the error is by motion to strike out.

3. Self-serving declarations, denoting an intention merely, are admissible only if regarded as an act of the party supporting his testimony.

4. In a prosecution for murder, in which evidence that defendant and deceased had had a previous difficulty had been admitted and the main facts brought out, evidence as to the details was properly excluded.

5. In a prosecution for homicide, a charge that manslaughter is the killing of another without malice aforethought, expressed or implied, was not error, where other instructions gave a full discussion of malice as an element of murder, and specifically stated that murder differed from manslaughter in that in murder the element of malice must exist, while in manslaughter that element is wanting.

6. Where, in a prosecution for murder, a certain fact is introduced by defendant, the application of the law to such fact cannot be complained of as a charge on the facts.

7. In a prosecution for homicide, failure to instruct on manslaughter is not error where there is no evidence to support such instruction.

8. In a prosecution for homicide, failure to charge that the jury could find the defendant guilty of murder with a recommendation for mercy, and as to the effect of such verdict, is not error where no request for such an instruction is made.

Gary, A. J., dissenting.

Appeal from General Sessions Circuit Court of Colleton County; Gary, Judge.

R. A. Adams was convicted of murder, and appeals. Affirmed.

Howell & Gruber and J. M. Walker, for appellant. Solicitor Davis, Griffin & Padgett, and Peurifoy Bros., for the State.

WOODS, J. The defendants were jointly indicted for the murder of Henry Jaques. They were tried at the March, 1903, term of the court of general sessions for Colleton county. W. B. Adams and Henry Hoff were acquitted. R. A. Adams was convicted of murder, and sentenced to death. His motion for a new trial was overruled, and he appeals to this court, alleging error in the admission of testimony and in the charge of the presiding judge.

The appellant was, of course, entitled to the benefit of any defense for which the evidence afforded a foundation, but the discussion of the exceptions will be better understood when prefaced by a statement of the main issue. R. A. Adams and Henry Jaques met on or very near the public road on February 11, 1903. Adams shot and killed Jaques. On January 4, 1903—a little more than a month before the fatal meeting—Jaques had shot Adams in the latter's own back yard for some alleged improper language to Jaques' family. The main issue on the trial was whether Adams killed in self-defense or in revenge.

The appellant first submits the presiding judge erred in allowing the witness John O. Jaques to narrate a conversation with Henry Hoff, in which, as he testified, Hoff told him R. A. Adams had said to him, "We have killed Henry Jaques," and upon being asked why he had done so, answered: "I

just couldn't help it. It took a man with a big heart to do it." The circuit judge did all he could to prevent this statement from affecting R. A. Adams by ruling that it could be taken as evidence against Hoff alone. As has been often held, there was no error in admitting the evidence with this qualification.

Error is assigned in the second exception in allowing John O. Jaques to testify that Hoff's wife had told him her husband knew all about the killing. No objection was made until the witness had made this statement, and no motion was made to strike it out. Immediately after this statement the witness said: "I went through the yard, and said, 'Has Henry come home yet?' She said, 'No.' I said, 'I suppose you heard that Albie Adams has killed Henry Jaques?' She said, 'No, but Henry told me he was going to do it this week.'" Whereupon the presiding judge of his own motion stopped him, saying, "No; just explain why you put her out." No motion was made to strike out this last statement of the witness. An effort had been made to discredit this witness by having him admit that he had turned Hoff's family off witness' land into the road while Hoff was in jail. The court properly held that witness could explain his reason for doing so, but when the explanation involved hearsay evidence against the defendants the witness was stopped. To avail himself in his appeal of any prejudice growing out of this statement, the appellant should have moved to strike it out.

In the third exception it is submitted that W. B. Adams should have been permitted to testify that his codefendant R. A. Adams repeatedly urged him to leave Ackerman's house, where they had stopped just before the homicide, and return home. The rule is that a defendant cannot introduce in his defense his own statements made to others. Even if this urging by appellant R. A. Adams could be regarded as an act of his tending to support his testimony that he had no intention of waiting for Jaques to come, and not as a mere statement in his own favor, the appellant was not prejudiced by its exclusion, for the reason that he himself does not testify that he did anything more than express his own intention of leaving on account of the rain, and only urged his brother to go with him after he had actually started off. There is nothing in his testimony to indicate that he was deterred from leaving by any indisposition of his brother to accompany him, or that he did not leave as soon as the inclination came.

In the fourth exception it is alleged that the wife of the deceased should not have been allowed to testify in reply that R. A. Adams cursed her on January 4th, before he was shot on that day by her husband. The court had allowed Youmans and Dandridge, two of defendants' witnesses, who were near by, to testify to every detail of this difficulty, which occurred some time before the homi-

cide, giving the language of both parties as far as they heard it. As the defendants' counsel was about to have another witness to give his version, the following colloquy took place: "The Court: You can prove the fact that these parties had a previous difficulty, but can't go into all the details of that difficulty. That is an issue the state is not called upon to meet. It consumes too much time. Mr. Gruber: Where the deceased committed acts even against a third person in the presence of the prisoner, it is competent to show it. We desire to show these acts were committed against the person of the prisoner by the deceased. The Court: Prove the facts, but the minute details is a consumption of time." This view of the court was manifestly correct. The evidence as to the previous difficulty was competent only to show the animus of the parties, and thus aid the jury in reaching a conclusion as to who was probably the aggressor, and what demeanor each party had reason to expect from the other when they met and the fatal difficulty occurred. The general details of the previous trouble were properly excluded. The specific question as to whether R. A. Adams on that occasion cursed Mrs. Jaques was never excluded. The appellant was asked this question on his direct examination, and testified that he did not curse her. This tended to show that, in the first difficulty, Jaques had shot on slight, not great, provocation, and so may have had some bearing on his animus toward appellant at the time of the homicide. It was competent for the state to introduce the testimony of Mrs. Jaques to contradict this statement. It was not an abuse of discretion for the circuit judge to refuse to allow the defense to introduce other witnesses on this collateral inquiry.

The fourth, fifth, sixth, and seventh exceptions raise practically the same questions. For the reasons above stated, they must be overruled.

In his eighth exception, the appellant insists the presiding judge was in error in charging that manslaughter "is the killing of another without malice aforethought expressed or implied." It is true that killing a human being without malice, to constitute manslaughter, must be unlawful; but these words of the circuit judge, when taken in their connection, could not have misled the jury. In the course of the charge there had been a full discussion of malice as an element necessary to the crime of murder. Then, to distinguish manslaughter from murder—not from self-defense, or misadventure, or other excusable killing—the presiding judge said: "Murder differs from manslaughter in this: that in murder the element of malice must exist, while in manslaughter the element of malice is wanting. That is the distinction—murder is the killing of another with malice, manslaughter the killing of another without malice aforethought, expressed or implied." This clearly meant that if the

jury found that a homicide had been committed having all the elements of murder except malice, the crime would be reduced to manslaughter. Subsequently, in the course of the charge, self-defense, which was appellant's plea, was fully covered. The appeal cannot be sustained on this ground.

Error is charged in the ninth exception because the circuit judge referred to the shooting of appellant by the deceased, which occurred on January 4th, as a fact in the case. Not only was this shooting admitted by both sides, but it was brought into the case by the defendants, who introduced testimony, as we have seen, intended to show that there was little provocation for it, and that it was due to the vindictiveness of Henry Jaques. It was therefore not for the appellant to complain that the judge charged the jury the fact had been established. *State v. Nickels*, 65 S. C. 176, 43 S. E. 521. If the appellant cannot complain of the statement of a fact which he himself proved, he cannot complain of a statement of the law applicable to that fact. It will be observed that the charge does not instruct the jury what inference is to be drawn from the shooting of January 4th; but in stating the reason for admitting the evidence as to that occurrence, after having referred to it as a fact, the judge immediately returned to a general statement of the law, using these words: "The law recognizes the fact that, where he has recently had a personal encounter with another, and they meet, that fact being known, that the party having had this personal encounter, or having been threatened, can construe more harshly and act more quickly upon apprehension than with one with whom he had not had an encounter or been threatened. Therefore previous threats and quarrels are permitted, not as a defense for killing a man, not as a defense to a homicide, but to show the attitude of the parties." No enlightened tribunal could receive such testimony on any other ground than that stated in this quotation; and we think it was not only proper, but the imperative duty of the circuit judge, to charge it should have no other effect. The case is essentially different from *China v. Sumter*, 51 S. C. 455, 29 S. E. 206. There the charge was: "If the city place obstructions there, not giving any notice, and he sustained damages, it would be an act of negligence and mismanagement, and the city would be responsible." This was held erroneous, for the reason, as said in *Bridger v. R. R. Co.*, 25 S. C. 30, "The law, however, does not state what facts proved will show the absence of ordinary care." The distinction is that the law does state that homicide committed in revenge for a previous injury is murder. The portion of the charge now under review was nothing more than a statement of this proposition.

The ninth, tenth, and eleventh exceptions stand on the same ground, and cannot be sustained.

In the twelfth, thirteenth and fourteenth exceptions appellant complains that the presiding judge did not specifically instruct the jury that they could find a verdict of manslaughter or of murder, with a recommendation to mercy, and inform them of the effect of such recommendation. As we have seen, the presiding judge did in a general way distinguish murder and manslaughter in his charge. But, aside from this, a careful examination of the testimony fails to suggest any theory upon which a verdict of manslaughter could rest. The issue was clearly murder or self-defense, and a new trial should not be granted for failure to charge upon a phase of the law to which the testimony could not, in any reasonable view, be made to apply. *State v. Dodson*, 16 S. C. 464. Failure to charge the jury that they could convict of murder and recommend to mercy, and that such recommendation would result in a sentence of life imprisonment instead of a sentence of death, has been held by this court not to be reversible error, when there was no request for such a charge. *State v. Owens*, 44 S. C. 324, 22 S. E. 244. The rule is thus stated in *State v. Meyers*, 40 S. C. 556, 18 S. E. 892: "As will be observed, in the first ground of appeal the appellant alleges that the circuit judge erred in failing to make a charge that appellant now thinks would have inured to his benefit. By numerous decisions of this court it has been held to be the law in this state that no such allegation of error will be considered in this court unless a request for such charge has been made to the circuit judge on the trial before him." See 11 *Ency. P. & P.* 217, and the numerous authorities there cited. The author says: "The failure of a judge to charge upon any material point usually results from inadvertence, and the law casts upon the parties the duty of calling the judge's attention to the matter. If he then refuses to give a proper requested instruction, such refusal is a ground of error; but a party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time. The court cannot be presumed to do more in ordinary cases than express its opinion upon the questions which the parties themselves have raised on the trial. It is not bound to submit to the jury any particular proposition of law unless its attention is called to it. If counsel desire to bring any view of the law of the case before the jury, they must make such view the subject of a request to charge, and, failing in this, they cannot assign error." Any other doctrine would, we think, produce overwhelming embarrassment and delay in the practical administration of justice. Under the Constitution of 1895 the rule has been applied in *State v. Smith*, 57 S. C. 489, 35 S. E. 727; *State v. Chiles*, 58 S. C. 47, 36 S. E. 496; *Youngblood v. R. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 *Am. St. Rep.* 824; *Sudduth v. Sumner*, 61 S. C. 276, 39 S. E.

534, 85 Am. St. Rep. 883; and other cases. The doctrine is based on acquiescence and waiver. It is true the Constitution of 1895 requires the judges in charging juries "to declare the law." But the right to have all the law declared may be waived like any other right, and an omission acquiesced in. The failure to request instructions on any particular point is regarded waiver of the right to such instruction and acquiescence in the omission. If the appellant, who was represented by most able and vigilant counsel, thought himself prejudiced by the inadvertent omission of the circuit judge to speak of the right of the jury to recommend to mercy and the effect of such recommendation, he should have requested the statement made.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

GARY, A. J. (dissenting). It appears from the record that his honor the presiding judge inadvertently failed to charge the jury that they might render a verdict recommending the defendants to the mercy of the court, and one of the exceptions assigns this as error. In 1894, section 109 of the Criminal Statutes was amended by adding a proviso so that it should read as follows: "Whoever is guilty of murder shall suffer the punishment of death: provided, however, that in each case where the prisoner is found guilty of murder, the jury may find a special verdict, recommending him or her to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the prisoner." The provisions of the Constitution of 1895 are quite different from those in the Constitution of 1868 as to charging the jury by the presiding judge. Section 26, art. 4, Const. 1868, was as follows: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Section 26, art. 5, Const. 1895, is as follows: "Judges shall not charge juries in respect to matter of fact, but shall declare the law." Section 29, art. 1, Const. 1895, is as follows: "The provisions of the Constitution shall be taken, deemed and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or promissory by its own terms." These mandatory provisions of the present Constitution made it incumbent upon the presiding judge to charge, substantially, the law applicable to the case. The act of 1894 made a substantial change in the punishment for murder, and it was of vital importance to the appellant that the jury should have been charged as to its provisions. The case of *State v. Owens*, 44 S. C. 324, 22 S. E. 244, is quite different from this case, for in *State*

v. Owens, at the conclusion of the charge, the prisoner's counsel assured the presiding judge that this charge was satisfactory, except that they desired him to explain more fully what is meant by a reasonable doubt. This was a waiver of the right to insist upon the objection now made. *State v. Fails*, 43 S. C. 52, 20 S. E. 798.

These, in brief, are the reasons for my dissent.

(88 S. C. 376)

J. A. ELLIS & CO. v. CARROLL.

(Supreme Court of South Carolina. March 31, 1904.)

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL PROMISE.

1. Where a person has a complete and enforceable lien on the property of his debtor, the promise of a third person to pay the debt upon forbearance to enforce the lien immediately is not within the statute of frauds, where the release is a damage to the creditor or a benefit to the person for whom the promise is made.

Appeal from Common Pleas Circuit Court of Cherokee County.

Action by J. A. Ellis & Co. against W. H. Carroll. From a judgment for plaintiffs, defendant appeals. Affirmed.

Butler & Osborne, for appellant. N. W. Hardin, for respondents.

JONES, J. J. B. Carroll, son of defendant, was indebted to the plaintiffs in the sum of \$65.41, which was not denied. On the 26th day of July, 1902, at Grover, N. C., the plaintiffs caused two mules and a wagon to be seized under a valid attachment as the property of J. B. Carroll. The defendant, who was at Grover, N. C., at the time, went to plaintiffs and told them that, if they would release the property of J. B. Carroll, he would pay the debt. Pursuant to that agreement, and on account of the promise made by the defendant, the property was released from attachment. Two or three days afterwards the defendant took the property back to plaintiffs, and asked them to release him from the promise, which they refused to do. The defendant claimed that he had been informed that the property belonged to the wife of J. B. Carroll. Defendant and his son, J. B. Carroll, reside in Cherokee county, S. C., about one-quarter of a mile from each other, and J. B. Carroll was at the time, and had been for a number of years, working the lands of his father. This action was brought before Magistrate A. M. Bridges, in Cherokee county, to recover of defendant upon his promise. Defendant pleaded the statute of frauds. The magistrate gave judgment against the defendant. With respect to the ownership of the attached property the magistrate held that the testimony was conflicting, but that the attachment created such a lien upon the property of J. B. Carroll that its release, on the express promise of the defendant to

pay the debt, lessened the chances of plaintiffs' collecting their debt, if it did not defeat the same.

On appeal to the circuit court one of the exceptions taken was that the magistrate erred in not holding that the property attached did not belong to J. B. Carroll, but to his wife, and that the alleged agreement of defendant to pay J. B. Carroll's debt was nudum pactum, and the other was that he erred in not holding that the agreement was within the statute of frauds. The circuit court overruled both exceptions. Therefore the circuit court has found as matter of fact that plaintiffs had a valid and enforceable lien on the property of J. B. Carroll by reason of the attachment, which was released upon defendant's promise to pay. "Where one has a complete and enforceable lien on the property of his debtor, a promise of a third person to pay the debt on condition that the property under the lien is given up, is not within the statute of frauds." *Dunlap v. Thorne*, 1 Rich. Law, 213; *Adkinson v. Barfield*, 1 McCord, 575; *Barnstine's Ex'rs v. Eggart*, 3 McCord, 163, 15 Am. Dec. 625.

The case of *Boyce v. Owens*, 2 McCord, 208, 13 Am. Dec. 711, does not conflict with the foregoing cases, because no lien was given up in that case, the constable having no authority to attach lands. Nor is there any conflict in principle with cases on the line of *Robertson v. Hunter*, 29 S. C. 2, 6 S. E. 850, which declare that the test in all such cases is whether there is a new consideration moving to the promisor so as to make it an original, and not a collateral, promise. While it may well be supposed that the release of the son's mules and wagon used in farming upon defendant's land was a benefit to the defendant, yet the cases cited show that it is not controlling that the consideration should be a benefit to the promisor. "If it be a damage to the other party, or a benefit to the party promised for, it will be sufficient, provided these proceed from the forbearance to enforce immediately some subsisting lien."

The judgment of the circuit court is affirmed.

(68 S. C. 378)

SECREST v. HARTFORD FIRE INS. CO.
(Supreme Court of South Carolina. March 31, 1904.)

FIRE INSURANCE—FORFEITURE FOR BREACH OF CONDITION—INCUMBRANCES.

1. A provision in a fire insurance policy on a stock of goods, that the policy shall be void if the subject of insurance be or becomes incumbered by a chattel mortgage, is violated where the insured executes a chattel mortgage on the goods, though it is afterwards set aside as a fraud upon the other creditors of insured under the assignment statute.

Appeal from Common Pleas Circuit Court of Lancaster County; Dantzler, Judge.

Action by Eugene C. Secrest, as receiver of J. A. Hilton & Co., against the Hartford Fire Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Ernest Moore and T. Y. Williams, for appellant. King, Spalding & Little and J. Harry Foster, for respondent.

WOODS, J. The Hartford Insurance Company, on January 1, 1897, issued a policy to J. A. Hilton & Co., insuring, to the amount of \$1,000, for one year, a stock of goods at Lancaster, S. C. The policy contained this clause: "The entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage." An instrument in the form of a mortgage was executed November 1, 1897, by Hilton & Co. to A. S. Mungo, covering the stock of goods. On November 13, 1897, Daniel Miller & Co. and the other creditors of Hilton commenced their action to have the mortgage declared null and void under the assignment act. After the commencement of the creditors' suit, and on the same day, the property was destroyed by fire. Some time afterward a decree was made by which the mortgage was adjudged invalid under the assignment act. The plaintiff was appointed receiver of the assets of Hilton & Co. and now brings this action against the Hartford Insurance Company on its policy issued to Hilton & Co. Judge Dantzler, who heard the case, sustained the defense that the policy became void upon execution of the mortgage, and directed a verdict for the defendant. The plaintiff appeals on the ground that the circuit judge should have held that the mortgage never had any existence, and therefore could not affect the policy, for the reason that the assignment act, on which the decree setting it aside was based, declares such a mortgage "shall be absolutely null and void, and of no effect whatsoever."

For the purposes of this discussion it is immaterial whether the mortgage was set aside on the ground that it was practically an assignment to one creditor, giving him a preference to the exclusion of the other creditors, and therefore "null and void and of no effect whatsoever," under section 2647 of the Civil Code of 1902; or on the ground that it was an unlawful preference, under section 2648, which declares "void" certain preferences given by a debtor to a creditor within 90 days of an assignment for the benefit of creditors. It is obvious that there was no privity of contract as to the insurance between the creditors and the insurance company, and therefore in this regard the receiver, who derived his title to the policy through Hilton & Co., after the fire, can stand in no higher or better position than Hilton & Co. then occupied. Hence

the receiver could not recover on the contract of insurance if it had been avoided before it came into his hands by any act of Hilton & Co., from whom he received it. The question, therefore, is, was the paper given in the form of a chattel mortgage valid as to Hilton & Co. at the time the loss occurred? More specifically, could Hilton & Co. have protected themselves against the mortgage at the time of the fire by alleging its invalidity under the assignment act? It is said in *Wilks v. Walker*, 22 S. C. 111, 53 Am. Rep. 706: "The manifest object of the act is to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more of his creditors, to the exclusion of all others; and whether this object is sought to be affected by a formal deed of assignment, or in any other mode, can make no difference." There is no word in the entire act indicating an intention to protect a debtor from a mortgage given by him, or to allow him to allege against his own deed. A preference or assignment denounced by the act is void only as against those who are prejudiced by it. If, after creditors had assailed this mortgage, the debtor had paid them, and thus procured the discontinuance of their suit, it would hardly be contended that the court would, under the assignment act, entertain the debtor's suit to have the mortgage declared void. Again, if a purchaser of the goods had acquired them with full knowledge of the mortgage, recognizing it in his purchase, surely it would not be void as to him. The true rule is thus laid down in *Endlich on Statutes*, § 86: "But it is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter in reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently express more in their literal meaning and natural force, and it is necessary to give them the meaning which best suits the scope and object of the statute, without extending to ground foreign to the intention. It is therefore a canon of interpretation that all words, if they be general, and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used in reference to the subject-matter in the mind of the Legislature, and strictly limited to it." In accordance with this principle of construction, the same author says, in section 269: "An act which required that indentures for binding parish apprentices should be for the term of seven years at least, declaring that otherwise they should 'be void to all intents and purposes, and not available in any court

or place for any purpose whatever,' was held, nevertheless, to make an indenture for a shorter term only voidable at the option of the master or apprentice; or, at all events, to leave it so far valid that service under it sufficed to gain a settlement. The act of 3 Hen. VII, c. 4, which declared that gifts of goods and chattels in trust for the donor and in fraud of his creditors should be 'void and of none effect,' was early held to be so only as to those who were prejudiced by the gift, but not as between the parties." See, also, *Kaufman v. Carter*, 67 S. C. 312, 45 S. E. 211.

The cases relied on by appellant as sustaining his view are very different in principle from this case. In *Fitchner v. Fire Association*, 103 Iowa, 276, 72 N. W. 530, the pretended mortgage was to a fictitious person, and retained by the party who signed it in his own possession. There was no mortgage, no debt, no delivery. In *Pitney v. Ins. Co.*, 65 N. Y. 6, the question was whether insured had sold the property, and therefore annulled the policy. The policy contained no clause against transfer. There was proof of a verbal agreement to sell, which, under the statute of frauds, was of no legal effect even between the parties. It was held that the title to the property was not changed, and the policy was not avoided. In *Insurance Company v. Asbury*, 102 Ga. 565, 27 S. E. 667, it was shown that the alienation of the property set up by the insurance company to defeat the claim was tainted with usury, and, under the Georgia law, absolutely void between the parties. It will be seen in all these cases the pretended sales and incumbrances before the court were clearly void between the parties—mere attempts to transfer or mortgage property—and on this ground they were held not to avoid the policy.

We conclude that at the time of the fire the stock of goods of Hilton & Co. was covered by a mortgage valid between the mortgagor and mortgagee, and that the policy, by its terms, was annulled by this incumbrance. In this view it is obviously unnecessary to consider the alleged errors imputed to the circuit judge by the respondent.

The judgment of this court is that the judgment of the circuit court be affirmed.

(68 S. C. 337)

YOUNG v. ST. PAUL FIRE & MARINE INS. CO.

(Supreme Court of South Carolina. April 1, 1904.)

FIRE INSURANCE—PAROL AGREEMENT TO WRITE POLICY—TIME OF DELIVERY—PAYMENT OF PREMIUM—CONDITIONS AGAINST OTHER INSURANCE—WAIVER.

1. A standard policy of insurance containing the usual conditions is a compliance with a parol agreement by an insurance agent on payment of premium to write a policy.

2. Where an insurance agent, at the request of insured, retains the policy, and delivers it to

her on demand after loss, the policy is regarded as delivered at the time of the insurance.

3. Waiver of a condition in an insurance policy against taking out other insurance cannot be implied from retention of policy at request of insured until after loss.

4. Waiver of condition against other insurance is not shown by the act of the local soliciting agent in expressing hope and confidence that the loss will be paid, or by the local agent giving notice to the adjuster of the loss and the coming of the adjuster to investigate it.

Appeal from Common Pleas Circuit Court of Laurens County; Dantzler, Judge.

Action by Alice A. Young against the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

John T. Seibels, for appellant. W. R. Rich-ey, H. J. Haynesworth, and Ferguson & Featherstone, for respondent.

WOODS, J. The plaintiff recovered judgment on a contract of insurance made by defendant, covering her dwelling house in the town of Clinton. At the close of plaintiff's testimony the court was requested to instruct the jury to find a verdict for the defendant. The first question is whether the presiding judge was in error in refusing this motion. The amended complaint alleges that Mrs. Young applied to Robertson, defendant's agent, and made a parol contract with him to insure her house for \$1,500; "that subsequently, and in the absence of the plaintiff, the said J. T. Robertson, as agent of the said company, in pursuance of said agreement, wrote out a policy of insurance, a copy of which is hereto attached as Exhibit A, and placed the same in his safe, where it remained until after the fire, which destroyed the plaintiff's house, when it was delivered to her; that in said policy, when written out, after the original agreement of insurance, the said agent stated the value of the building to be \$2,000, and the total amount of insurance to be carried on said house to be \$1,500, and further stated that 'this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereinafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy,' which statements were no part of the original agreement, and were made without the knowledge of or consent of the plaintiff, she having learned of them for the first time when her attention was directed to them after the said fire." The plaintiff was the only witness offered in support of this last allegation. She testified specifically, and with noteworthy candor, that she applied to Robertson for a policy, and he agreed to write her a policy. This clearly meant that both parties fully understood that the contract was not for parol insurance, but for the usual printed policy of insurance issued by insurance agents in the course of business. 1 May

on Insurance, § 23; 16 A. & E. Ency. Law, 853; Newark Machine Co. v. Kenton Ins. Co., 22 L. R. A. 773, and notes. In such case the presumption is that the parol negotiation is merged in the written contract represented by the policy. 16 A. & E. Ency. Law, 856, and notes; United Firemen's Insurance Co. v. Thomas, 82 Fed. 406, 27 O. C. A. 42, 47 L. R. A. 456; Merchants' Mutual Insurance Co. v. Lyman, 15 Wall. 684, 21 L. Ed. 246; Union Mutual Life Insurance Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674, and notes; Kleis v. Niagara Fire Insurance Co. (Mich.) 76 N. W. 155; Phenix Insurance Co. v. Wilcox & Gibbs Guano Co., 65 Fed. 730, 13 O. C. A. 88. If the agent had made a verbal agreement to the effect that a provision allowing other insurance would be inserted in the policy, and if Mrs. Young had requested the insertion of such a clause without dissent from him, the policy would not have covered all the branches and elements of the parol contract, and the insurance would not have been lost, unless the insured had in some way subsequently waived the omission. 1 Joyce on Insurance, § 41; McMaster v. New York Life Insurance Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. But Mrs. Young testifies nothing whatever was said as to other insurance on the house. The provision, "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereinafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," was printed in the policy of insurance as issued. To hold the insured not to be bound by this provision would be equivalent to holding that, when a contract is made for a policy of insurance, and the ordinary policy is issued with the usual conditions printed in it, all these conditions would be void, and have no effect on the liability under the policy, unless expressly brought to the notice of the insured, and assented to by him. To state such a proposition is to reject it. Nothing is more generally known and recognized in business dealings and the decisions of courts than that an agreement for a policy of insurance contemplates the issuance of a policy with certain conditions, such as stipulations against change of title, storing of highly combustible or explosive substances, incumbrance of the property, and additional insurance without consent. There was no evidence that the provision under discussion was unusual or unreasonable, but, on the contrary, the policy is indorsed, "Standard Fire Insurance Policy of the States of New York, Pennsylvania, Connecticut and Rhode Island."

The policy did not pass into the physical custody of Mrs. Young until after the fire, but it is apparent from the testimony that Robertson held it as a custodian for her by her acquiescence, if not her express request; and this was a sufficient delivery. The ab-

sence of manual possession is not fatal. "The manual possession of the thing which it is intended to deliver is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist where a legal delivery has been effected. The controlling question is not who has the actual possession of the policy, but who has the right of possession." 16 A. & E. Ency. Law, 856.

It was admitted by the plaintiff that she took out other insurance, and this was sufficient to defeat her recovery, unless this condition was waived. We are unable to find any evidence of waiver. Whether valid or void, the policy was the property of the plaintiff, and in turning it over to her after the fire the agent, Robertson, only performed an imperative legal duty, from which no waiver could be implied. It has been held in *Norris v. Insurance Company*, 55 S. O. 450, 33 S. E. 566, 74 Am. St. Rep. 765, that retention of the premium after the fire was no evidence of waiver. The mere expression of the local soliciting agent of hope and confidence that the loss would be paid is no evidence of waiver. In *Joye v. Insurance Company*, 54 S. O. 374, 32 S. E. 446, it was held that even a letter from the president of the company, written after the fire, promising to pay, would not constitute waiver, when there was a subsequent letter denying liability in the absence of proof that any change in the condition of the plaintiff had resulted from the first letter. It is hardly necessary to say that waiver cannot be implied from the act of the local agent in giving notice to the adjuster, or the coming of the adjuster to Clinton to investigate the loss. We find no evidence of waiver in any of the facts relied on by the plaintiff.

In no possible view of the evidence could the plaintiff be entitled to recover, and the jury should, therefore, have been directed to find a verdict for the defendant. Hence it is unnecessary to consider the other grounds of appeal.

The judgment of this court is that the judgment of the circuit court be reversed, and the complaint dismissed.

(63 S. C. 411)

STATE ex rel. BUCHANAN v. JENNINGS,
State Treasurer, et al.

(Supreme Court of South Carolina. April 11,
1904.)

JUDGES—SALARY—MANDAMUS TO COMPEL PAY-
MENT—CONSTRUCTION OF STATUTE—
RES JUDICATA.

1. The salary reduction act of December 22, 1893 (21 St. at Large, p. 417), to go into effect January 1, 1894, fixed the salary of circuit judges at \$3,000. By the general appropriation act, approved the next day, and which went into effect immediately, salaries were provided for, under the prior salary act, giving the circuit judges \$3,500, and section 13 (page 477) declared that if salaries then provided for officers, etc., "for which appropriation is herein made, shall be fixed by law at other rates than those

herein provided for, such rates shall not affect such salaries * * * for the year 1894, but the amounts herein appropriated shall be paid them." Held that, in referring to the year 1894 the fiscal year was intended, which, under the Constitution, commences on the 1st day of November, and that a circuit judge elected in December, 1894, was entitled only to the salary as reduced by the act of 1893.

2. Where there is no permanent, continuing statute, or constitutional provision, fixing the salary of a circuit judge, and no appropriation has been made therefor, mandamus will not issue to compel the Comptroller General to issue a warrant for a salary, and the State Treasurer to pay it, since the proceeding would be against the state, in which case the court would have no jurisdiction.

3. On mandamus to compel the Comptroller General to issue a warrant for the salary of relator, a circuit judge, the court held that the claim should be paid, and that the writ should be issued whenever there should be funds in the treasury, but refused to order it at that time; holding as a fact that the actual appropriation had been exhausted. Held, that such decree was not res judicata as to relator's right to the writ.

Appeal from Common Pleas Circuit Court of Richland County; Townsend, Judge.

Petition by the state, on relation of O. W. Buchanan, for writ of mandamus against R. H. Jennings, State Treasurer, and another. From an order directing a writ, defendants appeal. Reversed.

U. X. Gunter, Atty. Gen., for appellants.

WOODS, J. We adopt the respondent's clear and accurate statement of the facts:

"Respondent claims that he is entitled to be paid the salary allowed by law to a circuit judge at the time of his election and qualification; that such salary is the amount named in the general appropriation act of December 23, 1893, and not that named in the salary reduction act of December 22, 1893.

"The main facts are as follows: By the salary reduction act approved December 22, 1893, to go into effect 1st January, 1894, the salary of a circuit judge was fixed at \$3,000; by the general appropriation act approved the next day, and which went into effect immediately, December 23, 1893, salaries were provided for under the prior salary acts giving to circuit judges \$3,500, and in this act it was declared in section 13 'that in the event that salaries or other compensation for services now provided for by law for officers, clerks and other persons, for which appropriation is herein made, shall be fixed by law at other rates than those herein provided for, such rates shall not affect such salaries or other compensation for the year 1894, but the amounts herein appropriated shall be paid them.' 21 St. at Large, pp. 417, 477.

"By comparison of this appropriation act with salary reduction act of the previous day and prior salary acts, it will be seen that the salaries of the appropriation act were the same as in the prior salary acts,

and not at all in agreement with the salary reduction act of the day before, except in cases where that act made no changes.

"During the year 1894, on 4th December, O. W. Buchanan was elected judge of the Third Circuit, and four days afterwards he qualified and entered upon the discharge of his duties, his first term ending December 8, 1898. On 24th December, 1894, the general appropriation act was passed and went into effect, wherein only \$3,000 was appropriated for the salary of the judge of the Third Circuit. Judge Buchanan received this \$3,000 per annum for the four years of his first term, though demanding that he be paid \$3,500."

Judge Buchanan applied to the circuit court for a writ of mandamus to compel the Comptroller General to issue his warrant, and the State Treasurer to pay such warrant, for the sum of \$500 for each year the petitioner held the office of circuit judge; being the difference between \$3,000, the sum actually paid, and \$3,500, the sum petitioner claims he was entitled to receive each year. Judge Dantzler held by his decree, dated November 7, 1902, that the state was justly due the petitioner the sum of \$2,000, which covered the claim for his first term as circuit judge, but that upon his second election the act then in force fixing the salary of circuit judges applied, just as if he had not before held office. Judge Dantzler, as we understand his decree, practically refused to issue the writ at that time on the ground that the appropriation was then exhausted, and that it was not to be assumed that the General Assembly would refuse to pay the amount he found to be due. The petitioner was given leave to renew his motion after the adjournment of the session of the General Assembly commencing January, 1903. No provision having been made for the claim by the General Assembly, the petitioner on July 3, 1903, filed an entirely new petition, reciting the facts, including the decree of Judge Dantzler, and praying "that a writ of mandamus may issue, directed to the Comptroller General, A. W. Jones, and State Treasurer, R. H. Jennings, commanding the former to audit and allow and to issue his warrant upon the State Treasurer for the sum of \$2,000, being \$500 for each and every year of your petitioner's term of office, commencing 8th December, 1894, and commanding the State Treasurer to pay such warrant."

Upon hearing the petition and return, Judge Townsend ordered the writ to issue. From this order the Comptroller General and the State Treasurer appeal, alleging:

"That his honor Judge Townsend erred in adjudging the return to the petition as insufficient, and directing a writ of mandamus to issue:

"(1) In that the salary reduction act of 1893, approved December 22, 1893 (21 St. at Large, p. 416), reducing the salary of the circuit

judge to \$3,000, was passed and enacted prior to the election of the petitioner as such judge, and that said act, in so far as it fixed the salary to be paid the circuit judges after the year 1894, was of force when the petitioner was elected and entered upon the discharge of his duties as circuit judge.

"(2) In that it appeared upon the face of the petition that no appropriation has been made by law of any amount for the payment of the said sum of \$2,000 alleged in the petition to be due the petitioner.

"(3) That the court is without jurisdiction to issue the mandamus prayed for, inasmuch as the state is the real party in interest, and the mandamus prayed for would direct the payment by the state of a debt alleged to exist against it, the respondents, the State Treasurer, and Comptroller General, having no personal interest in the subject-matter of the suit, and the relief sought being an affirmative and official action by the state officers in performing an obligation which attaches to the state in its political capacity, and not the mere performance of a ministerial duty.

"(4) In that there were no funds in the treasury upon which the Comptroller General could draw his warrant directing the State Treasurer to pay the claim mentioned in the petition."

We consider first the status and construction of the salary reduction act approved December 22, 1893, and the appropriation act approved December 23, 1893.

In *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650, the court says: "If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be." See *Endlich on Statutes*, § 210. Where two statutes are passed at the same session, there is a still stronger presumption that they are intended to harmonize and not conflict, and it is the duty of the court to consider them, as far as possible, one statute, and endeavor to find what appears to have been the intent of the legislative body. Therefore the salary reduction bill, having been approved December 22, 1893, must be regarded amended and changed by the appropriation act passed the next day, so far as the two acts are in conflict. *Riggs v. Pfister*, 21 Ala. 469; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012. The reduction of salaries contemplated by the former act must therefore be regarded suspended during the period the latter act provided for payment of the larger salary.

As already intimated, as soon as the conflict can be regarded, in any reasonable view, at an end, it is the duty of the court to give to the former statute, as a separate enactment, full force, both as to the time when it shall have effect and as to its subject-matter. It is important, also, in the discussion,

to have in mind the familiar rule that violation of the Constitution is not to be imputed to the General Assembly, if such a conclusion can be avoided by any fair and reasonable interpretation of its enactments.

The salary reduction act repealed by necessary implication all previous salary acts, so far as they related to the offices therein mentioned, but by its terms it did not go into effect until January 1, 1894. We now inquire for what further time its operation was suspended by the appropriation act, approved December 23, 1893. This inquiry involves a consideration of the scope of the latter statute. The Constitution of 1868, art. 9, § 13, provides: "The fiscal year shall commence on the first day of November of each year." In accordance with this requirement, the General Assembly, by the act approved December 23, 1893, as appears from the title of the act, made appropriation "for the fiscal year commencing November 1st, 1893." Section 13 of this act is as follows: "That in the event that salaries or other compensation for services now provided for by law for officers, clerks and other persons, for which appropriation is herein made, shall be fixed by law at other rates than those herein provided for, such rates shall not affect such salaries or other compensation for the year 1894, but the amounts herein appropriated shall be paid them." 21 St. at Large, p. 477. It is important to determine whether the words "the year 1894" referred to the calendar year or to the fiscal year, for, if the fiscal year was meant, then the appropriation for the salary of the judge of the Third Circuit ended on November 1, 1894, and the act reducing the salary of circuit judges to \$3,000 was in effect, without limitation, when Judge Buchanan was elected, on December 4, 1894. It is true that, where reference is made to a certain year, the presumption is that the calendar year is meant. But where a legislative body is acting under a Constitution providing a fiscal year different from the calendar year, it seems clear that its fiscal legislation should be referred to the constitutional fiscal year, and not the calendar year. We think this rule of interpretation should be adopted in the absence of any express legislative intention. An examination of the statutes will show the General Assembly has said by direct expression that it meant by "the year 1894" to refer to the fiscal year 1894; that is, the fiscal year ending November 1, 1894. The act of 1893 making appropriations for that fiscal year by its express terms carries salaries and other public obligations to November 1, 1894, and no further, and this act provides for a salary of \$3,500 per annum for circuit judges. The like act of 1894 took up the salaries and other public obligations on November 1, 1894, and carried them to November 1, 1895, providing a salary of \$3,000 for circuit judges.

We think, therefore, the General Assembly has expressed its intention by these acts, passed in consonance with the constitutional provision as to the beginning and end of the fiscal year, that the reduction of salaries should take place at the close of the fiscal year, November 1, 1894.

We agree with petitioner's counsel that a salary may be fixed by an appropriation act providing for it, but the presumption is obviously very strong against an intention to fix in an appropriation bill the amount of salary to run beyond the period for which the appropriation is made. The contrary intention is here indicated. The appropriation is "for the salaries of the eight circuit judges, \$28,000," and this is, as we have seen, for the fiscal year ending November 1, 1894. When the provision is made that, if salaries of the officers mentioned "shall be fixed by law at other rates than those herein provided for, such rates shall not affect such salaries or other compensation for the year 1894, but the amount herein appropriated shall be paid them," it seems clear from the last clause, which we have italicized, that the rate of salary was not provided by the act beyond the amount actually appropriated, and that amount reached only to November 1, 1894.

Whether it would be a violation of that rule of the Constitution (Const. 1895, art. 8, § 17) which requires that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title," for the General Assembly, in an act entitled "An act to make appropriations to meet the ordinary expenses of the state government for the fiscal year commencing November 1, 1893," to attempt to fix a salary to run beyond the end of the fiscal year referred to in the title, is a question we do not consider, for the reason that we do not think such an attempt was made.

As already indicated, if Judge Buchanan had been elected before November 1, 1893, he would have been entitled to a salary of \$3,500 per annum for his entire term, notwithstanding that might have been intended to be the salary only during the currency of the appropriation bill, for the reason that the salary with which he entered office could not be lessened. But he was elected and qualified in December, 1894, after the end of the fiscal year, and after the reduction act went into effect. We are therefore forced to the conclusion that he was entitled to only the reduced salary.

Assuming, however, that the petitioner is entitled to the amount claimed, we next consider whether any appropriation has been made from the state funds, for, as we understand, it is conceded that the court can require money to be paid from the state treasury only when it has been appropriated by the Constitution or a statute. In article 2, § 22, of the Constitution of 1868, it is provided, "No money shall be drawn from the treasury

but in pursuance of an appropriation made by law." If the Constitution, in addition to providing that the judges "shall at stated times receive a compensation for their services to be fixed by law which shall not be diminished during their continuance in office," had also provided the amount of the compensation, there would be great force in the argument that this would constitute an annual and certain appropriation, requiring no further legislative action to warrant and require its payment by the fiscal officers of the state. This was held to be the law in *Thomas v. Owens*, 4 Md. 190; in *State v. Hickman* (Mont.) 23 Pac. 740, 8 L. R. A. 404, and other cases. See, also, note to *Carr v. State*, 22 Am. St. Rep. 638. But the essential difference between those cases and this is that our Constitution of 1868 left the amount of the salary to be fixed by the General Assembly, and there was therefore no constitutional appropriation of any particular sum to be paid.

Strong argument has been presented, also, in support of the proposition that, when the salary claimed is fixed by a permanent continuing statute, the actual right to which omission from an annual appropriation act will not affect, no special current appropriation is necessary to entitle the claimant to payment. *Henderson v. Burdick* (Wyo.) 33 Pac. 125, 24 L. R. A. 266. But the petitioner cannot sustain the application for mandamus on this ground, for the reason that here his claim does not rest on a continuing statute, but on the temporary annual appropriation act itself, which in terms limits the appropriation to a time which expired before the beginning of his term of office. In addition to this, there was not only an omission to appropriate and provide in the temporary statute the salary claimed, but an annual appropriation by the next General Assembly of a smaller amount than that claimed. So that the conclusion is inevitable that the legislative branch of the government, from which the appropriation must come, has practically declined to pay the larger salary, by providing for the payment of a smaller. We think, therefore, there has been no appropriation of public funds for the payment of the amount demanded. If there had been such appropriation, it would be the obvious ministerial duty of the Comptroller General to issue his warrant, and of the Treasurer to pay it, and the court would enforce this duty by mandamus. As there is no such appropriation, this application must be regarded as a proceeding against the state, and the court is without jurisdiction to entertain it. The General Assembly has acted in the matter, and the refusal of the executive officers to pay the claim is in consonance with direction coming to them from that branch of the government which alone is empowered to provide for the payment of the state's obligations. The law is thus stated in *Pennoyer v. McConaughy*, 140 U. S. 10, 11 Sup. Ct. 701, 35 L. Ed. 303:

"Where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts," it is, in effect, a suit against the state itself. *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. Ed. 992; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805. See, also, *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425. We cannot escape the conclusion that the issuance of the writ, in the circumstances, would be an effort on the part of the judicial department of the government to coerce the legislative department.

The fourth defense of the Comptroller General and the State Treasurer, covered in this court by the fourth exception, is: "For a fourth defense, the respondents say that there are no funds in the treasury upon which the Comptroller General can draw his warrant directing the State Treasurer to pay the claim mentioned in the petition." If there had been an appropriation of the amount claimed, this defense would not avail, because it is not stated that there are no funds in the treasury, only that there are none applicable to this claim. But as there has been no appropriation, the proposition embraced in this defense is a necessary sequence, and must be sustained.

It only remains to consider the question whether petitioner's right to the writ was adjudicated in his favor by the decree of Judge Dantzler, from which there was no appeal. Judge Dantzler held that the claim should be paid, and that the writ should be issued whenever there should be funds in the treasury; but he refused to order it issued at that time, holding as a fact that the actual appropriation had been exhausted. No relief was given, and hence there was no judgment in favor of the petitioner. Manifestly the Treasurer and Comptroller General could not appeal, because no order or judgment had been made against them. No appeal would lie from Judge Dantzler's expression of opinion that the claim was just, and that the writ of mandamus should issue if there were any funds in the treasury. An indication of opinion as to what judgment would be rendered under a different state of facts, or should be rendered in the future, is not a judgment, and is not binding on the parties. *Van Fleet's Former Adjudication*, § 27; 24 A. & E. Ency. Law (2d Ed.) 792; *Child v. Morgan*, 51 Minn. 116, 52 N. W. 1127.

The judgment of this court is that the judgment of the circuit court be reversed, and the petition dismissed. Rehearing refused.

(68 S. C. 265)

HUGUENOT MILLS v. GEORGE F. JEMPSON & CO.

(Supreme Court of South Carolina. March 29, 1904.)

CORPORATIONS—ULTRA VIRES CONTRACT—PARTNERSHIP CONTRACT—SALES—BREACH OF CONTRACT—DAMAGES—STATUTE OF FRAUDS—REPRESENTATION OF FIRM BY PARTNER—EVIDENCE.

1. A corporation which had formed a partnership with an individual contracted to sell to defendant goods purchased in part with corporate funds, and on defendant's refusal to receive the goods the corporation, in its own right, and as assignee of its partner, sued for breach of contract. *Held* that, though the corporation's contract of partnership was ultra vires, this defense could not be raised by defendant, who was charged with knowledge that plaintiff could not enter into a legal partnership, and will be held to have dealt with plaintiff and its partner as joint owners of the property.

2. Where the particular goods were not fixed by a contract of sale, but were to be selected from samples by the customer of the purchaser, and after such selection were to be taken from the warehouse stock and shipped to the customer, the contract of sale was executory, and hence the seller of the goods could maintain an action for damages for refusal of the buyer to accept the goods.

3. In an action by the seller of goods under an executory contract to recover for the buyer's breach, the measure of damages is the difference between the contract price and the market price at the time the buyer refuses to accept the goods.

4. Where an executory contract for the sale of goods was evidenced by a letter from the buyer, written in response to the bill sent to him by the seller, it is not obnoxious to the statute of frauds.

5. The fact that a partner was acting for his firm in signing certain letters may be shown by parol.

6. Evidence that a partner, as an individual, separate from his partnership relation, acted as purchasing agent for third persons, is not competent on the question whether, in a particular instance, he acted for the firm, there being no evidence that the person with whom he dealt knew that he was also purchasing agent for persons other than the firm.

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Action by the Huguenot Mills against George F. Jempson & Co. From a judgment for plaintiff, defendants appeal. *Affirmed*.

McCullough & McSwain, for appellants. Haynsworth, Parker & Patterson, for respondent.

WOODS, J. The supplemental and amended complaint alleges that at the times therein mentioned, the plaintiff, a corporation, and Herbert Rountree were "partners (or associates in business) under the name of the Greenville Commission Company"; that in November, 1900, the defendants agreed to buy from the plaintiff and Rountree, as such company, 80 bales of goods known as "Granger Plaids," at 8½ cents per yard, payable within 10 days, the goods to be billed up and sold for shipping instructions to be given by

the defendants; that 30 bales were ordered out and paid for, and the defendants directed the remaining 50 bales to be billed to Gus Blas Dry Goods Company, of Little Rock, Ark., but both that company and the defendants have declined to receive the goods or pay for them; that after the contract was made the market price of the goods declined greatly in value, and the sellers, as the Greenville Commission Company, were damaged by the defendants' breach of contract to the amount of \$500; that since the commencement of the action, Rountree has assigned all his interest in the claim for damages to the plaintiff. The defendants, in their answer, deny all the allegations of the complaint; allege that the plaintiff, being a corporation, could not enter into a copartnership, and had no power to contract or be contracted with in that capacity; and allege further that the contract falls within the statute of frauds, being for the sale of merchandise at a greater price than \$50, and not evidenced by any note or memorandum in writing, signed by the parties to be charged or their agents. At the trial the defendants demurred orally on "the ground that it [the complaint] does not state facts sufficient to constitute a cause of action, in that the plaintiff sues as assignee of the Greenville Commission Company, an alleged partnership existing between the Huguenot Mills, a corporation chartered under the laws of the state of South Carolina, and one Herbert Rountree, and under the charter of the Huguenot Mills and the law a partnership cannot exist between the said Huguenot Mills and the said Herbert Rountree, and the alleged contract was therefore ultra vires."

In the first exception, the defendants allege that the circuit judge erred in overruling the demurrer. The general proposition is well established that a corporation cannot enter into a valid partnership agreement. This implies that such an agreement, made by the corporation, even with the assent of all the stockholders, may be annulled at the instance of the state. It implies that an agreement made by the officers may be annulled or disregarded by the stockholders, and that the officers who embark the corporate funds in such an enterprise would be liable for losses resulting to the corporation as for a breach of trust. It implies that the stockholders could require the officers to take a conveyance from the corporation of its interest in property acquired by an attempted partnership of this kind, and restore the funds used in its purchase. But it does not imply that the corporation does not acquire, as against the outside world, part ownership of property bought in part with corporate funds in the progress of an attempted partnership business. An incident of ownership is the power of sale, and the power to sell implies the power to hold those who agree to buy to perform their agreement or pay damages for its breach. To illustrate, it cannot be doubt-

ed, if in this instance the stockholders had brought an action to have the business closed up as *ultra vires*, the court would have ordered the assets sold, and the contracts for purchases from the concern enforced by suit for the benefit of the corporation. To such suits it would have been idle for those who had purchased or contracted to purchase to deny the corporate right to own and sell the goods. If this were a suit in a partnership name, the defendants' demurrer would stand on a very different foundation, for the question would then be whether the joint owners could recover when they had sold as an alleged partnership. Even then we think the defendants could not deny the validity of their obligation on that ground. 5 Thompson on Corporations, § 5838; Connolly v. Union Pipe Co., 184 U. S. 544, 22 Sup. Ct. 431, 48 L. Ed. 679; Bank v. Hammond, 1 Rich. Law, 288; Harvester Co. v. Donahue (Minn.) 12 N. W. 854. In the case really presented the corporation sues alone in its own right and as assignee of Rountree. The defendants are charged with knowledge that the plaintiff could not enter into a legal partnership (Pearce v. R. R. Co., 21 How. 441, 16 L. Ed. 184), and that in the contract to purchase they were dealing with the plaintiff and Rountree as joint owners of the property, who as such had a right to sell it. For this reason they cannot now dispute the validity of the contract of purchase, or the liabilities which fell upon them when they repudiated it. The demurrer was therefore properly overruled.

Substantially the same question was made by a motion for nonsuit and in requests to charge. It follows that the first exception as to the demurrer, the first exception as to the refusal to grant a nonsuit, and the first, second, fourth, and fifth exceptions to the charge cannot be sustained.

The defendants' next position is that the motion for nonsuit should have been granted, because the testimony showed that there had been an actual sale and symbolical delivery, and therefore the plaintiff, holding the goods only as bailee for the defendants, could not sue for damages for breach of the contract, but only for the price the purchasers agreed to pay. The complaint is for breach of an executory agreement to purchase. It is true that Rountree testifies he regarded the goods belonging to the defendants as soon as he made the contract of sale, but his mere opinion can have no weight in fixing the nature of the contract. It is perfectly clear from the letters of buyer and seller that the specific patterns and the particular pieces were not fixed by the contract of sale, but were to be selected from the samples by the customer of the purchaser, and after such selection were to be taken from the warehouse stock and shipped to such customer. The contract, if any, was therefore executory. 24 Am. & Eng. Ency. 1054. Hence, when the purchaser refused to receive, the

seller could retain the goods and sue for damages. 24 Am. & Eng. Ency. 1113; Millar v. Hilliard, Cheves, 153.

This being an executory contract, and the seller having a right to retain the goods and account for the market price at the time of the breach by the purchaser, the seller was under no obligation to actually resell. He did not resell at the time of the breach, and is not claiming damages for the difference between the price obtained at a resale and the contract price, but for the difference between the contract price and the market price at the date of refusal. The law as to resale therefore has no application. The measure of the seller's damages for breach of an executory contract for the sale of goods is the difference between the contract price and the market price at the time the goods ought to have been accepted by the purchaser. Stack v. R. R., 10 S. C. 97; Millar v. Hilliard, *supra*. The reason for applying this measure of damage is that the seller has the right to put the goods on the market after the contract is broken, and obtain the market price. 2 Benjamin on Sales, § 1117. But he cannot sell until the date for acceptance has passed, because until that time the purchaser has the right to take the goods. By the same reasoning, where the exact time for delivery is to be afterward fixed by the purchasers, the measure of damages is the difference between the contract price and the market value at the date of refusal to receive; for such refusal necessarily implies a refusal to fix a time, and there is then a complete breach of the contract. In refusing the nonsuit and in charging as to the measure of damages the circuit judge took the correct view of the law on the subject.

The evidence as to the difference between the contract price and the market value at the date of purchaser's refusal to accept might well have been more definite, but it was sufficient to sustain a verdict. Rountree testified: "The market weakened immediately after I made the sale, and continued to decline. It went down from four cents to three and three-eighths; went down as low as three cents. The day I made the trade with George F. Jempson & Co., it was four cents." The defendants offered no testimony to rebut this statement, and we think the jury could well infer that the witness meant the decline to three cents took place immediately after the contract of sale. There was therefore no error of law in refusing the motion for a new trial.

The executory contract was evidenced not only by the conversation between Jempson and Rountree, but by the letter of Jempson written in response to the bill sent to Jempson & Co. by the Greenville Commission Company. The contract is therefore not obnoxious to the statute of frauds. It is true the letters were signed "G. F. Jempson" and not "George F. Jempson & Co.," but it was competent to show by parol that Jempson was

acting for the firm in signing the letters. *Bulwinkle v. Cramer & Blohme*, 27 S. C. 876, 3 S. E. 776, 18 Am. St. Rep. 645; *Benjamin on Sales*, p. 252. The issue as to whether he was acting for himself or the firm of Jempson & Co. in making the contract was fairly submitted to the jury.

There was no error in excluding the testimony of George F. Jempson as to his private arrangements with the Gus Bias Dry Goods Company and other customers, of which the plaintiff had no notice. George F. Jempson, as one of the partners of Jempson & Co., was empowered to contract for the firm. The question was whether he so acted in this matter as to justify the sellers in believing they were contracting with the firm. If he did, the partnership would be bound. The controlling inquiry is, what intention did Jempson express to the sellers by words and acts, not what his unexpressed will was. The fact that as an individual, separate from his partnership relation, Jempson was a purchasing agent for others, might have some bearing in ascertaining whether he, in his inner consciousness, had an intention to contract for the firm or as an individual purchasing agent; but, there being no evidence that the sellers knew he ever acted in the latter capacity, proof that he did so act could have no effect in ascertaining whether the sellers had a right to infer from his words and acts that he intended to contract for the firm of which he was a member.

All the exceptions are overruled, and the judgment of the circuit court affirmed.

(68 S. C. 494)

RHODES v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. April 20, 1904.)

CONTINUANCE—ABSENCE OF COUNSEL—JURY—QUASHING ARRAY—APPEAL—WITNESSES—COMPETENCY—FELLOW SERVANTS.

1. A continuance will not be granted because one of the counsel for the applicant is confined in the hospital, the result of an operation, where the illness of the counsel was in contemplation for some time previous to his going to the hospital, and there were other counsel on the record, one of whom had taken part in a trial of the case at a preceding term.

2. The fact that the clerk of the board of county commissioners, instead of the county auditor, the county treasurer, and the clerk of the court, prepared a list of electors from the taxbooks, which was canvassed and revised by the proper officers, was a mere irregularity, and an insufficient ground for quashing the array.

3. An order refusing to quash the array of jurors on grounds held to be mere irregularities is not appealable under Code Civ. Proc. § 344.

4. In an action by an administrator, evidence by defendant as to a conversation between him and deceased in relation to deceased being informed as to contents of certain bulletins is inadmissible under Code Civ. Proc. § 400.

5. A conductor of a train and the employees under his direction are not fellow servants.

Appeal from Common Pleas Circuit Court of Barnwell County; J. A. McDonald, Special Judge.

Action by Lizzie D. Rhodes, administratrix of George T. Rhodes, against the Southern Railway Company and P. I. Welles. From judgment for plaintiff, defendants appeal. Affirmed.

B. L. Abney, Jos. W. Barnwell, and Robt. Aldrich, for appellants. Bates & Simms, for respondent.

GARY, A. J. This is an action for damages based upon the alleged negligence of the defendants. In the first paragraph of the complaint it is alleged that the Southern Railway Company is a corporation operating a railroad from Batesburg, S. C., to Hardeeville, S. C., and that the defendant P. I. Welles is the superintendent of his co-defendant, and as such was in charge of said railroad in behalf of the Southern Railway Company.

The second and third paragraphs of the complaint are as follows:

"(2) That upon the 26th day of August, A. D. 1901, one George T. Rhodes was and had been engaged and employed by said defendant as a conductor of the said defendant, and in charge of one of the freight trains operating between said points as aforesaid; and, being so engaged and employed, upon said day, and in discharge of his duties as such conductor on said train, and whilst at the station of Salley's, undertook, in pursuance of his said duties, to have the freight destined for said place unloaded thereat, among which freight was a cotton gin of considerable size and weight. And the said defendants had only provided, for the purpose of unloading said freight, certain skids, consisting of two in number, which were extended from the freight car as aforesaid to the platform at said station of Salley's, and which said skids were under the charge of the defendants' depot agent at said place, and upon these skids the train hands on said train were compelled to attempt to unload said gin in said way.

"(3) That whilst in the midst of unloading said cotton gin the same careened and toppled over to the ground, and while so doing struck the said George T. Rhodes, who, in discharge of his duty, was standing by, and fatally wounded him; and the plaintiff avers that the cause of said careening and falling of said gin was that the defendants had not furnished proper appliances for the unloading and loading of the freight of said character, and that the skids were not of the same size and thickness, but, on the contrary, one was thinner than the other; and when the heavy gin above described was attempted to be unloaded upon said skids of uneven thickness, the weight of the said gin on the side of the thinnest skid made said skid give more than its companion, which said giving, and

§ 5. See *Master and Servant*, vol. 34, Cent. Dig. § 501.

the gin not, therefore, upon the same level, caused the said gin to careen and topple over; and the said defendants, not having also provided sufficient help by way of hands and laborers to unload said gin, were unable thereby to prevent the result stated, or to obviate the same by making up in physical help what was lacking in such defective appliances aforesaid."

The other allegations are formal.

The answer of the defendants denied the material averments of the complaint, and set up the defense of contributory negligence. The jury rendered a verdict in favor of the plaintiff for \$10,000.

The defendants appealed, and their first exception is as follows: "Because it is respectfully submitted that his honor, the special judge erred in forcing, and that it was an abuse of his discretion to force, the case to trial, in spite of the illness of the defendants' counsel in charge of the case, and in spite of the declaration of the counsel who was forced to try the case that he had no opportunity to prepare for the trial of the same." The action was commenced in September, 1902, but was not reached on the docket at the fall term of that year. At a special term held in December of the same year the case was heard, but the result was a mistrial. No civil cases were tried at the following March term, and a special term was requested by the Barnwell bar in April, 1903. A roster was arranged by the bar for this special term, and this case, amongst others, was set for trial at that term. On the 22d day of April, 1903, Mr. Barnwell, the leading counsel for the defendants, wrote to the plaintiff's attorneys, requesting a continuance of the case on account of his inability to attend the court by reason of the necessity for a surgical operation on his leg, which confined him in the hospital for a number of weeks. The plaintiff's attorneys did not see their way clear to grant his request. His honor stated the following reasons for refusing the motion for a continuance of the case: "Well, gentlemen, the whole matter rests very strongly on my sympathy, and I regret very much that Col. Barnwell is ill, and has undergone an operation, and if I conceive it my duty, I would consider it a pleasant duty to grant his request. Two weeks ago the same motion was made. At that time I stated that ample time would be given to prepare for counsel if Col. Barnwell could not be present. I don't think the case of *Varn v. Green* applies, because both of the counsel were ill and incapacitated. Here the illness was in contemplation of counsel for some time previous to his going to the hospital, and there were other counsel upon the record in the cause, one of whom—Col. Aldrich—had already taken part in the trial of this case at a preceding term, and therefore familiar with the case. Two weeks had been given the counsel to procure the papers and to get ready for trial, and therefore, under

all of the circumstances of this case, I do not think the case to be one where it would be a proper exercise of my discretion to grant the motion." The duty which was devolved upon his honor the presiding judge of deciding the motion for a continuance was of great delicacy. Ordinarily, an order refusing such motion is not appealable. An appeal lies only when there has been an abuse of discretion. The reasons assigned by the presiding judge in refusing the motion satisfy this court that there was no abuse of discretion.

The second exception is as follows: "Because, it is respectfully submitted, that his honor erred in refusing to quash the panel of jurors upon the following grounds: (a) That the jury list of 'qualified electors' was not prepared by the county auditor, the county treasurer, and the clerk of the court of common pleas in Barnwell county, where said case was tried, as is required by law, but by the board of county commissioners and the clerk of the board of county commissioners; and that subsequent adoption and ratification of the acts of the said board of county commissioners and clerk by the said county auditor, county treasurer, and clerk of the court of common pleas did not cure such illegal preparation of said list. (b) That the jury list required by law to be deposited with the ballots in the jury box was not so deposited, but was found outside of the said box, uninclosed, in the office of the clerk of said court. (c) That what purported to be said jury list, when found, did not consist of one list, but of two jury lists. (d) That the said jury lists were made out from the list of taxpayers, and not from the qualified electors, as required by law."

We will first consider subdivision "a." The plaintiff introduced in evidence the affidavit of the county auditor, county treasurer, and clerk of the court, in which they stated: "That each of said commissioners, being exceedingly busy with the manifold duties in their respective offices, at their own expense employed R. C. Roberts, Jr., the clerk of the county supervisor, to make a list of the qualified electors of said county, under the provisions of the Constitution, between the ages of twenty-one and sixty-five years, and of good moral character, and to furnish to the said commissioners for their action the said list, which was duly done by the said clerk. That upon the said names being furnished to the said commissioners by the said clerk the said commissioners inspected the same, and passed upon the qualifications of the persons whose names appear upon the said list; and the said board, upon the said investigation, judicially found that the said names included not less than one from every three of such qualified electors, under the provisions of said Constitution, and, as far as their judgment advised, such parties are of good moral character and between the ages of twenty-one and sixty-five years, and living within the said county of Barnwell; and that the same, in the judg-

ment of the said defendants, are all otherwise well qualified to serve as jurors, being persons, in their opinion, of sound judgment, and free from all legal exceptions. That throughout the whole transaction the said R. C. Roberts, Jr., exercised none of the functions of this board, but only acted in pursuance of his employment as a clerk in the preparation of the lists of said qualified electors, and in no manner desired, nor did he usurp, any of the prerogatives of the said board, or relieve the said board of any of their liabilities or responsibilities to the public under the law with reference to the drawing of said jurors. That the said board itself judicially passed upon the qualifications, as aforesaid, of each of the said electors, and their names were only placed in the jury box after their said fitness had been so determined. That upon the list of jurors so selected being accepted by the said board, they caused the names of the electors so accepted to be written, each on a separate paper or ballot, so as to resemble each other as much as possible, and so folded that the names written thereon, in their judgment, were not visible on the outside, and placed them with the said list in the regular jury box. * * * And in all other particulars the said jury box has been kept securely locked with three separate and strong locks with keys, etc., as required by law; and that at the same time the said deponents placed in a special apartment in the said jury box, known as the 'tales box,' the names of not less than one hundred nor more than four hundred of such persons whose names appeared on the said lists as reside within five miles of the courthouse, and the names of such persons were likewise placed in the said jury box."

The fact that the clerk of the board of county commissioners prepared a list of the electors from the tax books, which was canvassed and revised by the proper officers, was a mere irregularity, and therefore an insufficient ground for quashing the array of jurors. In the case of *State v. Massey*, 2 Hill, 379, the defendant appealed upon the ground that the jury list had not been made from the tax returns according to the act of 1799. After citing the provisions of the act, the court used this language: "This is purely directory to public officers in the discharge of their duty. If they fail to discharge it, and the jury is drawn from the old list, it does not vitiate the array, nor is it any objection to the polls. The jurors are still *boni et legales homines*." 2 Hawk P. C., book 2, c. 48, § 14. The party is not prejudiced if the jury for his trial are from the vicinage, the district where the offense is committed, and have all the other legal qualifications. It will be observed that the act does not declare a venire issued for jurors drawn from the old list to be void; nor does it direct the array to be quashed. It was not intended to secure any right, benefit or privilege to the defendant. It was merely to regulate the

drawing of the jury in such a way as to divide the duty of serving upon the jury among the inhabitants of a district." In *Thompson & Merriam on Juries*, sectional page 184, it is said: "Statutes which prescribe the time and manner of selecting the general list, as described, are generally treated as directory. The primary object which they have in view is the just apportionment of jury duty among the citizens of the county or other jurisdiction, rather than the preservation of the rights of litigants. If the names of persons not qualified for this duty get inadvertently into this list, and if such names are drawn as members of the panel for a particular term, persons having litigation at that term have a complete remedy by challenging for cause any member of the panel as being disqualified or partial. The general rule, therefore, is that irregularities in the general list constitute no ground for challenging the array. Thus, if the officers charged with such duty fail to make the list as required by law, and the jury, in default of such list, is drawn from the old lists, this does not vitiate the array, nor is it a cause of challenge to the polls. If the jurors are qualified individually, the parties to suit are not prejudiced."

Subdivision "b" will next be considered. In refusing the motion, the presiding judge said: "As to that list not being in the box, it appears from the facts of the case that it was left in the clerk's office. The clerk of the court, and perhaps the other member of the board, thought it was in the box. It was introduced in open court, and appears to be regular." This was only another irregularity, and is disposed of by what was said in considering subdivision "a."

The same may be said of subdivision "c."

Subdivision "d" is disposed of by the fact that the presiding judge found as a fact that the lists were made out from the qualified electors.

The third exception is as follows: "Because it is respectfully submitted that his honor erred in declaring that the requirements of the statutes that the jury list should be prepared by the county auditor, the county treasurer, and the clerk of the court, and that the list should be deposited in the jury box, and that there should be only one list, and that the jury list should be made out from the list of qualified electors, were mere irregularities, and that the requirements of the statute on the subject were purely directory." This exception is disposed of by what has already been said.

The fourth exception is as follows: "Because it is respectfully submitted that his honor erred in ordering the case to trial over the objection of the defendants' attorney, after service of written notice of appeal from the ruling of his honor, with regard to the challenges to the panel of jurors, such notice of appeal, it is submitted, operating as a supersedeas." The law is well settled in this state that an appeal from an appealable order

acts as a supersedeas. *Hammond v. R. R.*, 15 S. C. 10; *Le Conte v. Irwin*, 23 S. C. 106; *Elliott v. Pollitzer*, 24 S. C. 81; *Simonds v. Haithcock*, 26 S. C. 595, 2 S. E. 616; *Bank v. Stelling*, 32 S. C. 102, 10 S. E. 766; *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711; *State v. Ry. Co.*, 45 S. C. 470, 23 S. E. 385; *Alston v. Limehouse*, 61 S. C. 1, 39 S. E. 192. Was the order made by his honor the presiding judge, refusing to quash the array of jurors, appealable? In *Wait's Ann. Code*, 669, it is said: "It is not the policy of the Code with reference to appeals to allow a review of intermediate orders, unless they are such as in effect terminate the action and prevent a judgment, from which an appeal will lie, or unless upon appeal from final judgment." In *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711, Mr. Chief Justice Pope uses this language: "As to the third exception, relating as it does to a right of appeal from an interlocutory order, this is not usual, and yet in some exceptional cases it is admitted. The distinction seems to arise in those matters where the circuit judge commits some error of law that will prejudice the appellant in his trial, and which error of law goes to the root of the matter. * * * It is in only exceptional cases that this court views with approval an appeal from an interlocutory order, for it is usually far better to await the coming here upon an appeal from a final decree or judgment, at which time it is competent for this court to review alleged defects or errors, not only in the final decree or judgment, but also at the same time to consider alleged errors in intermediate or interlocutory orders." It will be thus seen that it is not the policy of the law to regard with favor appeals from interlocutory orders. Section 344 of the Code of Civil Procedure provides that an appeal may be taken to the Supreme Court in the cases mentioned in section 11. The second, third, and fourth subdivisions of that section are wholly inapplicable, and therefore need not be set out. The first subdivision is as follows: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal: (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas * * * and final judgments in such actions: provided, if no appeal be taken until final judgment is entered, the court may, upon appeal from such final judgment, review any intermediate order or decree, necessarily affecting the judgment not before appealed from." We have hereinbefore shown that the grounds of the motion to quash the panel of jurors were mere irregularities. They did not involve the merits of the action, and the order refusing the motion was not appealable. The court therefore had the right to proceed with the trial of the case.

The fifth exception is as follows: "Because his honor erred, it is respectfully submitted, in ruling out the evidence of Mr. P. I. Welles

as to a conversation between himself and George T. Rhodes, plaintiff's intestate, showing why the said intestate should have had knowledge of the bulletins issued by said P. I. Welles giving demerits to one of the conductors of the Southern Railway Company for loading heavy goods over long skids from the main track, on the ground that conversations between the intestate and said superintendent and defendant P. I. Welles were not competent; whereas it is submitted that such conversations, being against the interest of said intestate, were competent and admissible as declarations against his interest." In the case of *Norris v. Olinkscales*, 47 S. C. 488, 25 S. E. 797, the court, having under consideration section 400 of the Code of Civil Procedure, uses this language: "It describes four classes of persons and three characteristics of testimony. The four classes of persons are these: (1) A party to the action or proceeding; (2) a person having an interest which may be affected by the event of the trial; (3) a person who has such an interest, but which has been in any manner transferred to, or has in any manner come to, a party to the action or proceeding; (4) an assignor of a thing in controversy in the action. The three characteristics of the testimony are these: (a) In regard to any transaction or communication between the witness and a person deceased, insane, or lunatic; (b) against a party prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic; (c) when the present or previous interest of the witness may in any manner be affected by the testimony or by the event of the trial. It will be thus seen that, to justify the exclusion of testimony under this proviso of section 400, it should be shown to the satisfaction of the trial judge, first, that the witness belongs to one or more or to all of the four classes of persons whose testimony may, under certain circumstances, be excluded; and, secondly, that his testimony partakes of not merely one or two of the disqualifying characteristics classified under 'a,' 'b,' and 'c,' but that it possesses all three of those characteristics." The witness was a party to the action. The testimony offered was in regard to a communication between the witness and a person deceased. The testimony was against a party prosecuting the action as administratrix of such deceased person, and the present interest of the witness might be affected by the testimony, or by the event of the trial. These conditions rendered the testimony inadmissible.

The sixth exception is as follows: "Because his honor erred, it is respectfully submitted, in not charging the following request of the defendants, to wit: 'That one of the risks which an employé takes in entering into the employment of another is the risk of the negligence of a co-employé or fellow serv-

ant employed in the same department with himself and on the same piece of work; and if the jury find from the evidence that the injury to plaintiff's intestate was caused through the negligence of such co-employé or fellow servant, who was not a superior agent or officer to the intestate, or a person having the right to control or direct the services of the intestate, and was not a servant upon a different train of cars, then the railroad company is not responsible for such negligence, and the jury must find for the defendants, on the ground that the question of assumption of risk had not been pleaded by the defendants; whereas it is submitted that the request was based upon the defense that the negligence, if any, was that of a co-employé, which could have been set up without being specially pleaded under the general denial of negligence on the part of the defendants in the answer." This exception cannot be sustained, for the reason that the conductor and the employés under his direction and control did not sustain to each other the relation of fellow servants. *Boatwright v. R. R. Co.*, 25 S. C. 128; *Coleman v. R. R. Co.*, 25 S. C. 446, 60 Am. Rep. 516; *Hicks v. R. R.*, 63 S. C. 559, 41 S. E. 763.

Judgment affirmed.

(68 S. C. 339)

ADAMS v. SOUTH CAROLINA & G. EXTENSION R. CO.

(Supreme Court of South Carolina. April 11, 1904.)

PLEADINGS — AMENDMENT TO CONFORM TO PROOF — NEGLIGENCE — SEPARATE ALLEGATIONS — FAILURE OF PROOF — NONSUIT.

1. A motion during trial to amend pleadings to conform to the proof should not be denied where the amendment does not work a surprise on the opposing counsel.

2. In an action for personal injuries, in which plaintiff charges several acts of negligence, nonsuit should not be granted for failure of the evidence to support one charge if there is evidence to support the others.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; Dantzler, Judge.

Action by Lillian S. Adams, as administratrix of estate of Ernest L. Adams, against the South Carolina & Georgia Extension Railroad Company. From order of nonsuit, plaintiff appeals. Reversed.

W. W. Lewis, for appellant. Geo. W. S. Hart and N. W. Hardin, for respondent.

POPE, C. J. Ernest L. Adams, while employed as and in service as a brakeman on a freight train owned and operated by the defendant railroad company, was killed at or near Catawba Junction, S. C., on the 24th day of November, 1900. The plaintiff was duly appointed the administratrix of his estate, and as such brought her action against

the railroad company under what is known as "Lord Campbell's Act" to recover damages alleged to be \$20,000 in favor of said Lillian S. Adams, as the widow of said intestate. In her complaint, omitting the caption and the formal parts relating to the corporate character and location of the defendant railroad company, and that part alleging the grant of administration to the plaintiff, also the date of the death of intestate, she alleges as follows:

"(5) That while in the employment of said defendant company on said date in said capacity, while at Catawba Junction, in York county, he was called upon by the officers and employés of said road in authority over him to assist in the handling, management, and shifting of the freight train on which he was employed as aforesaid, and which was being so handled, managed, and shifted under the direction and by the orders of the conductor of said train.

"(6) That while engaged as set forth in the preceding paragraph, and while engaged in making (under orders to him from the conductor) what is known as a 'flying switch,' the said Ernest L. Adams, without fault on his part, but through the negligence and carelessness of the said railroad company, its agents, employés, and officers, was projected and thrown upon the tracks of said railroad company in front of the engine operating and pulling said train, and then and there crushed to death by the wheels of said engine, the same being operated by the agents and employés of said defendant company.

"(7) That the work and labor of making said 'flying switch,' in which the said deceased was engaged under orders to him from the conductor of said train at the time of his negligent killing by said railroad company, was an extrahazardous, careless, and negligent handling of said train by the officers and employés in authority over said deceased, and was not necessary nor incident to the proper and reasonably safe management and operation of said train nor the switching of the cars thereof, and which, on account of its dangerous nature, risk, and exposure to which it subjects employés of railroads, is prohibited by a large majority of the railroads operating in this country. Plaintiff, in this connection, further shows and alleges that the said deceased was totally unfitted to perform the work required of him in assisting in making said 'flying switch,' and his unfitness for this work was well known to said railroad company, its officers and agents, before and at the time he was ordered to do said work.

"(8) That the work of assisting in making said 'flying switch' was not within the scope of the duties for which said Ernest L. Adams was employed as flagman, but, owing to the negligence of the said railroad company in failing to provide for said train the number of brakemen necessary to properly operate it, and the number required by the laws of

this state to be supplied to a train of the size and having the number of cars that were in said train, whose duty it would have been to have made such 'flying switch,' instead of deceased, the said Ernest L. Adams was ordered by the conductor of said train to do said work; and while doing the same, without fault on his part, but through the negligence of the said railroad company, its agent and officers, in the particulars above set out, the defendant met his death as aforesaid.

"(9) That by the negligent killing of said Ernest L. Adams this plaintiff, she being the beneficiary for whose benefit and in whose behalf this action is brought, by the negligent killing as aforesaid, by the loss of companionship and support of said deceased, and the great mental anguish to which she has been subjected by reason of said killing, and the loss of said deceased, has been damaged in the sum of twenty thousand dollars, payment of which has been demanded of defendant and the same refused, and now remains unpaid."

The answer of defendant admits its corporate character and location; that Ernest L. Adams came to his death at the time and place set out in the complaint; that plaintiff is the administratrix of his estate. But it avers that Ernest L. Adams came to his death from his own gross carelessness and recklessness, or through misadventure, and then denies all other allegations in the complaint.

The action came on for trial before Judge Dantzler and a jury at a special term of the court of common pleas of York county held on the 3d day of February, 1903. At the close of plaintiff's testimony the defendant moved for a nonsuit. During the argument for that motion the plaintiff moved the court to be allowed to amend his complaint by striking out the word "flying" wherever it occurred in the expression "flying switch," so as to make the allegations of the complaint correspond with the proof. The motion to amend was refused, and an order for nonsuit was granted. The order for nonsuit was as follows: "The above-entitled action came on to be tried before me and a jury. At the close of plaintiff's testimony defendant moved for a nonsuit on two grounds: (1) That there was no testimony that the deceased, Ernest L. Adams, was engaged at the time that he met his death in making a 'flying switch,' as alleged in the complaint. (2) That, apart from the ground first stated, there was no evidence of any kind of negligence on the part of the defendant as a cause of the death of the plaintiff's intestate. The motion for nonsuit by Messrs. Geo. W. S. Hart and N. W. Hardin, attorneys for the defendant, is granted, with leave to the defendant to enter judgment for costs against the plaintiff."

From this order the plaintiff has appealed upon the following grounds:

"(1) In that his honor erred in refusing to allow the plaintiff to conform the pleadings to the proof by striking out the word 'flying' wherever it occurred in the amended complaint in the expression 'flying switch,' the error being that said motion should have been allowed because the variation between the pleadings and the proof was not material, and did not mislead the defendant; the proof being that the plaintiff's intestate came to his death while engaged in making a switch for the railroad company, although the same was not a 'flying switch.'

"(2) For error in holding that the plaintiff could not recover in the absence of evidence tending to show that the deceased came to his death while making a 'flying switch,' and that the plaintiff was limited strictly to the allegations of the amended complaint that the negligence of the railway company was in making a 'flying switch,' and holding by indirection, at least, that that was the only ground of negligence charged against the defendant in said amended complaint.

"(3) For error in failing to hold that the amended complaint set out negligence on the part of the defendant railway company in two particulars, namely, that the railway company was negligent in requiring the plaintiff to make a 'flying switch,' and, second, that the amended complaint charged also that the railway company was guilty of negligence in projecting and throwing forward the deceased upon the tracks of said railway company in front of the engine operating and pulling said train, and then and there crushing to death the deceased by means of the wheels of the said engine, as shown by the allegations of the sixth paragraph of the complaint.

"(4) In holding that there was no evidence of any kind of negligence on the part of defendant causing the death of plaintiff's intestate; whereas it is respectfully submitted that the testimony of W. A. Graham afforded some testimony sufficient to go to the jury to show that the plaintiff's intestate, while standing upon the pilot of the engine, was, through the negligence and carelessness of the engineer operating the engine, thrown forward upon the tracks of said company, and crushed to death by the engine operated by the engineer.

"(5) For error in granting nonsuit when there was some evidence, at least, of negligence on the part of the defendant company."

We will now pass upon these exceptions.

1. We think that there was error in refusing to allow the plaintiff to amend his complaint so as to have the allegations of the complaint conform to the proofs offered. As soon as the plaintiff's second witness (Mr. Graham) testified that they (the train hands under his direction) were endeavoring to put three freight cars upon the switch track so as to take one from the others, but that they were not attempting to make what is

known as a "flying switch," Mr. Lewis, as plaintiff's attorney, at page 21 of the "case," said, "The term we have used in the complaint is a misnomer;" and when the circuit judge said, "I just wanted to know what a 'flying switch' was," Mr. Lewis again said, "That is simply a misnomer." It seems to us that the court and the opposing counsel then and there were apprised of the mistake made by plaintiff's counsel—that there was then developed a difference between the allegations of the complaint and the probata. Counsel for the respondent at no time announced that the amendment, if granted, would work any surprise to him. It seems to this court that this point is fully covered by the two cases, *Booth v. Langley Co.*, 51 S. C. 412, 29 S. E. 204, and *Mew v. R. R. Co.*, 55 S. C. 90, 32 S. E. 828. In the first case just cited a little nine year old girl was injured by defective machinery in a factory. In her complaint she described that the spinning frame assigned to her, the plaintiff, was defective; whereas it turned out in the testimony that it was not the spinning frame assigned to her that was defective, but that assigned to another. This court held that, when the plaintiff asked leave to amend, it was error in the circuit judge to refuse her motion. So, also, in the second action cited, where the question was, did the circuit judge have power to allow an amendment to the complaint during the trial so as to allow the allegations of the complaint to conform to the testimony during the trial? this court held that the circuit judge had the power, and cited sections 190, 191, 192, and 194 of the Code of Civil Procedure, and also *Booth v. Langley Co.*, supra, as supporting this power of amendment. This exception is sustained.

2. We think there was error as pointed out in the second exception. The plaintiff was not limited by the allegations of the complaint to negligence in the "flying switch." There were other grounds of negligence in the complaint. This exception is sustained.

3. The third exception is sustained. A careful scrutiny of the complaint discloses that the plaintiff relied also upon the negligence of the railroad company in having its engineer to stop its train so suddenly as to throw plaintiff's intestate on the track, where its engine crushed the intestate to death.

4. We think the fourth exception is well taken. Certainly Mr. Graham's testimony was material when he described how the intestate was thrown, by the sudden reversing of the engine, upon the railroad track, and then crushed to death. The plaintiff was entitled to have this testimony go to the jury.

5. We have already virtually passed upon this exception. It is sustained. By what we have said we do not mean to say what weight, if any, the jury shall attach to this

testimony, only that there was some testimony.

It is the judgment of this court that the judgment of the circuit court be reversed and a new trial had.

WOODS, J. (dissenting). I concur in the view expressed by the Chief Justice that the plaintiff was entitled to amend, but I think the judgment of nonsuit should be sustained on the ground that there was no evidence that the death of plaintiff's intestate was caused by the negligence of the defendant. As appears from the evidence offered by plaintiff, Adams was run over and killed by the engine while engaged in shifting cars as brakeman. There were two different ways in which he could have performed this duty in comparative safety; but without orders from his superior, and contrary to the custom of the crew with which he was working, he, of his own volition, chose the most dangerous method, and undertook to couple cars with a lever while standing on a narrow platform or ledge attached to a moving locomotive. It is not clear whether he fell before the engine was reversed, or in consequence of the jar produced by reversing. But, assuming the fall was produced by the jar, as alleged by plaintiff, he was well aware that the engineer would necessarily reverse in order to carry the engine back from the switch to the main track. There is not the slightest evidence that the engineer reversed without warning, or before Adams had time to get down from the dangerous position he had assumed. As it seems to me, the only inference that can be drawn from the testimony is that the deceased lost his life by misadventure in a position of great danger, which he had taken voluntarily and negligently.

(68 S. C. 408)

JOHNSON, LYTTLE & CO. v. SPARTAN MILLS.

(Supreme Court of South Carolina. March 28, 1904.)

MASTER AND SERVANT—PAYMENT OF WAGES—ORDER PAYABLE IN MERCHANDISE—RECOVERY OF MONEY JUDGMENT—STATUTORY PROVISIONS—CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS.

1. Code 1902, §§ 2719, 2720, declare it unlawful for any corporation, person, or firm to issue or circulate for payment of wages any order, check, memorandum, or evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same is negotiable in cash or in goods, at the option of the holder, at the store or other place of business of such firm, etc., or at the store of any other person on whom such paper may be drawn. The act provides that it shall not apply to agricultural contracts or advances made for agricultural purposes, and provides a penalty against the officers or agents of any person, firm, or company engaged in manufacturing or mining. Held, that where a check redeemable in merchandise was issued by a manufacturing corporation to its employé as a credit, and not

in payment of labor, the employé could not maintain an action to recover a money judgment on the check.

2. Such act does not violate the constitutional provision guarantying equal protection of the laws.

Appeal from Common Pleas Circuit Court of Spartanburg County; Purdy, Judge.

Action by Johnson, Lytle & Co. against the Spartan Mills. From a judgment for defendant, plaintiffs appeal. Affirmed.

The decision on circuit is as follows:

"The defendant is a corporation engaged in cotton manufacturing in Spartanburg county, in this state, and the plaintiffs are merchants in the same county. The plaintiffs commenced eight actions in the magistrate's court against the defendant, asking judgment for the sum stated in each complaint, and aggregating about \$716. As the same principle is involved in all of the cases, and the same testimony will be applicable to all, it was agreed that the testimony taken in one case should answer for all the cases.

"The complaints in each case are similar, and each, in substance, is as follows: After setting out the copartnership of the plaintiffs, they allege that the defendant is indebted to the plaintiffs in the sum stated in each complaint, with interest from March 12, 1902, for certain redeemable brass or metal checks held by and belonging to them, and issued by the defendant, aggregating the amount stated in the complaint, and which were presented to the defendant for payment on March 12, 1902, a regular pay day, and payment refused, in violation of an act of the General Assembly of this state appearing at page 746 of the Acts of 1901. The defendant appeared and put in a general denial, and pleaded the unconstitutionality of the act referred to, alleging that it is in violation of both the state and federal Constitutions. The magistrate gave judgment in each case in favor of the plaintiffs, and the defendant excepted upon the various grounds set out in its notice, which it is unnecessary to repeat in full, as the notice is in the record; but it may be said that some of the exceptions impute error to the magistrate in assuming that the checks were issued in payment for labor, and in not holding that the act was unconstitutional, in that it does not give all persons the equal protection of the law, does not apply to all laborers, and it takes property from a citizen without due process of law, and limits and interferes with the liberty of the citizen, in that it prevents him from freely and in his own way entering into contracts with others, when this liberty is allowed to all persons engaged in agricultural pursuits; that the magistrate erred in deciding that the plaintiffs were entitled to judgment in money equal to the amount of the checks, and erred in not holding that the plaintiffs, if entitled to judgment at all, could only recover the value of the checks, payable in merchandise and not

in money, and erred in not holding that the plaintiffs could not sue the defendant at all, because the act fixes the penalty for its violation, and erred in holding that judgment could be obtained against the defendant for any sum other than for the penalty provided by the act. The act is entitled 'An act to protect laborers in their wages, and to repeal inconsistent acts,' and the body of the act is found in the first volume of the Code of 1902 (sections 2719 and 2720), as follows:

"Sec. 2719. It shall not be lawful for any corporation, person or firm in this state to issue, pay out or circulate for payment for the wages of labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, unless the same is negotiable in cash or in goods, wares or merchandise or supplies, at the option of the holder, at the store or other place of business of such firm, person or corporation, or at the store of any other person on whom such paper may be drawn, where goods, wares or merchandise are kept for sale, sold or exchanged; and the person who, or corporation, firm or company which, may issue any such order, check, memorandum, token or other evidence of indebtedness, shall, upon presentation and demand, within thirty days from date of delivery thereof, redeem the same in goods, wares, merchandise or supplies, or in lawful money of the United States, as may be demanded by the holder of any such order, memorandum, token or other evidence of indebtedness: provided, that if said corporation, person or firm engaged as specified in this section have a regular pay day once in every thirty days, then said corporation, person or firm shall not be required to redeem such token or evidence of indebtedness in cash until the first pay day after the same becomes payable, as herein provided, and such token or evidence of indebtedness shall be presented for payment in cash only on such pay day: provided, that the provisions of this section shall not apply to agricultural contracts or advances made for agricultural purposes.

"Sec. 2720. Any officer or agent of any corporation, or any person, firm or company engaged in the business of manufacturing or mining in this state, who by themselves or agent shall issue or circulate in payment for wages of labor any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, without being negotiable and payable at the option of the holder in goods, wares, merchandise, supplies or lawful money of the United States, as required by section 2719, or who shall fail to redeem the same when presented for payment within thirty days from date or delivery thereof, by the said company or its agent at his or their office or place of business, in lawful money of the United States, or who shall compel or attempt to coerce

any employee of any such corporation, shall forfeit to the employee \$50, to be recovered in court of competent jurisdiction.'

"It should have been stated that the checks in question have on one side of them the statement that they are issued for the convenience of employes, and on the other side that they are payable in merchandise at the Spartan Mills.

"The first question that presents itself under the exceptions is whether any other person than the laborer or employe has a right to sue. The contention of the plaintiffs is that the word 'holder,' as used in the statute, refers to any person who may have the custody of the checks at the time they are presented for payment, while the defendant contends that the act, as shown by its terms and by its preamble, is intended solely for the protection of laborers. It is proper, and oftentimes necessary, to refer to the preamble of an act in order to assist in the construction of its terms, and, upon referring to the preamble in this case, it is designated 'An act for the protection of laborers,' and the only thing in the act that points to any other conclusion is the use of the word 'holder' in the body of the act, which, taken by itself, will indicate that it had reference to the person who had possession of the check. When we take into consideration the preamble of the act, from which we gather its purport and purpose, and consider that, with the main body of the act, and with the concluding clause of section 2720, we come to the conclusion that the terms 'holder,' 'laborer' and 'employee' are all used in the same sense—in fact, bear but a single meaning, and all point to the person who performs the labor. This is manifestly so, for the reason that the Legislature can have no intention to protect outsiders dealing with the laborer, but its manifest intention was to protect the laborer dealing with his employer. But suppose that this should not be so; what rights would the holder of the check have? He would have clearly such rights as the statute gave him, for, when a statute undertakes to make a declaration concerning any subject, that is the whole on that subject. Here it has undertaken to say that 'it shall not be lawful for any corporation, person or firm in this state to issue, pay out or circulate for payment for the wages of labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its face value, without discount in cash or in goods, wares or merchandise or supplies at the option of the holder * * * While it makes the declaration that this shall not be done, yet at the same time it does not declare such contract to be void and not enforceable, nor does it provide that, in the case of the failure to carry out the requirements of the act, the holder of the check, memorandum, or token shall

have the right to recover a judgment based upon such check, memorandum, or token. Then whence does this right arise? The plaintiff in this case alleges that the defendant became indebted to the plaintiffs for certain brass checks issued and redeemable under this act. Now, in order to become indebted to the plaintiffs, there must have been some contract, express or implied. There was no express contract on the part of the defendant to pay these checks in money, and there was no implied contract to pay them in money, because an implied contract of indebtedness could not be inferred from the nature of the check itself, which expressly says that the same shall be payable in merchandise, and there are none of the elements of an implied contract in the transaction, and, as stated, the statute does not give any right to the holder to bring an action against the defendant in case of his failure to pay in money. The act was designed to protect the laborer, by preventing the employer from issuing these tokens in payment for labor, and then coercing the laborer to take the same in merchandise instead of money, and it was not designed to enable such persons as might deal with the laborer to come in and take the place of the laborer, and insist on a right not created in his favor. It will be noted in these cases that the laborers themselves are not complaining, and there is no testimony whatever from any of them as to the manner of acquiring or parting with these checks. The magistrate, in his report, says that there was no question that these checks were issued in payment for labor, but that is not borne out from the testimony, for the statement of Mr. Montgomery, the treasurer of the mill, is as follows: 'Q. Mr. Montgomery, was any contract ever made between the mill and any of its employes for the payment by the mill to its operatives for their labor in checks? A. No, sir. Q. So, then, you never issued the checks to any of the operatives of the mill in payment for their labor? A. No, sir. Q. I want to ask this, Mr. Montgomery: Was it not true that these checks would frequently be issued before the labor was performed? A. Yes, sir; we issue checks to people before they ever go into the mill.' Mr. Montgomery then goes on to illustrate how the checks were issued and the books kept.

"If it should be conceded that the act in question is a valid exercise of the legislative power, and that its provisions will extend to the plaintiffs in this case, as to holders of the checks, then what rights would they have? The act itself says that it shall not be lawful to issue any check payable other than in the manner prescribed in the act, viz., other than in money or merchandise, but in this case the defendant has done what the act says it must not do—it has issued checks redeemable in merchandise—and the plaintiffs have purchased them and have paid for them in merchandise, and now

they invoke the aid of the act to enable them to get payment in money. Since the defendant has violated the terms of the act, and made a contract other than as provided for under its terms, the remedy of the holder (conceding at this point that the holder has any remedy) would be to present the checks and demand merchandise, and then, if his demand for merchandise were refused, he might bring his action for damages, alleging his damages to be the value of the merchandise which was refused to be furnished. But in this case no such action can be brought, for the reason that the plaintiffs have prevented the defendant from carrying out the contract in this manner, by refusing to take the merchandise, and, as has been before stated herein, there is no penalty provided for this, other than that created in favor of the employé.

"But the greatest stress is laid upon the exception that the statute is unconstitutional, in that it violates the provisions both of the state and federal Constitutions. The provisions of these Constitutions are practically identical, and their terms are so well known that they need not be repeated. Our Supreme Court has recently passed upon this question in a full, clear, and elaborate manner, in the case of *Porter v. Railroad Company*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, and one of the latest, if not the latest, decisions on the subject by the United States Supreme Court is the case of *Connolly v. Union Sewer Pipe Co.*, 22 Sup. Ct. 431, 46 L. Ed. 679, and our own court is thoroughly in accord with the principles laid down in this case. In *Connolly v. Union Sewer Pipe Co.*, decided March 10, 1908, the court says: 'What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. * * * The fourteenth amendment, in declaring that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or of liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled

to pursue their happiness and acquire and enjoy property. * * * And it also states that 'The equal protection of the laws is a pledge of the protection of equal laws,' and further: 'The fourteenth amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' 'Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' And again: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature, or the people of the state in framing their Constitution.' And again, in reference to classification, the court says: 'The difficulty is not met by saying that, generally speaking, the state, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects.' For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that, in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.'

"If we add to the foregoing the well-known principle that everything must be taken in favor of the constitutionality of an act—that it will not be declared to be unconstitutional except it be shown to be clearly in violation of some constitutional provision, either state or federal—we have before us the principles upon which the validity of the act in question must be determined. In declaring that the provisions of this act shall not apply to agricultural contracts or advances made for agricultural purposes, and in providing a penalty against the officers or agents or any corporation, or any person, firm, or company, engaged in the business of manufacturing or mining in this state, is

the act simply classifying in a proper manner those persons or subjects, and operating upon them properly as a class, or has it made an arbitrary selection in reference to them, and in excluding all others? There should be some reason for excluding agricultural contracts or advances made for agricultural purposes from the provisions of the act, and there should be some reason for subjecting officers, agents, persons, firms, companies, and corporations engaged in manufacturing and mining to the penalty prescribed by the act.

"What reason can be given for this? A man, with the members of his family, might go in the early part of the year to work on a farm as farm laborers, and the farmer would be permitted, if he thought proper to do so, to hand out to this man and his family checks or other tokens of indebtedness for labor, and, after they were received, the persons receiving them, or the persons who might trade for them, would be compelled to take them in merchandise; while, on the other hand, the same person, with the members of his family, after the crop is made and carried to the Spartan Mills, for instance—the defendant here—and sold to it, could enter into the employment of the defendant, undertaking to labor, and if they saw fit to take checks as a matter of accommodation, from which to obtain credit at the store of the defendant, or in payment for labor, they could on any pay day come and change their contract, and demand payment in money. The same avenue is open to the farmer who employed them in the summer time, to obtain the money through the great commercial arteries of the country, and settle with them at stated periods, as is open to the defendant. Then why protect one and deny the equal protection of the laws to the other? Where is the reason for it? Can it be said that the defendant has better facilities for obtaining money? Is it more wealthy than the farmer who employs labor? If this be so, it can be answered that one farmer may have two or three times as much as his next door neighbor, who is also a farmer, and that, as long as there is a difference in temperament and intellect, some men will be poor and others rich. And yet the law knows no difference. It operates on rich and poor alike.

"It is contended by the defendant that not only does the act in question operate unequally upon persons in the same class, similarly situated, but that it denies the same rights and privileges granted to others, in that it allows certain persons and classes of persons similarly situated to make any kind of contracts that they may think proper, and denies this right to others. As a general proposition, all persons who are capable of consent can enter into a contract, based upon a real consideration, touching a legal subject-matter, and the courts will enforce contracts which have these elements, and will

not undertake to make contracts between the parties. The act in question prohibits issuing, paying, or circulating for payment for the wages of labor, any order, check, memorandum, or token, unless the same be redeemable in cash, goods, wares, or merchandise, but excludes from its operations the persons named, and imposes a penalty upon some of those who violate its terms, and does not subject others, although they may be similarly situated, to the same penalty. In reference to corporations generally, it would be perfectly competent for the Legislature to declare certain restrictions concerning the management and government of the corporation, because the corporation, being the creation of the Legislature, is subject to its control, but it would have to make an enactment that would operate upon all corporations of a similar class in like manner. Here manufacturing and mining corporations have been arbitrarily selected, and made the subject of a penalty for doing an act which other corporations similarly situated may do with impunity. The act prevents persons from selling any article or property and taking payment in labor, and prevents laborers from acquiring property by their labor, if one of them should see fit to contract to sell his property for labor, and the other to receive property in payment for labor.

"If the act in question be allowed to stand, then no person in this state could enforce any contract for the sale of any property or article with any laborer, other than an agricultural laborer or a laborer taking agricultural advances, for, no matter what may be the form of the evidence of indebtedness—no matter whether the laborer has agreed to take payment in land, houses, cattle, or merchandise—he can repudiate his contract at pleasure, and come up and say that he must be paid in money, which is a direct contravention of the Constitution of the United States, which declares that no law shall be passed to impair the obligation of a contract, and directly interferes with the liberty of the citizen in acquiring and disposing of property. And in this view of the case the act would be unconstitutional even without the exemptions, but with the exemptions, and the imposition of the penalty on certain persons, firms, and corporations, it is clearly unconstitutional.

"Take, for instance, another result, if this act be allowed to stand. Under the act in relation to business corporations in this state, suppose that the defendant here should decide to issue an increase of its capital stock, and a large number of shares were thrown on the market, and having, as it has, a large number of employes, it desired to encourage these employes to take stock and become interested in the workings of the mill, and that those employes had no other means of paying for their stock than by their labor; the statutes provide that such subscriptions may be paid in money, property, or labor. And

suppose that the employes enter their subscriptions payable in labor, and that at the end of each month, until the price of the subscription has been worked out in labor, the officers of the corporation should give to such laborer a memorandum stating, 'This certifies that A. B., the holder thereof, is entitled to \$10 for labor performed, payable only in subscription to the capital stock of the Spartan Mills, in accordance with the terms of its subscription.' Here the laborer has performed labor for a corporation. Here is a memorandum or token issued in payment for labor, and, if the construction of the act contended for be given to it, the laborer could come, and on any pay day violate the terms of his subscription, and demand and compel the defendant to pay in money, instead of giving him stock for his subscription.

"According to the views that we entertain of the statute, and of the law applicable thereto, the plaintiffs herein could have no right, as a holder of the checks, to a 'money judgment.' The act was not intended for their protection, and their remedy, if they had any remedy at all, was simply to receive the goods; and, having been offered the goods, they have no right to sue in this case.

"And further, the act in question is unconstitutional, in that it violates both the terms of our own Constitution and of the Constitution of the United States, in abridging the liberty of the citizen to contract and be contracted with—to acquire and enjoy his property. It impairs the obligations of contracts, and denies the equal protection of the laws to the citizens of our state.

"It is therefore ordered, adjudged, and decreed that the exceptions be sustained, and the complaints in each of the said cases be, and they are hereby, dismissed, with costs."

From this judgment the plaintiffs appeal on the following exceptions:

"(1) That his honor erred in holding that the terms 'holder,' 'laborer,' and 'employee,' in the act entitled 'An act to protect laborers in their wages, and to repeal inconsistent acts,' incorporated as sections 2719 and 2720 of the Code of 1902, are all used in the same case, with but a single meaning, to wit, the person who performs the labor. The error being that there is nothing in the act to point to such conclusions, or to indicate that any other meaning was intended to attach to 'holder' than its usual and ordinary one, to wit, the person holding the checks.

"(2) That his honor erred in holding that the act does not provide that, in case of failure by the employer to carry out the requirements thereof, the holder of the check shall have the right to recover a judgment based upon such check. The error being that the act specifically provides that the holder, whoever he may be, shall have the right to demand, and that it shall be the duty of the employer to pay, such check in money;

thereby enacting a cause of action in favor of the holder against the employer upon such right of the holder and such violated duty of the employer.

"(3) That his honor erred in holding that the magistrate's finding that there was no question that the checks were issued in payment for labor is not borne out from the testimony. The error being that his honor only considered a part of Mr. Montgomery's testimony, and not the whole of it; and his testimony conclusively showing that the labor of the employe bought and paid for the checks, and that the checks bought and paid for the labor; it making no difference whether the checks were delivered in advance of the labor rendered or subsequent thereto; the agreement of the parties being that the checks were to be paid for by labor, or vice versa; there being an interchange of labor for checks, or checks for labor.

"(4) That his honor erred in holding that the plaintiffs cannot recover, for the reasons that the defendant violated the act in issuing checks redeemable in merchandise only; the remedy of the plaintiffs being, if they have a remedy, to present the checks and demand merchandise, and, upon demand being refused, to bring their action for damages in the amount of the value of the merchandise, but that in these cases no such action could be brought, because that plaintiffs prevented the defendant from carrying out the merchandise contract by refusing to accept the merchandise. The error being, it is respectfully submitted, that such holding is argument in circle, and bases the defendant's nonliability to plaintiffs solely upon the defendant's violation of the right of plaintiffs under the statute to require the labor to be paid for in money, and that his honor's conclusion is in direct conflict with the terms of the statute.

"(5) That his honor erred in holding that the said act is unconstitutional for the reasons stated by him, because in violation of the United States Constitution and the Constitution of South Carolina, in abridging the liberty of the citizen to contract and be contracted with, and to acquire and enjoy his property. The error being that the reasons stated by his honor for such position are not sustained by the act, and do not lead to the conclusion reached by him.

"(6) That his honor erred in holding that the act in question is unconstitutional, because impairing the obligation of contracts, and denying the equal protection of laws to citizens of the state. The error being that the reasons stated by his honor for such conclusions are not sustained by the act in question, and do not lead to the conclusions reached by him. The exception of agricultural contracts and advances made for agricultural purposes does not render the act unconstitutional, because such exception rests upon a difference bearing a reasonable and just relation to the act, and not made ar-

bitrarily. The said act accords to every person or class of persons the same protection of law that is enjoyed by other persons or classes under like circumstances. Farm laborers occupy a peculiar relation to their employers, and, to a large extent, are dependent upon the output of a farm for their remuneration. In a majority of instances they receive their pay at the end of the year in part of the crops, and not in money. They have a lien upon the crops made by them for their wages by statute. Farm laborers' products are not sold as fast as made, as in cases of other laborers, and are not reduced to cash. To require payment of farm labor in cash, and not by credit, would necessitate a revolution in the methods of farming in the state; and at the time of the passage of said act there was already in force in this state an act prohibiting the issue of plantation checks, designed for the protection of this special class of labor, which act is incorporated in volume 2 of the Code of 1902, as section 358, and plantation laborers being further protected in their contracts by sections 2715 and 2716 of volume 1 of said Code."

Stanyarne Wilson, for appellants. O. P. Sanders, for respondent.

JONES, J. We affirm the judgment of the circuit court upon this ground: The circuit court has found, as matter of fact, that the testimony does not bear out the conclusion of the magistrate that the checks in question were issued in payment for labor. This being an appeal in a case at law, the finding of the circuit court on a question of fact is not reviewable. We do not think that it can be said that the only inference from the testimony is that the checks were issued in payment for wages of labor. One of the plaintiffs (Mr. Lytle) testified that, when he demanded payment of the checks in cash from the assistant treasurer of the mills, he said he would redeem them in goods, but not in cash; that he did not issue them for labor, but that they were issued for the convenience of the operatives and the store. The assistant treasurer, Mr. Montgomery, testified that the checks were sold to the operatives, and a charge made of them against the operatives on the storebooks of the company as merchandise checks; that on the regular pay days, which were the 12th and 27th of each month, the operatives would be paid for their labor the balance due after deducting the store account; that no contract was ever made between the mill and any of its employes for the payment of their labor in checks; that no checks were ever issued to any operative in payment for his labor; that checks were frequently issued before any labor was performed; that it was optional with the employes to buy checks or coupon books, or have merchandise charged. This was the substance of the testimony on this

point, and it cannot be said that the circuit court committed error of law in holding, upon the testimony, that the checks were not issued in payment of labor. Since the undisputed testimony was that these metal checks were redeemable on their face only in merchandise at the store of the defendant, and that defendant offered and stood ready to redeem them in merchandise, and plaintiffs refused to accept same, plaintiffs cannot recover in this action. Plaintiffs claim the right to recover because of the statute cited, but have failed to bring themselves within the terms of the statute, as the holders of checks issued in payment for labor.

Under this view, it is immaterial to the disposition of this case whether the act in question is constitutional or not, and defendant is not in a position to assail the constitutionality of the act, since the record does not show a case arising under the act. Inasmuch, however, as the circuit court has declared sections 2719, 2720, Civ. Code, unconstitutional, and the matter has been strenuously argued before us, and an expression of our view is deemed important, we will not withhold consideration of the question. The view of the circuit court is presented in the circuit decree, which, with the exceptions thereto, is herewith reported.

In the first place, as this is not an action to recover any penalty imposed under section 2720, quoted in the decree of the circuit court, a consideration of such section is not involved. The plaintiffs' action is based solely upon section 2719, and our consideration should be confined to that. As to that section, it is contended that the proviso "that the provisions of this section does not apply to agricultural contracts or advances made for agricultural purposes" renders the act unconstitutional. The authority mainly relied on to sustain this view (*Connolly v. Union Sewer Pipe Co.*, 22 Sup. Ct. 431, 48 L. Ed. 679) does not appear to us to be at all conclusive. Under the Illinois trust act condemned in that case, all, except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, to destroy competition and control prices, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which if done by others would be a crime against the state. As was stated by this court in *Simmons v. Telegraph Company*, 63 S. C. 430, 41 S. E. 521, 57 L. R. A. 607: "Legislation is not unequal or discriminatory, in the sense of the equality clause of the Constitution, merely because it is special or limited to a particular class. The decisions of the United States Supreme Court establish that the Legislature has power to make a classification of persons or property for public purposes, provided such classification is not arbitrary

and bears reasonable relation to the purpose to be effectuated, and that the equality clause is not violated when all within the designated class are treated alike. In the case of *Barbler v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, the court said: 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its operation, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [fourteenth] amendment. * * * Neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state—sometimes termed its police power—to prescribe regulations to promote the health, peace, morals, education, and good order, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.' In *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730 [28 L. Ed. 1145], the court said: 'The specific regulations for one kind of business which may be necessary for the protection of the public can never be a just ground of complaint because like restrictions are not imposed upon the business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions.' In the case of *Railway v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161 [32 L. Ed. 107], the court affirmed the constitutionality of a Kansas statute imposing upon railroad corporations future liabilities for damages to employes by negligence of their fellow servants, notwithstanding no such liability existed against any other person or corporation, because the court considered that the legislation met a particular necessity, and all railroad corporations, without distinction, were made subject to the same liability."

In the case of *St. Louis, etc., Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, which accords with *McCandless v. R. R. Co.*, 38 S. C. 116, 16 S. E. 429, 18 L. R. A. 440, it was held that a statute making railroad companies liable for property destroyed by fire communicated from their locomotives did not violate the fourteenth amendment, even though the liability did not depend on any negligence of the railroad company. Let it be noticed that in the two last named cases the classification for the imposition of special liability was not affected by the fact that there were other common carriers operating with steam, which might communicate fire, or whose employes might sustain injuries through the negligence of their fellow servants; thus showing that a classification need not include all engaged in a general business, as the business of carrying freight and passengers, but may simply embrace a more limited class, who carry

freight and passengers in a particular way or by particular instrumentalities.

So, in the case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the court sustained, as not violative of the fourteenth amendment, a Utah statute forbidding the employment of workmen for more than eight hours per day in mines and in the smelting reduction, or refining of ores or metals, although, no doubt, it would be easy to point out in Utah other occupations wherein it might be proper and advisable to prescribe limitations of the hours of labor. It is no fatal objection to a classification that it is not perfect, that it is unwise, that it is inexpedient. To be obnoxious to the fourteenth amendment, the classification must be manifestly unreasonable, without basis or any reasonable difference or distinction among the objects of classification—with respect to the purpose of classification, must be arbitrary. The solution of this question in many cases is confessedly difficult and delicate, and it must always be borne in mind, as a vital principle, that a statute should not be declared unconstitutional unless it is a clear, unmistakable violation of the fundamental law.

In the case of *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 169, 47 L. Ed. 323, the court held that the California Constitution (article 4, § 26), avoiding the contracts for the sale of shares of corporate stock on margin, did not violate the equal protection of the law because the provision strikes only at some, and not all, objects of possible speculation. In delivering the opinion of the court in that case, Mr. Justice Holmes uses these wise and appropriate words: "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for difference of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*."

The meaning of the proviso to section 2719, as I suppose, is that the provisions of the section shall not apply to agricultural labor contracts, or advances for agricultural purposes made to laborers. I think there are substantial reasons why the Legislature deemed it proper to insert the proviso. In the first place, a previous statute (section 358, Cr. Code) had already made provisions for the protection of farm laborers. That statute provides: "Any person or persons who shall offer to any laborer or employee at the time when the wages of such laborer or

employee are due and payable by agreement, unless otherwise provided for by special contract, as compensation for labor or services performed, checks or scripts of any description, known as plantation checks, payable at some future time, or in the shops or stores of employers, in lieu of lawful money, shall be liable to indictment and punishment by a fine not exceeding \$200, or by imprisonment not exceeding one year or both, according to the discretion of the court: provided, the word 'checks' herein shall not be construed so as to prohibit the giving of checks upon any of the authorized banks of deposit or issue in this state." So, also, provision for the protection of farm laborers are made in other statutes, as in sections 2715, 2717, vol. 1, Code. The object of both statutes quoted, construed together, is to protect all laborers from coercion by employers to compel laborers to receive, as wages for labor, goods, wares, or merchandise, or supplies, in lieu of lawful money. It is true, there is a distinction between the two statutes, in this: that persons or corporations engaged in manufacturing or mining may incur a penalty for refusing to redeem checks issued in payment of wages in lawful money, even though the laborer may possibly have contracted to receive his wages in whole or in part in goods, etc., whereas persons engaged in agriculture incur no penalty for paying, or offering to pay, the wages of farm laborers in goods, etc., provided a special contract with the laborer authorizes payment of wages in that way. But this distinction is reasonably based upon differences in the general conditions surrounding farm labor as a class, and manufacturing and mining laborers as a class.

The testimony shows that no contract between the manufacturer in this case and the laborer was made by which the laborers were to receive their wages in goods or merchandise checks, and I venture to say that it is rarely, if ever, the case for manufacturing or mining establishments to contract to pay wages otherwise than in money. But from the nature of the business, and the large number of employes, it is no doubt necessary to have regular pay days at reasonable intervals, usually twice per month, as in the case of defendant mill. Naturally, many operatives, by reason of their necessities, would frequently want means of providing for themselves and families before the arrival of pay day; hence arose the practice of issuing checks or coupon books, or some form of credit by which the operatives could secure supplies in advance of pay day; said checks or coupons being in certain denominations, and redeemable at the mill store in merchandise. Here arose an opportunity for apprehension, in enabling an unscrupulous employer to take advantage of the necessities of the laborer, and demand extortionate prices for the merchandise. The statute seeks to remove this inequality between the

employer and employé by making such checks, etc., negotiable and redeemable in cash under specified conditions and at stated times. Such legislation was undoubtedly intended to meet what was regarded an evil particularly affecting laborers in mills and mines, for which no remedy had been devised, as in the case of farm laborers. Farm laborers having previously been classified for purposes of legislation in their protection, and there being no suggestion that such classification was unreasonable, it could hardly be said that legislation designed to protect other laborers is void for unreasonableness, merely because a distinct class already provided for is excluded from the statute. A very different situation was presented to the court in *Connolly v. Union Sewer Pipe Co.*, supra. It must be remembered that every classification, in the nature of things, involves some inequality as between a member of one class and a member of another class, for otherwise there would be no such thing as classification. But in law there is no inequality, if the members of a class, reasonably designated, are given the same rights or made subject to the same restrictions. Hence it is no objection to this legislation, in so far as equal protection of the law is involved, to point out that sections 2719 and 2720 interfere to some extent with the right of mill owners and their operatives to contract that labor shall be paid otherwise than in lawful money, whereas section 358, as to farm laborers, does not interfere with the right of landowners and farm laborers to make such contract. The right of contract is not absolute, and is subject to the police power of the state. Of course, the right of contract cannot be arbitrarily interfered with.

In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, a statute fixing the period of employment in underground mines at eight hours per day was held as not to unlawfully restrict the right of employer and employé to contract for a longer period per day.

In *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, where a contract of insurance provided for liability not exceeding the cash value of the property at the time of loss, and where a Missouri statute provided that the insurance company should not be permitted to deny that the property was worth the full amount insured at the time of the insurance, and in case of total loss the measure of damages shall be the amount for which the property was insured, less depreciation in value since insurance, the court held that the statute was within the police power of the state, even though it placed a limitation upon the right of contract.

In *Otis v. Parker*, cited supra, the court held that the California Constitution avoiding all contracts for sales of shares of corporate stock on margin, and providing for

recovery of money paid on such contracts, did not unconstitutionally interfere with the right of contract, although this provision may be construed to apply to bona fide as well as gambling contracts. See, also, *Avent Beattyville Coal Co. v. Kentucky* (Ky.) 28 S. W. 502, 28 L. R. A. 276, and *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396, showing that similar legislation does not unlawfully interfere with the right of contract. If we admit that placing farm labor contracts into one class, and mill and mine labor contracts in another class, is a reasonable classification, so as not to violate the principle of equality, then the case of *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, is conclusive that legislation of the kind in question does not unlawfully interfere with the right of contract.

This brings us back to the real question, as to whether the two statutes, which, construed together, embrace all labor contracts, constitute an arbitrary classification. The two systems of labor engaged in farming, on the one hand, and manufacturing, on the other, and the conditions surrounding each, are distinct in many ways. The large number of mill operatives, aggregated into communities, as contrasted with the few laborers in the employ of the average farmer, and scattered throughout the country; the daily output of the mills, as contrasted with the yearly product of the farm; the resources of aggregated wealth to command ready cash, compared with the ability to pay always in cash of the average farmer, dependent for his cash upon crops once a year; the consequent ease with which manufacturers may carry out a system involving regular pay days in cash at brief intervals throughout the year, as contrasted with the difficulties in the way of the farmer to comply with such a system; the rarity of contracts to pay mill laborers in anything but money; the prevalence of farm labor contracts involving payment of wages in supplies or farm products—are some of the considerations which would make it reasonable to have some differences in the regulations made for the protection of the respective classes of labor. It is well known that many agriculturists contract to pay a portion of the wages of labor in supplies obtained through orders upon merchants. A very prevalent system of farming exists in this state, under which the farm laborer agrees to receive a share of the crops grown or cultivated by him as compensation for his labor, but in the meantime, until the crops are gathered and divided, the landowner undertakes to make advances in supplies, to be deducted from the laborer's share of the crop. The necessities of the average farmer often compel him to make arrangements with some merchant to fill his orders for supplies to such laborers. Now, but for the proviso in section 2719, all orders for supplies, which could be construed to be

in payment for labor issued by landowners to farm laborers under these circumstances, would be redeemable in cash in the hands and at the option of the laborer, if presented for redemption, as required by the statute, notwithstanding the laborer's contract to the contrary, although such contract is a part of a prevalent system advantageous to both landowner and laborers. To place orders of landowners, made under such circumstances, in the category of merchandise checks, etc., redeemable in cash, as prescribed in the statute, would very seriously affect the system of labor contracts on farms. Hence the proviso. We hold, therefore, that the statute in question is not unconstitutional.

The judgment of the circuit court is affirmed.

(88 S. C. 430)

B. F. KING & SON v. LANE et al.

(Supreme Court of South Carolina. April 12, 1904.)

TRIAL—IRREGULAR VERDICT—CORRECTION IN OPEN COURT.

1. Two persons were sued, one of whom defaulted. On trial of the issues between plaintiff and the answering defendant, the jury found a verdict for plaintiff against the defaulting defendant, and on inquiry from the court said that they intended to find in favor of the answering defendant, and supposed that the verdict against the defaulting defendant would have that effect. *Held*, that it was not error for the court to direct the clerk to write a verdict in favor of the answering defendant, and have the foreman sign it in open court, since the first verdict was irregular.

Appeal from Common Pleas Circuit Court of Orangeburg County; Purdy, Judge.

Action by B. F. King & Son against E. B. Lane and another. From the judgment, plaintiffs appeal. Affirmed.

Jas. F. Izlar, for appellants. Raysor & Summers, for respondents.

GARY, A. J. This is an action on an open account for lumber sold and delivered. A copy of the summons and complaint was served on both the defendants. The defendant Lane did not appear, answer, or demur to the complaint, but defaulted, and an affidavit to that effect was duly made. The defendant J. W. Smoak answered the complaint. The case was docketed on calendar 1, and was not docketed on calendar 3. The jury returned the following verdict: "We find for the plaintiff against E. B. Lane, \$218.22. D. J. Fogle, Foreman." The record contains this statement: "After publication of the foregoing verdict, the counsel for the defendant Smoak suggested to the court that under the charge of the court and the finding of the jury, as published, the jury should have gone further, and found in favor of the defendant Smoak; whereupon the court turned to the jury, and asked them if, under the charge of the court, they meant to find Mr. Lane alone liable, to which the foreman of the jury replied, from his seat, that they in-

tended to find a verdict in favor of Mr. Smoak, and that they thought the verdict against Mr. Lane alone showed that they found in favor of Mr. Smoak, and that it was their intention to so find: whereupon the court remarked that under its charge the court thought the verdict sufficiently explicit. Nevertheless, as the counsel for Mr. Smoak desired the verdict to be put in express form, the court stated to the jury, 'If that is your verdict, and you intend to find in favor of the defendant J. W. Smoak, the clerk can write out the verdict, and the foreman can sign it in your presence;' whereupon this was done, and, after the verdict was so signed, assented to the same as their verdict in open court, having previously stated in open court that they had found such verdict, and they were not again sent into the room, the court deeming it unnecessary, as it regarded the signing of the verdict in open court, after the jury had found the verdict without any suggestion from the court as to what they should find beyond what was contained in the judge's charge, as being merely a clerical matter." After the publication of the foregoing verdict the deputy clerk of the court then wrote the following verdict: "We find for the defendant J. W. Smoak." This verdict was then signed, "D. F. Fogle, Foreman," in open court. This verdict was duly published. Both verdicts were then entered upon the minutes of the court by the clerk. The plaintiffs appealed upon the following exceptions:

"(1) That the presiding judge erred in instructing the jury as to the form of their verdict, as follows: 'If you find against both defendants, simply say, "We find for the plaintiffs," whatever you think the plaintiffs are entitled to recover, and write out your verdict, with what amount you find against both of them;' whereas he should have instructed the jury that, the defendant Lane having neither appeared, answered, nor demurred to the plaintiffs' complaint, no issues, either of law or fact, are raised as to this defendant; that they alone were concerned with the liability of the defendant J. W. Smoak to the plaintiffs; and that their verdict should alone refer to the issues raised by the answer of J. W. Smoak, defendant, and to his liability to the plaintiffs; and that their verdict could not, under the circumstances here presented, be for or against both defendants.

"(2) That the presiding judge erred in instructing the jury as to the form of their verdict, as follows: 'If you find for the plaintiffs, and find against Mr. Lane alone, you would say, "We find for the plaintiffs" so many dollars—whatever the amount is—against E. B. Lane;' whereas he should have instructed the jury that E. B. Lane, defendant, having failed to appear, answer, or demur to the plaintiffs' complaint, his liability to the plaintiffs was not involved in the issues then being tried by them, and that in

no event could they make any finding as to the defendant E. B. Lane.

"(3) That the presiding judge erred in directing the jury to render a verdict for the defendant J. W. Smoak in open court, and in not sending them back to their room with full instructions as to the rights and liabilities of these several defendants under the pleadings, and as to the form of their verdict, there to consider and determine the same as to said defendant.

"(4) That the presiding judge erred in directing and permitting the foreman of the jury to sign a verdict in open court in favor of the defendant J. W. Smoak, without any consultation or conference with his fellows, in their jury room, under the further instructions of the court, and in permitting the same to be entered by the clerk on his minutes, without publication, as the verdict of the whole jury in favor of said defendant.

"(5) That the presiding judge erred in receiving any verdict of the jury, under the circumstances, against the defendant Lane, and in permitting the same to be entered by the clerk on the minutes of the court, such verdict being not only irregular, but a nullity; the defendant Lane having neither appeared, answered, nor demurred to the plaintiffs' complaint, and his liability to them not being an issue to be passed upon and determined by the jury, but by the court, on proof which, if satisfactory to the court, would entitle the plaintiffs to a judgment against said defendant for the sum sued for, as in the case of a liquidated demand.

"(6) That the presiding judge erred in refusing the plaintiffs' motion for a new trial on his minutes, his instructions to the jury being erroneous, and the verdict for the defendant Smoak being irregular and void by reason of said erroneous instructions, and that the verdict against the defendant Lane was without warrant or authority of law, and was and is therefore null and void.

"(7) That the presiding judge erred in not instructing the jury that, the defendant Lane not having served any notice of appearance, answered, or demurred to the action of the plaintiffs, the plaintiffs were entitled, on proof of their claim in open court, whether itemized or not, to a judgment by the court against the defendant Lane for the sum sued for, as in the case of a liquidated demand; and that the liability of the defendant Lane to the plaintiffs on the open account sued on was not an issue to be passed upon and determined by the jury; and that under the circumstances no verdict could be found by them against the defendant Lane; and that the issues raised by the answer of the defendant Smoak were alone the issues to be considered and determined by them."

We will first consider the assignments of error relating to the finding of a verdict against the defendant Lane under the charge of the presiding judge. The case of the State

v. Baldwin, 14 S. C. 137, shows that the first verdict was irregular, and that the only verdict in accordance with law was the one last rendered by the jury. That was an action against Baldwin, as county treasurer, and two other defendants on his official bond. The verdict returned by the jury was, "We find for the plaintiffs the sum of \$3,120.74 against C. H. Baldwin." The verdict was recommitted to the jury, to find a complete verdict. On hearing the appeal, the Supreme Court used this language: "Our next inquiry will be whether there was any error of law committed in recommitting the case to the jury after the first announcement of the verdict. It is very common practice—one which has the sanction of long usage, and is undoubtedly correct—for a circuit judge to recommit the record to the jury after the verdict has been announced for the purpose of enabling them to put the verdict in proper and complete form, and this seems to have been the purpose in this case. The action was against three persons, and the verdict, as first announced, was manifestly incomplete, and not in legal form. While it determined the issues as between the plaintiffs and one of the defendants, as to the other two it left the issues wholly undetermined. The jury, therefore, when they first announced their verdict, had manifestly failed to complete their task, and the judge properly recommitted the case to them for the purpose of enabling them to finish their work. The case was not recommitted because the jury had made an incorrect finding, but because they had failed to find at all as to two of the defendants." Even conceding that the charge to the jury and the finding by them of the first verdict were erroneous, the rights of the appellant were in no wise thereby prejudiced, as the only verdict rendered in conformity with law did not even mention the name of the defendant Lane, but said, "We find for the defendant J. W. Smoak."

We will next dispose of those exceptions assigning error in the rendition of the second verdict. The record shows that when the first verdict was published the presiding judge asked the jury if they meant to find the defendant named alone liable, whereupon the foreman replied that they intended to find a verdict in favor of the defendant Smoak, and that they thought the verdict against Lane had that effect. The court then said to the jury, "If that is your verdict, and you intend to find in favor of the defendant J. W. Smoak, the clerk can write out the verdict, and the foreman can sign it in your presence;" whereupon the verdict was assented to in open court. Under these circumstances it was not necessary for the jury to retire to their room. The action of the court was in accordance with the well-established practice in this state. *Devore v. Geiger*, 41 S. C. 138, 19 S. E. 288.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(33 S. C. 339)

WILLIAMS v. SOUTHERN RY.

(Supreme Court of South Carolina. March 30, 1904.)

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—RES GESTÆ—DECLARATIONS OF PERSON INJURED.

1. In an action against a railway company for the killing of a minor at a railroad crossing, evidence as to other boys playing on the crossing was incompetent on the question of decedent's contributory negligence.

2. Declarations of a person injured as to the manner in which the injury occurred, made immediately after the accident to persons who ran to his help, were admissible as a part of the *res gestæ*.

Appeal from Common Pleas Circuit Court of Union County; Buchanan, Judge.

Action by Rosa Williams, as administratrix of Wallace Williams, against the Southern Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

C. P. Sanders, for appellant. V. E. De Pass and W. W. Dixon, for respondent.

POPE, C. J. This action, under Lord Campbell's act, was brought to recover \$1,990 damages from the defendant, alleging that, through the negligence of the defendant, one Wallace Williams a lad of 14 years, had his leg cut off by one of the defendant's trains on the 16th April, 1902, and died therefrom on the 3d July, 1902. That the negligence of the defendant consisted in failing to blow the whistle or ring the bell of the engine drawing the train, as required by law, and also running at a reckless speed across a street crossing in the town of Union, S. C. This was all denied by the defendant, who also alleged that, if it was guilty of negligence in failing to ring its bell or to sound the whistle on the engine, the intestate was guilty of contributory negligence by trying to get on its train while in motion, and, by failing to get on its train, fell so near or on its track that his foot was run over by a wheel of one of its freight cars.

The action came on for trial before his honor O. W. Buchanan as circuit judge, and a jury at the October term, 1902, of the court of common pleas for Union county. During the trial the circuit judge admitted some testimony, and refused to admit some testimony, which the defendant alleges was erroneous; and also alleges error in his charge to the jury in modifying defendant's sixth request to charge. The jury found a verdict for plaintiff of \$400. The defendant then moved on the minutes of the court for a new trial, which motion was refused by the circuit judge. After entry of judgment upon the verdict, the defendant appealed therefrom upon the following grounds:

"(1) In refusing to allow the witness Mrs. Hawkins to be examined as to the frequency of boys running about and playing at the

crossing where the injury occurred during the time trains were passing there, and in sustaining the objection of plaintiff's counsel to such testimony; it being respectfully submitted that such testimony was both competent and relevant to the issues involved in this case.

"(2) In permitting the witnesses Gossett, Ford, and Rochelle to testify and state the declarations of Wallace Williams, the injured boy, on the ground they were a part of the *res gestæ*; whereas it is respectfully submitted his honor should have held that these declarations were hearsay, and were not a part of the *res gestæ*, and should have excluded them from the evidence.

"(3) In not allowing the witness Jacob Rice to testify to the fact that the crossing where the injury occurred was a common gathering place and playground for little negro boys; it being respectfully submitted that this evidence was relevant and competent on the question of contributory negligence, and also as to whether the boy may not have been a trespasser.

"(4) In not charging the defendant's sixth request without modification, to wit: 'Where one sues for damages on account of injuries causing death, he must prove that the deceased died from the injuries alleged;' and in modifying this request by instructing the jury that they should consider this in the light of and in connection with section 2139, vol. 1, of the Code of 1892. The error being, it is respectfully submitted: First. That his honor, in the light of the testimony of the physicians in this case, erred, in that this modification was calculated to lead the jury to believe that if one is injured, and this injury weakens his constitution, and renders him less able to resist disease than he would be if in sound health, that his heirs could recover damages from the persons inflicting the injury, if some disease not superinduced by the injury attacks the injured person and causes his death; whereas it is respectfully submitted that if one is injured in such manner so as to weaken his constitution, even if this does render him less able to resist disease than he would be if in sound health, then that the person inflicting the injury is not liable for the death of the injured person if he is attacked by and dies from a disease not superinduced by such injury. Second. That his honor's modification was calculated to lead the jury to conclude that under Lord Campbell's act, where one is injured, and death ensues from some disease, whether superinduced or not by the injury, that, because the system was weakened, those named in the act would have a cause of action against the one inflicting the injury; whereas his honor should have held that the injury must cause death, or at least be the proximate cause thereof, before a cause of action can exist under the act. Third. That by this modification his honor took away from the jury the question of the proximate

cause of the death, and led the jury to believe that, if one is injured at a highway crossing, and the defendant failed to ring its bell or sound its whistle, as the statute required, and this injury weakened his constitution, and he was afterwards attacked by disease, whether superinduced by the injury or not, from which disease he died, then that his heirs could recover of the defendant if the injury contributed to the death in any degree whatever; whereas it is respectfully submitted that under the law applicable to causes of action for the beneficiaries, where an injury causes death, and in the light of the testimony in this case, the injury must at least have contributed as a proximate cause to the death before a recovery could be had.

(5) Because his honor erred in refusing the motion for a new trial, the error being that his honor erred in holding that he could not interfere with the determination of the jury where there was any evidence on the issue involved; whereas his honor should have held that the verdict of the jury in this case was against the great weight of the evidence: (a) As to whether the injury was caused by the engine striking the boy on the street as he was attempting to cross it, or by the boy attempting to get on a moving car after the engine had already crossed the street; (b) as to whether this alleged injury caused the death of the boy. That his honor should have used his discretion, and should have passed on the question whether or not the verdict was against the greater weight of the evidence."

We will now examine the exceptions in our own order.

1. We do not think there was error when the circuit judge refused to allow Mrs. Hawkins to testify in this case that little boys frequently ran about and played on the crossing at Wallace street, where the accident occurred, when she had testified that she never saw Wallace Williams on such crossing. Her proposed testimony was not only immaterial to any issues involved in this case, but was calculated to prejudice plaintiff's case. This exception is overruled.

2. We think the circuit judge committed no error when he allowed Gossett, Ford, and Rochelle to testify as to what Wallace Williams told them as to the manner in which he was injured. One or two of the witnesses saw Wallace Williams when he was struck by the engine. They rushed to his help, and he then and there declared to them how he was hurt. This court has several times held that the declaration need not be made coincident with the injury, but near about it; so nearly that it is not likely that the declaration could be manufactured. The very recent case of the State v. McDaniel, 47 S. E. 384, establishes the foregoing proposition as to the admissibility of declarations as a part of the *res gestæ*. *Leahy v. Cass Avenue & Fair Grounds Railway (Mo.)* 10 S. W. 58, 10

Am. St. Rep. 300; also *Wormsdorf v. Detroit City Ry. Co.* (Mich.) 42 N. W. 1000, 13 Am. St. Rep. 453. This exception is overruled.

3. The witness Mr. Jacob Rice could not testify, against the objection of plaintiff, that little boys used the crossing where the accident occurred as a playground. What concern was it who played there, if plaintiff did not? As remarked in disposing of first exception, such testimony was not only immaterial to the issues here involved, but would have been prejudicial to the case. This exception is overruled.

4. We will now consider the fourth exception. The defendant requested the presiding judge to charge the jury as follows: "(6) Where one sues for damages on account of injuries causing death, he must prove that the deceased died from the injuries alleged. I have just read you that statute which says 'contributed to the injury,' and I charge you that in the light of and in connection with the section I have just read to you. (7) A jury ought not to find that one died from injuries from mere probabilities. It should be proven by the preponderance of the evidence. I charge you that." It will be seen that the presiding judge made the charge, but qualified it by referring to that statute which says "contributed to the injury." But it does seem to us that when the circuit judge charged the seventh request, which we reproduce herein, he cleared away any possible doubt. We have examined the whole charge of the circuit judge, and find it admissible in every respect. We do not think it was any business of the circuit judge to canvass the opinions testified to by several physicians. It would have been at variance with our state Constitution if he had done so. The jury heard all the testimony. They remembered that the uncontradicted testimony of the plaintiff was that her intestate was never sick a day since he was a baby. That the testimony of the defendant's own witness Dr. S. S. Lenord stated that there was no sign of anything but the wound made by the cutting off his foot by the railway on the 16th April, 1902, when he went to call on the intestate. He was the physician employed by the railway itself. He used the iodoform after which the "rash," as it was called, first made its appearance. Both he and his son testified that the wound made by the operation in cutting off the leg of Wallace had never entirely healed, and the other physicians say that it was never entirely healed. It is true, he fell from his crutches and opened the wound again. It is true that he had a spell of malarial fever, but it was stated that the fever had subsided. The doctors all united in saying that they expected Wallace to recover, but he did not. He died a few days after Dr. Culp saw him. We ought to have stated that the doctors never did undertake to say with any certainty as to what killed Wallace. They all admitted that the wound inflicted by the railway company had

its effect in reducing Wallace's power of resistance to disease. The jury heard, as before remarked, the uncontradicted testimony that Wallace had never been sick in his life; that he was stricken down by this railway company on the 16th April, 1902; and that he died on 3d July, 1902, never having recovered from this wound made by the railway company. They had the right, and it was their duty, to pass upon all the testimony in the case. The circuit judge impressed upon their minds that they ought not to find that one died from injuries from *mere probabilities*. (*Italics ours.*) Indeed, that was the duty of the plaintiff to prove that the wounded boy died from the injuries alleged. We think that the charge of the circuit judge could not mislead the jury. The parties have had a fair trial. It is to the interest of the people of this commonwealth that when a fair trial has been had in a cause that should be the end of it.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(68 S. C. 222)

RILEY v. MUTUAL LIFE INS. CO.

(Supreme Court of South Carolina. April 1, 1904.)

MAGISTRATE'S COURT—JURISDICTION OF PERSON—APPEAL—DISMISSAL—REMAND.

1. On appeal from a magistrate, if the circuit court decides that the magistrate had not acquired jurisdiction of defendant's person, it should dismiss the case, and not remand it for further action.

Appeal from Common Pleas Circuit Court of Saluda County; Klugh, Judge.

Action by D. Luther Riley against the Mutual Life Insurance Company. From an order of the circuit court remanding the cause to magistrate court, defendant appeals. Reversed.

Eugene W. Able, for appellant. B. B. Evans, for respondent.

POPE, C. J. The plaintiff instituted his action in the court of M. L. Little, Esq., one of the magistrates for Saluda county, on the 3d day of April, 1903, to recover the sum of \$26.50 of the said defendant, the Mutual Life Insurance Company. The summons was served upon F. H. Hyatt, Esq., as manager for this state of said defendant insurance company, on the 7th day of April, 1903, at Columbia, S. C., and said summons is in these words: "State of South Carolina, County of Saluda, Court of Magistracy. Summons for Relief. Complaint Served. D. Luther Riley, Plaintiff, against The Mutual Life Insurance Company, Defendant. To the defendant, the Mutual Life Insurance Company: You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer

to the said complaint on the subscribers at their office, Saluda, S. C., within twenty days after the service hereof, exclusive of the day of service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in the complaint. **Barnard B. Evans, Plaintiff's Attorney. M. L. Little, [L. S.] Magistrate. Saluda, S. C., April 3d, A. D. 1903.**" A complaint was served with the summons. The "case" shows that at 8 o'clock p. m. on the 28th day of April, 1903, the magistrate, M. L. Little, Esq., called the case for trial. B. B. Evans, Esq., as attorney for plaintiff, alone was present. Neither defendant nor its attorney put in an appearance. Upon the production of an affidavit as to service of the summons and complaint, the said magistrate gave judgment for \$28.50; also for 60 cents for magistrate's costs, and for \$11 constable's costs. We should have stated that the complaint showed a claim against the defendant on account. On the 29th day of April, 1903, the defendant served notice of appeal upon the magistrate and plaintiff's attorney, which, omitting formal part of notice and exceptions, was as follows: "(1) Because the magistrate, M. L. Little, has never acquired jurisdiction of the defendant herein, in that there has been no proper or legal summons served on the defendant requiring him to appear in his court more than twenty days from the date of service thereof; and, further, because the summons served was wholly insufficient, and did not appoint a time or place of trial. (2) In that the judgment rendered was irregular and void, in that there is no proof whatever offered of the truthfulness of the complaint, and, the action not being upon a written instrument for the payment of money only, the cause of action must be proven regularly, even where default has been made. (3) In that it was error to give judgment for \$11 for constable's costs in the case, because under the law an officer can charge for the miles actually traveled in making service only, and it is a fact that the officer making the service herein is a resident of Columbia, S. C., and made the service in that city, and did not travel from Saluda to Columbia." But the "case" shows that the magistrate, after the notice of appeal, to wit, on the 1st day of May, 1903, entered on his record these words: "The court took a recess until May 1st, when the proof of the claim was introduced, and the following testimony taken." Then followed the testimony taken on 1st May, 1903, by the magistrate in support of plaintiff's claim. The appeal came on to be heard before his honor Judge Klugh in the court of common pleas of Saluda county at the May term, 1903, of said court. As the result of such hearing the said circuit judge passed an order sustaining exception No. 1, and ordering the record to be returned to the magistrate, M. L. Little, Esq., for such further

proceedings to enforce his decree as were necessary. The circuit judge, in his order, declared that he deemed it unnecessary to pass upon the other matters contained in exceptions 2 and 3. Within due time, the defendant appealed from and excepted to the order of Judge Klugh on the following grounds: "(1) Because his honor Judge Klugh erred in remanding the cause to the magistrate, in that, having found that the court had never acquired jurisdiction of the defendant, the judgment rendered by the magistrate should have been set aside, with costs, and the cause dismissed. (2) Because his honor Judge Klugh erred when he sustained defendant's first exception in failing to set aside the judgment entered by the magistrate, and awarding costs on the appeal to the defendant, and dismissing the action. (3) Because his honor Judge Klugh erred in refusing to consider the exception of the defendant wherein defendant complained that it was error for the magistrate to enter judgment against the defendant without formal proof of the cause of action; and it is respectfully asserted that it was error for the magistrate to receive any testimony herein on May 1st, after entering the orders that he entered April 28th, and receiving notice of defendant's intention to appeal April 29th. (4) Because his honor Judge Klugh erred in refusing to consider defendant's exception whereby defendant complained that it was error for the magistrate to give judgment for constructive mileage of an officer for serving papers."

We will now endeavor to consider this appeal. In the first place, we will remark that the question that the magistrate below had no jurisdiction to hear and determine this case is conclusively settled against all parties by the circuit judge sustaining appellant's first exception, and there is no appeal therefrom. But defendant (appellant) contends that the circuit judge should have given his own judgment, and not referred the cause back to the magistrate for that purpose. So we sustain the appellant's first exception or ground of appeal. See section 368, subd. 1, of the Civil Code of Procedure of South Carolina, where the circuit judge is directed to render his judgment.

As to the second exception, we sustain that also, and we might add that, whenever a question of jurisdiction is settled against a plaintiff, then his action should be dismissed. There can be no valid orders or judgment in an action where the court is without jurisdiction. *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937. If the judgment of the magistrate is void for want of jurisdiction, then all he adjudged is null and void. It was not error in the circuit judge to refuse to go into particulars, as set out in the third and fourth exceptions.

It is the judgment of this court that the order of the circuit court appealed from be remitted to that court, with direction to the

presiding judge of said court to make a judgment declaring the judgment of the magistrate's court null and void, and reversing the same.

(68 S. C. 512)

HUTCHINGS v. MILLS MFG. CO.

(Supreme Court of South Carolina. April 20, 1904.)

INJURY TO EMPLOYÉ—EVIDENCE OF NEGLIGENCE—PLEADING—CONTRIBUTORY NEGLIGENCE.

1. In an action by an employé to recover for personal injuries, evidence that it was his duty to instruct new employés as to the danger from machinery, and that he went to a machine for that purpose, which machine, according to the custom of the mill, should at the time have been stopped, but which had been left running without notice to the employé, and that he was injured thereby, was some evidence of negligence on the part of the master, though the employé could easily have ascertained if the machine was running.

2. A denial in an answer of allegations that plaintiff was without fault in bringing about his injury raises the question of contributory negligence.

3. Refusal of an amendment at trial does not preclude the right to move for it before the next trial.

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Action by W. F. Hutchings against the Mills Manufacturing Company. Judgment for plaintiff. Defendant appeals. Reversed.

Cothran, Dean & Cothran, for appellant. Blythe & Blythe, for respondent.

WOODS, J. Plaintiff's hand was caught in a card machine and severely cut, while he was working as an operative in defendant's cotton mill. This action was brought to recover damages for the injury, and resulted in a verdict for the plaintiff.

Defendant, in the first exception, assigns error in the refusal of the presiding judge to order a nonsuit on the ground that the evidence failed to show any act of negligence on the part of the defendant. The plaintiff's testimony tended to prove that the accident occurred under the following circumstances: Having observed that the knives connected with a card machine in charge of another operative had fallen from the machine, plaintiff reported the fact to his superior, and returned to his work. The operative in charge of this machine was inexperienced, and it was part of plaintiff's duty to help him by giving him information and instruction concerning his work. It was the custom of the mill, when a machine got out of order, to strip it and then stop it by disconnecting the machinery. On this occasion, however, the card machine was left running, by the express order of a superior, for the grinder to sharpen it. Relying on the custom of stopping the machine, the plaintiff took his inexperienced co-employé to it to show him how the knives were adjusted and the office they performed. The machine being inclosed,

and comparatively noiseless, the plaintiff did not discover that it was running, and, in explaining to his co-employé, undertook with his hands to clear off the motes under the machine, instead of using a stick provided by the company for that purpose. One hand was caught in the machinery and mangled. The plaintiff knew he could ascertain with certainty whether the machinery was in motion by stepping to one side and observing the pulley, but he did not take that precaution, because of his confidence that the machine had been stopped, as was usual in such circumstances. If the foregoing statement is true, plaintiff was acting within his line of duty in explaining the machine to the inexperienced operative, and the failure of his superior to notify him that he had ordered that the machine be left running, contrary to the usage of the mill, was some evidence of negligence. We refrain from discussion of the facts, because the case must, on other grounds, go back for another trial.

The defendant submits, in his fifth exception, that the presiding judge erred in charging the jury that they could not consider whether the plaintiff had been guilty of contributory negligence, holding that this defense had not been set up in the answer. Where the complaint in an action of tort, charging negligence of the defendant as the proximate cause of the injury, alleges that the plaintiff was without fault, a denial of this allegation raises the issue of contributory negligence. *Long v. Southern Railway Co.*, 50 S. C. 53, 27 S. E. 531. The seventh paragraph of the complaint is as follows: "That plaintiff examined the said machine, and knowing that it was the duty and custom of the operatives, after stripping, to stop the machine, not knowing of the orders of the said card grinder that said machine be left running, not having any evidence that the said machine was running, but, on the contrary, believing that said machine was not in motion, inserted his hand therein at the bottom thereof, in order to show the said Lytle the stand from which the said knives had fallen, and where they should be when in their proper place." The plaintiff had before set forth in detail certain acts of the defendant as constituting the negligence which led to the accident. He then in this paragraph anticipates that it may be charged by defendant that he also was negligent in putting his hand under the machine, when he knew, or ought to have known, that it was running; and, without waiting for the defendant to make the charge, he tenders the issue himself by alleging that he did not know the machine was running, and had no evidence of the fact. It is manifest, under the authority just cited, that the denial of the plaintiff of this allegation raised the issue of contributory negligence in the particulars in which it was denied by the plaintiff. The fifth exception must therefore be sustained.

This conclusion, it is obvious, makes the refusal of the circuit judge to allow the defendant to amend, by pleading more specifically the defense of contributory negligence, of no importance. The refusal of the circuit judge to allow an amendment at the trial could not prejudice the defendant's right to move for it before the next trial.

The first, second, and third exceptions are overruled; the fourth and sixth were abandoned.

The judgment of this court is that the fifth exception be sustained, and the cause be remanded to the circuit court for a new trial.

(68 S. C. 506)

STANDARD SEWING MACH. CO. v. ALEXANDER.

(Supreme Court of South Carolina. April 20, 1904.)

PLEADINGS — AMENDMENT — BANKRUPTCY — DISCHARGE — PENDING CASES — EFFECT — ESTOPPEL — ELECTION OF REMEDIES.

1. Code Proc. § 194, limiting the right to amend pleadings, applies to amendments asked for during or after the trial which might prejudice by surprise, and not to amendments before the trial.

2. An order on a discharge in bankruptcy providing that it shall not affect a certain pending case until final judgment therein, and that as to such judgment the discharge shall have the same force that it would have if the judgment had been recovered after the application for discharge and before the granting of the same, permits the prosecution of such suit.

3. Plaintiff in an action in tort on the ground that goods were obtained by false representations is not estopped by filing in the bankrupt court notes taken for the price of goods.

4. Where vendor of personalty sues on notes taken for the purchase price, and finds that a judgment thereon cannot be obtained because of proceedings in bankruptcy, he may abandon the action, and sue in tort, on the ground that the goods were obtained by fraud.

5. The vendor of goods is not, by retaining past-due notes, barred from suing in tort for obtaining goods by fraud, where the notes were in his possession at the time of the trial.

Appeal from Common Pleas Circuit Court of Greenville County; Gary and Purdy, Judges.

Action by the Standard Sewing Machine Company against M. L. Alexander. From judgment for plaintiff, defendant appeals. Affirmed.

B. M. Shuman, for appellant. Haynesworth, Parker & Patterson, for respondent.

WOODS, J. In the original complaint against the defendant, who was a bankrupt, a number of notes given by him were set out upon which judgment was demanded, and it was further alleged that the goods for which the notes were given were obtained by fraud in making certain false statements as to his financial condition, upon which plaintiff relied

in delivering the goods. Before the trial, Judge Watts allowed the plaintiff to amend his complaint by striking out the allegations concerning the notes, and alleging that defendant induced the plaintiff, by the fraudulent representations as to his condition, to sell and deliver merchandise reasonably worth \$8,108.54, which was also the amount for which the notes were given.

The first position taken in the appeal is that Judge Watts erred in allowing the amendment, because it changed substantially the claim of plaintiff, and allowed an action for tort to be substituted for an action on contract. It has been decided in *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684, and other cases, that the limitation of the right to amend fixed by section 194 of the Code of Procedure, upon which defendant relies, applies to amendments asked for during or after the trial which might prejudice by surprise, and not to amendments before the trial.

The defendant was adjudged a bankrupt on the 5th day of November, 1900. On the 7th day of March, 1901, the defendant filed in the bankrupt court his application for his discharge in bankruptcy. This action was not commenced until the 14th day of October, 1902. It thus appears that the application of the bankrupt for his discharge was pending when this action was commenced. The contention of the defendant is that when he made and filed his application for discharge it was to be granted or refused him according to the status of things as they then stood; that the right to discharge could not be made to depend upon some new status or condition created after the application for discharge; and hence this suit, not having been commenced until after the application for discharge was made, is barred by the order of discharge. The decretal part of the order of discharge is: "It is ordered that said discharge be, and the same is hereby, granted, and that the said exceptions of said bankrupt be, and the same are hereby, sustained; provided, that this discharge shall not affect the case of the Standard Sewing Machine Co. against M. L. Alexander, now pending in the court of common pleas in and for the county of Greenville, in the state of South Carolina, until final judgment therein; and as to any judgment that may be recovered therein by the plaintiff in said case this discharge shall have the same force and effect that it would have if said judgment had been recovered after the application for said discharge and before the granting of the same, and no other." The true interpretation of this order is that the plaintiff was given permission by the United States District Judge to pursue his action in the court of common pleas to judgment, the question as to the effect of the discharge on any judgment that might be obtained being reversed. We do not understand, however, that Judge Brawley undertook to limit the defenses that might be set up to the action pending in the court of com-

mon pleas for Greenville county, although such defenses might involve the consideration of the bankrupt law. Hence, if the bankrupt act does not permit a suit of this nature to be commenced against the bankrupt after the petition for discharge has been filed, the action must be dismissed. It is clear that the order of discharge did not affect plaintiff's claim, but, on the contrary, expressly reserved the rights of both parties to this suit.

It is not the duty of this court in this case to inquire whether an order for conditional discharge could be legally granted. Such an order has been made by the court having jurisdiction of such matters, and it must be given full effect according to its terms. Taking the view most favorable to the defendant and regarding the order as having the same effect as an unconditional discharge granted after the termination of this suit, it has the same effect as an order of discharge with a judgment recovered in an action for fraud outstanding against defendant; and such an order would not discharge defendant from such a judgment. The bankrupt act saves from discharge judgments in actions for fraud in existence at the date of the discharge, and the exception is not limited by the act to those judgments in existence at the date of the filing of the petition for discharge.

The plaintiff is not estopped from bringing this action by proving in the bankrupt court the notes given for the goods. *Strang v. Bradner*, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248. This case, it is true, arose under the bankrupt act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), but the same doctrine has been applied to the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). In *re Lewensohn* (D. C.) 99 Fed. 73, Id., 104 Fed. 1006, 44 C. C. A. 309.

There can be no doubt of the correctness of the general proposition that suit for the purchase money on a contract of sale is an affirmance of the sale and a waiver of any claim that the vendor was induced to part with the property by fraud. We think this case, however, clearly falls under an important exception, thus stated in 1 Benjamin on Sales, 581, note: "But in *Peters v. Ballistier*, 3 Pick. 495, the captain of a vessel sold a cargo without authority. The owner at first brought assumpsit, but, discovering before trial that he had misconceived his remedy, he discontinued the suit, and brought trover, which was sustained. On principle, this seems correct. In general, where a party is unsuccessful because he has not brought the proper form of action, he is not barred from his true remedy. It would seem that he ought to be barred by his election only where he has in fact two remedies, not where he resorts to a remedy which gives him no judgment on the merits. See *Butler v. Hildreth*, 5 Metc. 49, where this

distinction is taken." The plaintiff brought his action on the notes, alleging the fraud manifestly under the mistaken impression that a judgment obtained under those allegations would not be affected by the bankruptcy proceedings. Upon discovering his error and ascertaining that any judgment obtained in a suit on the notes would be barred by the discharge in bankruptcy, he moved to amend and sue for the fraud disaffirming the contract. The conduct of the plaintiff and the contents of his pleadings indicated plainly these facts, and it was no error for the circuit judge to leave the question to the jury as to whether the statements of the original complaint indicated an intention to waive the tort. Even direct allegations of fact in an original pleading inconsistent with those of the amended pleading are not conclusive in a trial on the amended pleading, but only evidence of admissions to be weighed with any other evidence on the subject. *Hall v. Woodward*, 80 S. C. 564, 9 S. E. 684. The court did not submit to the jury the construction of the pleading, but told them, in considering whether the plaintiff had waived the fraud in suing on the contract, they should consider the allegations of fraud in the original complaint.

The defendant insists that a nonsuit should have been granted for the reason that plaintiff undertook to sue for the fraud without returning the notes. The notes did not operate as payment. If proving the notes as debts against the bankrupt does not operate as a bar to an action like this for fraud, certainly a failure to return them could not be so regarded. Indeed, section 57 of the bankrupt law requires notes to be filed with the proof of claim, so that they are ordinarily presumed to be in the hands of the officer of the court. If the notes had passed from the hands of the plaintiff, and ceased to be his property, so that he could not have them in court to return, as in *Townsend, Arnold & Co. v. Stevenson & Walker*, 4 Rich. Law, 59, this defense would be stronger. The rule invoked by defendant stands on the reason that the seller should not be allowed to have the sale annulled for fraud, while he held something received in the trade which might be of value to him or bring loss to the buyer. In this case the undisputed evidence was that the notes were in the hands of the plaintiff at the time of the trial. They could be of no value to the plaintiff, because, by pressing to judgment this suit to annul the sale, he has conclusively elected to repudiate them. The notes being overdue, an assignee of plaintiff would stand in no better position. Hence they were as absolutely destroyed as if they had been canceled and returned.

Having endeavored to consider all the positions taken by defendant in his exceptions, we are unable to discover any error in granting the motion to amend, or in refusing the

motion for nonsuit, or in the charge to the jury.

The judgment of this court is that the judgment of the circuit court be affirmed.

(88 S. C. 483)

McKEOWN v. SOUTH CAROLINA & GEORGIA EXTENSION R. CO.

(Supreme Court of South Carolina. April 19, 1904.)

NONSUIT—ACCIDENT TO PERSON ON TRACK.

1. In an action to recover for the death of plaintiff's decedent by being struck by defendant's cars, where the evidence showed that he was hard of hearing, and was walking on a part of the track where pedestrians were accustomed to walk when he was struck by a freight train running at night without a headlight, nonsuit was improper.

Appeal from Common Pleas Circuit Court of York County; Dantzler, Judge.

Action by John G. McKeown, administrator of J. W. McKeown, against the South Carolina & Georgia Extension Railroad Company. From order of nonsuit, plaintiff appeals. Reversed.

Wilson & Wilson, for appellant. C. P. Sanders, for respondent.

JONES, J. This action was brought to recover damages for alleged wrongful death of plaintiff's intestate, J. W. McKeown, through the negligence and wantonness of the defendant. This appeal is from a nonsuit.

The complaint alleged: "(4) That on the night of the 5th day of February, 1901, about 9:30 o'clock, the said J. W. McKeown was walking along the side of the track of defendant railroad between Yorkville and Sharon, in said county and state, and which, with the knowledge and acquiescence of defendant, had long been used by the public as a traveled way, when one of defendant's freight trains, going toward Sharon, and negligently running without any headlight on its engine, recklessly and negligently ran upon and against the said J. W. McKeown, knocking him down on the side of said track, and inflicting severe, but not necessarily fatal, injuries; and that, although the engineer and fireman running and operating said train for defendant at the time knew, or had good cause to know, or by proper care and inquiry would have known, that the said J. W. McKeown had been so struck and injured, they recklessly, wantonly, and negligently failed to stop said train and take care of him, but continued on their way. (5) That the said J. W. McKeown was hard of hearing, and so could not hear the approach of said train; but, if said engine had been supplied with the proper headlight, the reflection therefrom would have warned him of its approach, so that he could have avoided the same. (6) That the injury so inflicted upon the said J. W. McKeown would not have resulted in his death

if said train had been stopped and proper care and attention had been given to him; but, owing to the recklessness and wanton negligence of the defendant, as aforesaid, the said J. W. McKeown was allowed, in said condition, to lie on the side of said track, in the wet and cold, for hours, without any aid or assistance, thereby causing his death."

The motion for nonsuit was based upon the following grounds: "(1) Because there is no evidence tending to show that the place where the deceased was killed was a street, highway crossing, or traveled place, but, on the contrary, the evidence shows that the place where the deceased was killed was on the track of the defendant at a point other than a street, highway, or traveled place, and where neither the public nor the deceased had a legal right to be. (2) Because there is no evidence tending to show that the deceased was seen, or might have been seen, by the engineer, or those in charge of the engine or train, even if there had been a headlight, or that the employees of the defendant company knew, or might have known, that the deceased was in a place of apparent danger, from which he could not have extricated himself. (3) Because there is no evidence tending to show that the employees of the company were guilty of any willfulness, wantonness, or of any such negligence or want of care, as would make the defendant liable for injuring or killing one who was using its tracks at a point where he had no legal right to be. (4) Because there is no evidence which tends to show any breach of duty by the defendant to the deceased, even assuming him to have been a licensee. (5) Because there is no evidence that deceased was killed by the defendant. (6) Because there is no evidence tending to show that the train could have been stopped in time to avoid injuring the deceased, even if it had been equipped with a headlight. (7) Because there is no evidence tending to show that the want of a headlight was the proximate cause of the injury."

Judge Dantzler, in his order of nonsuit, sustained the first, second, third, sixth, and seventh grounds, but overruled the fourth and fifth. The appellant alleges error in granting nonsuit on the grounds stated, and respondent has given proper notice that the court would be asked to sustain the nonsuit also upon the grounds overruled.

First, as to whether there was any evidence tending to show that deceased was killed by the defendant. In what we shall say hereafter we do not mean to express any opinion whatever as to the force or sufficiency of the evidence, but intend only to indicate our view as to whether there was any evidence tending to prove the allegations of the complaint, and which the jury should have been permitted to consider. There was testimony that on the night of February 5, 1901, between 10 and 11 o'clock, J. W. McKeown was found lying in a helpless condi-

tion on defendant's track between Yorkville and Sharon, in York county, by William Currence, who lived close by, and had for some time heard his cries before going to his assistance. This was after defendant's freight train had passed going from Yorkville towards Sharon, the interval not being definitely stated, but spoken of by the witness as "a good bit." The train left Yorkville that night and went towards Sharon without a headlight, and deceased, who was partially deaf, was probably going in the same direction, as he was last previously seen in Yorkville late that evening, and lived beyond Sharon. No one who testified saw the train strike deceased. After he was found on the track, there was much delay in securing sufficient help to remove him; but he was finally removed a short distance away, where he died about 1 o'clock that night. The physician who examined his body found a bad bruise on the right side about 12 inches broad, with congested blood under the skin, as if struck by a violent blow, and the physician stated that, in his opinion, the wound was such as could have been made by some portion of a train of cars projecting over the track and striking him. There was some evidence of impressions on the soil near by where he was found, indicating that he had staggered off from the track, was down upon his knees, and had dragged himself back to the place where he was found. This was sufficient to justify overruling the nonsuit on the fifth ground.

In sustaining the nonsuit the court gave as his reason that the evidence showed that the deceased, at the time of his alleged killing or injury, was a trespasser upon the track of the defendant company, and did not tend to show any wantonness, willfulness, or intentional disregard of the rights of the deceased by the defendant which rendered the defendant liable for such killing or injury. Assuming now that defendant's train struck deceased, the next inquiry should be whether there was any evidence tending to show that defendant thereby breached any duty which it owed the deceased. If deceased was a trespasser, defendant owed him the duty to do him no wanton injury. If he was a licensee, the defendant owed him the duty to exercise ordinary care not to injure him. But whether the deceased was a trespasser or a licensee, and whether the conduct of defendant was wanton or merely negligent, are questions of fact for the jury, if there is any testimony tending to establish the issue presented in that regard. It is only when the testimony is incapable of any inference in support of plaintiff's case that a nonsuit is allowable. The complaint alleged and the testimony tended to show that the path along the side of defendant's track, where plaintiff was struck, had long been used by the public as a place of travel, with the knowledge and acquiescence of the defendant. The testimony was to the effect that the path had been constantly used by the public, even more

frequently by pedestrians than the public road near by, without the slightest objection by the defendant, and that the neighborhood was thickly settled. The circumstances were such as might, in the mind of the jury, indicate that the defendant, through its agents, knew of the use made by the public of the pathway, and by not objecting defendant indicated a willingness that it should be used by the public. Such evidence would not tend to show that the public had acquired a right of way by alienation or prescription, so as to give the public a legal right to use the pathway against the consent of the defendant, but it does tend to show circumstances which call for the exercise of ordinary care on the part of defendant. As stated by this court in *Jones v. Railway Co.*, 61 S. C. 560, 39 S. E. 758: "Even though the use of the track by the public as a walkway was not for such length of time, nor of such character, as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent of such use by the company, yet, if there was evidence tending to show knowledge of and acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons upon the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the company. Under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care under the circumstances to avoid injury." The case of *Haltiwanger v. R. R. Co.*, 64 S. C. 24, 41 S. E. 810, is not entirely consistent with the rule stated in *Jones v. Railway Co.*, but the recent case of *Matthews v. Seaboard Air Line Ry.*, 67 S. C. 501, 46 S. E. 335, is in accord therewith, and states the rule thus: "While a railroad company cannot lose its right of way by alienation or prescription because of the public interest in its holding it for public purposes, it may impose upon itself as a private corporation duties and obligations to the public or to individuals by inviting the use of the right of way, or indicating its willingness that it should be used by the public or particular individuals. In such circumstances the duty devolves on the railroad company to exercise ordinary care to avoid injury to those so using the right of way." The court erred in this case in not submitting to the jury to determine what was deceased's relation to the defendant's right of way, whether as trespasser or licensee, and in declaring that deceased was a trespasser. He further erred in not submitting to the jury the question whether defendant's conduct was negligent or reckless and wanton. The testimony was not only that defendant's train was being operated at night, without a headlight, along a track where there was reason to expect pedestrians to be, but that the operatives were con-

scious that it was negligent to be without a headlight, for at Yorkville they were aware of the failure of the headlight for want of oil, and there was some conversation among the operatives as to who was to blame for the failure to procure oil; and, although the train remained quite a while at Yorkville, and oil was readily procurable there, nevertheless they deliberately started out at night without a headlight. We mean, of course, that the testimony had tendency to show this state of facts. Was this reckless, or wanton, or negligent? The jury ought to have been permitted to say. Wantonness may be inferred from a conscious failure to observe due care. *Watts v. R. R. Co.*, 60 S. C. 74, 38 S. E. 240. Whether the want of a headlight was a proximate cause of the injury, and whether the train could have been stopped in time to avoid injuring the deceased if there had been a headlight, were questions for the jury under instructions as to the law. There was testimony that a headlight would throw light so as to distinguish a man some 200 or 250 yards. Did the absence of the headlight prevent the engine and fireman from seeing the deceased in time to avoid injuring him? Would the presence of a headlight, by its reflections forward on the adjacent objects, have enabled deceased, though hard of hearing, to avoid the danger, notwithstanding his back was probably towards the engine? These were matters for the jury in determining, from all the circumstances, whether the absence of the headlight was a breach of any duty owing by defendant to deceased, and whether it was a proximate cause of the injury.

The judgment of the circuit court is reversed, and the case is remanded for a new trial.

(68 S. C. 478)

WINDHAM et al. v. HOWELL et al.

(Supreme Court of South Carolina. April 19, 1904.)

PARTITION—EVIDENCE—DIRECTING VERDICT.

1. Complainants in partition alleged ownership in fee. One defendant claimed title. There was evidence that there were three life tenants of the property. *Held* error to direct a verdict for defendant on the ground that the evidence did not sustain allegations as to the estate in fee, but partition should have been adjudged as between the life tenants.

Appeal from Common Pleas Circuit Court of Darlington County; Townsend, Judge.

Action by A. H. Windham and others against George O. Howell and others. From judgment on verdict directed for defendants, plaintiffs appeal. Reversed.

Geo. W. Brown and R. W. Shand, for appellants. Woods & Macfarlan, J. Monroe Spears, and Stevenson & Matheson, for respondents.

JONES, J. This is an appeal from a judgment on a verdict directed by the court for

the defendant on an issue of title raised by the answer to plaintiff's complaint for partition of real estate. The verdict was directed and the complaint dismissed on the ground that under the pleadings and evidence the plaintiffs had failed to sustain the allegation of their complaint as to title in fee simple to the land in dispute.

The complaint alleged a deed, dated December 14, 1867, from James Windham to Eliza J. Windham for life, and at her death to the children of her husband, Eli W. Windham (son of the grantor), for their lives, of a tract of land in Darlington county. It is also alleged that James Windham subsequently died, leaving a will devising this same tract of land to Eli W. Windham for life, and directed that at the death of the said Eli this land should be sold, and the proceeds equally divided between the lawful heirs of his body which he may leave living at his death; that Eli W. afterwards died, leaving living children—Mary Woodford, whose share is now owned by defendant George O. Howell; Eliza Troublefield, defendant, whose share is now owned by plaintiff A. H. Windham; Garen Yarborough, who is now dead, leaving husband and children named in the complaint; Lulu Windham, a plaintiff; and Louisiana Howell, a defendant. The complaint further alleged that Eliza J. Windham died in 1900, leaving surviving her three of the remaindermen for life provided for in said will, viz., Eliza Troublefield and two of the children of Eliza J. Windham, whose names are Louisiana Howell and Lulu Windham, and that said Eliza Troublefield has conveyed her interest and estate to A. H. Windham; that, by reason of the matters above stated, the said A. H. Windham, Lulu Windham, G. O. Howell, the heirs of Garen Yarborough, and Louisiana Howell are now owners in fee of the said tract of land, the life estate of A. H. Windham; one-seventh for the lifetime of Eliza Troublefield, of Lulu Windham of one-seventh for her lifetime, and of Louisiana Howell of one-seventh for her lifetime—having all merged in their greater fee-simple estates; that George O. Howell and his wife, Louisiana Howell, are in possession of the land, claiming under a deed from Eliza J. Windham, receiving rents and profits and committing waste. The complaint demanded injunction against waste, an accounting of rents and profits, and partition or sale. The defendants Howell and wife denied the main allegations of the complaint, and claimed ownership in fee in Louisiana Howell under the deed from James Windham to Eliza J. Windham, described in the complaint, and a deed from Eliza J. Windham to Louisiana Howell dated January 16, 1900.

The issue of title thus raised came on for trial before Judge Townsend and a jury. The plaintiffs offered evidence tending to establish all the allegations of fact in the complaint relevant to the issue of title. One of

plaintiffs' witnesses did say that the tract described in the deed is larger than the tract described in the will, but this was inconsistent with the allegations in the complaint of the identity of the tracts described in the deed and will; and there being no testimony whatever to indicate to the court and jury the difference between the tracts, or means by which one could be distinguished from the other by the jury, and the matter not having been called to his attention, or pleadings amended, the court was warranted in assuming the identity of the tracts as alleged in the complaint. The deed conveyed the land "unto the said Eliza J. Windham forever, and at her death to her children, and also to John W. Windham, C. M. Windham, Mary E. Wadford, Eliza Troublefield, wife of Thomas Troublefield," etc.

The will devised the land as follows: "Item 1. I leave unto my son, Eli W. Windham, for his use and benefit during his life, a tract of land, more or less, embracing all the lower end of my home plantation to a cross fence near the big ditch, then in a direct line with said fence across the road down to the run of Sparrow Swamp. After his death said land shall be sold and the money equally divided between the lawful issue of his body which he may leave living at his death." The deed was executed about eight days before the will took effect, so that the will can only dispose of such estate of the testator as was not conveyed in the deed. Eliza J. Windham, life tenant under the deed, having died in 1900, plaintiff Lulu Windham and defendants Louisiana Howell and Eliza Troublefield became tenants for life under the deed. There was evidence of a deed by Eliza Troublefield conveying her interest to the plaintiff A. H. Windham. Here, then, we have before the court three tenants in common for life. That there may have been other parties before the court, not necessary to a partition between tenants in common for life, is of no consequence, as no objection has been made for defect of parties. Tenants in common for life may have partition—Civ. Code 1902, § 2436; Varn v. Varn, 32 S. C. 77, 10 S. E. 829; Jordan v. Neece, 36 S. C. 295, 15 S. E. 202, 31 Am. St. Rep. 869—unless some prior incumbrance by the grantor should prevent, as in Cannon v. Lomax, 29 S. C. 869, 7 S. E. 529, 1 L. R. A. 637, 13 Am. St. Rep. 739.

The verdict of the jury under the direction of the court, if permitted to stand, would operate to deprive plaintiffs A. H. Windham and Lulu Windham of all interests in the land, whereas there was uncontradicted evidence that they were tenants in common for life with the defendant Louisiana Howell, all parties claiming under the same deed. It is true that the complaint alleged, as a conclusion of law upon the facts stated, that plaintiffs had a fee-simple title to the land, but that could not operate to prevent a recovery of such possession as the facts alleged

and proven warranted. Litigants may not get all they ask for, but may reasonably expect to receive what rightfully belongs to them under the case made.

As the foregoing conclusion will require a reversal of the decree of the circuit court, based upon an erroneous direction of verdict, we do not deem it important to discuss the other matters presented in argument. The judgment of the circuit court is reversed, and the cause remanded for trial of the issue of title as made by the pleadings.

(68 S. C. 440)

CAMPBELL v. VIRGINIA-CAROLINA CHEMICAL CO.

(Supreme Court of South Carolina. April 19, 1904.)

SPECIFIC PERFORMANCE—CONTRACT—SUFFICIENT—TRUSTEE—SALE OF REALTY—INVESTMENT OF PROCEEDS.

1. Equity will enforce a contract for the sale of phosphate mineral rights in certain land.
2. Where, pending negotiations for the sale of certain phosphate rock in place, the evidence showed that there was no complete agreement, and that, when one of the parties thereto expressed his willingness to carry out the requirements proposed by the other party, it saw fit to terminate the negotiations, there was no such mutuality in the agreement as would authorize its specific performance.
3. Where a trustee of realty had full power to sell the same, his discretion as to the investment of the proceeds of the sale will not be interfered with, where it is not shown that the rights of the beneficiaries would be jeopardized, and the purchaser is not required to see that the proceeds are invested according to the trust.

Appeal from Common Pleas Circuit Court of Charleston County; Watts, Judge.

Suit by C. O. Campbell, trustee, against the Virginia-Carolina Chemical Company and others. Decree for plaintiff, and the chemical company appeals. Reversed.

Mitchell & Smith, for appellant. Smythe, Lee & Frost, for respondent.

GARY, A. J. This is an action for the specific performance of an alleged contract for the sale of the phosphate mineral rights in a certain tract of land. The circuit court rendered a decree in which it was held that the plaintiff was entitled to such performance of the contract.

The defendant appealed upon numerous exceptions, but his attorneys have grouped the questions presented by them as follows: "(1) Has the would-be purchaser of real property held in trust the right to demand that the proceeds of sale be reinvested under the same trusts as directed by the trust deed? (2) Was any explicit written contract of sale in this case entered into between the plaintiff and the defendant the Virginia-Carolina Chemical Company such as would be valid under the statute of frauds? (3) Under the circumstances of this case, was the Virginia-Carolina

Chemical Company guilty of such wrongful action as a court of equity would decree a specific performance? (4) Is not the present a case in which the plaintiff had a complete and adequate remedy at law, and therefore equity would refuse its aid in decreeing a specific performance?"

As No. 4 of the foregoing questions is jurisdictional in its nature, it will be first disposed of. It is only necessary to refer to the case of *Hammond v. Foreman*, 48 S. C. 175, 28 S. E. 212, to show that the court, in the exercise of its chancery powers, had jurisdiction to decree specific performance of the contract.

The next question in regular order to be considered is whether the alleged agreement was obnoxious to the statute of frauds. Prior to the 7th of December, 1899, there had been some negotiations between the plaintiff and the Virginia-Carolina Chemical Company, through W. B. Chisolm, its general manager, with regard to the sale of the phosphate rock, in place, in the premises described in the complaint, and known as "Lilliput Farm." On that day C. O. Campbell wrote to W. B. Chisolm as follows: "I will take \$2,500 for the phosphate rock on the 'Lilliput' farm, adjoining the 'Vineyard' lands, on which you are now mining." The plaintiff also introduced in evidence other correspondence, which must be considered in connection with the foregoing letter, as it throws light upon the question whether the letter dated 7th December, 1899, was in response to an absolute and unconditional offer on the part of the appellant. W. B. Chisolm on the 8th December, 1899, wrote to the plaintiff: "I will have our Mr. Pendarvis examine the property and advise you later." In a letter to W. B. Chisolm dated 4th January, 1900, the plaintiff wrote: "At your earliest convenience please advise me if Mr. Pendarvis' examination has been satisfactory or not. My foreman from the farm writes me that he has laid out lines for a railroad across one of the fields, and wishes to know if he must remove the fencing. I wrote him to do what Mr. Pendarvis requested, but cannot instruct him further until I hear from you." On 6th January, 1900, W. B. Chisolm wrote: "As soon as I can take up the matter with Mr. Pendarvis, I will advise you." In a letter dated 12th February, 1900, the plaintiff said: "I delivered the papers relating to the farm on Ashley River to Mr. H. A. M. Smith, of Messrs. Mitchell & Smith, as requested by you, but have heard nothing from them. You were so busy on our last interview that I hastened off without stating what I expected in the sale of the rock. It is a limit of five years for its mining. Kindly have this time limit incorporated in the contract." W. B. Chisolm replied 12th February, 1900: "I note that you want a limit of five years for this mining inserted in this paper. This we are not willing to do at all. There were no specifications and no limit whatever as to time of our taking it. We would not touch it at any price if we were compelled to

take it out in five years. The price we agreed to pay you for this rock was, as you know, far greater than the whole property was worth. There is no mention in the letter written us by you of anything pertaining to this subject. I will have Mr. Smith, as soon as he can, draw up these papers in conformity with our agreement." C. O. Campbell, on the 14th of February, replied: "I regret to note the illiberal view you take of our transaction in your letter of the 12th instant. I told you I would sell the rock on the farm at your offer of \$2,500. After examination you have notified me you accept. If five years be too short a time for mining the rock, I am willing to be perfectly fair and give eight years." W. B. Chisolm wrote February 19, 1900: "You had better come to Charleston and see me with reference to this matter." On the 30th of March, 1900, the appellant's attorneys wrote the plaintiff: "You could either go into court, and get authority from the court to make the sale to you, in which case we should have nothing to do with the reimbursement of the proceeds of sale, or you could sell under the power of sale; but, in that case, we would be compelled to see that the proceeds of this sale were reinvested, subject to the terms of the original trust. It is impossible for Mr. Chisolm to arrange any transfer so as to eliminate these requirements, and unless you can comply with them, he will be unable to carry out the purchase." The plaintiff denied the right of the appellant to insist upon these requirements, and refused to comply with them, whereupon the appellant's attorneys, on the 25th of April, 1900, wrote to the attorneys of the respondent that the transaction was at an end. On the same day the plaintiff's attorneys wrote to the appellant's attorneys that the plaintiff was willing to carry into effect their requirements as to title, but the appellant's attorneys declined the proposition. The correspondence subsequent to the letter of the 7th December, 1899, was inconsistent with the theory that it was written in reply to an absolute and unconditional offer by the appellant to purchase the rock at the price of \$2,500, for, immediately after it was received, W. B. Chisolm wrote to the plaintiff that he would have an examination of the property made, and advise him later, and the plaintiff recognized this right. Then, again, the plaintiff insisted upon a time limit for the removal of the phosphate rock, but the appellant refused to consent to it. During the pendency of the negotiations either party had the right to insist upon whatever conditions he saw fit, and the agreement could not be considered as a complete contract until the proposed conditions were assented to by the opposite party. Before the plaintiff signified his willingness to carry out the requirements proposed by the appellant, it saw fit to terminate the negotiations, which it had the right to do. The testimony convinces us that the minds of the parties did not meet, and that the agree-

ment was lacking in mutuality. The plaintiff therefore is not entitled to specific performance of the contract.

These views render speculative the question whether the appellant had the right to demand that the proceeds of sale be reinvested under the same trusts as directed by the trust deed. However, as the question fairly arises upon the record, we will not decline to consider it. The attorneys for the appellant have not cited any authority from this state sustaining their contention. His honor the circuit judge cited the following cases to show that such right does not exist: *Webb v. Chisolm*, 24 S. C. 490; *Price v. Krasnoff*, 60 S. C. 172, 38 S. E. 413; *Redheimer v. Pyron*, *Speers*, Eq. 134; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Jones v. Hudson*, 23 S. C. 494—to which may be added *Lining v. Peyton*, 2 Desaus. 375. The reason that the purchaser has no such right is that it would limit the time within which the trustee should make the reinvestment, whereas, if he was allowed to exercise his full discretion, he might be able to make an investment far more advantageous to the rights of the cestui que trustent. It would, furthermore, hamper his discretion as to the kind of property in which he might desire to reinvest. If the person creating the trust confer upon the trustees full power of sale, the court will not interfere with his discretion unless it is made to appear that there is fraud, or the rights of the cestui que trustent are otherwise jeopardized.

Judgment reversed.

(68 S. C. 468.)

REID v. COURTENAY MFG. CO.

(Supreme Court of South Carolina. April 19, 1904.)

EASEMENT—INJURIES TO GRANTOR—RIGHT TO DAMAGES—DIRECTING VERDICT.

1. Plaintiff, who had given defendant a right to overflow a portion of certain land or maintain a dam of a certain height thereon, cannot recover for injuries received from the proper use of such right.

2. It is proper to direct a verdict where there is no dispute as to the facts, and the only matter at issue is the construction of the deed.

Appeal from Common Pleas Circuit Court of Oconee County.

Action by James T. Reid against the Courtenay Manufacturing Company. From judgment for defendant, plaintiff appeals. Affirmed.

J. E. Boggs and Stribling & Herndon, for appellant. Jaynes & Shelor, for respondent.

JONES, J. Plaintiff brought this action to recover damages alleged to have been sustained by him by reason of defendant's erection and maintenance of a dam across Little river, in Oconee county, which caused the water to back and overflow his bottom lands

above on Cane creek, a tributary of Little river. The defendant, by way of defense, sets up an easement by grant of plaintiff. At conclusion of the testimony, on motion of defendant, the court, Judge Purdy presiding, directed a verdict in favor of the defendant. The plaintiff appealed from the judgment entered on three exceptions, the first of which was abandoned. The questions raised are (1) whether the court erred in construing the grants under which defendant claimed license or easement to overflow plaintiff's land; (2) whether he erred in not submitting the case to the jury.

It appeared in evidence that on June 30, 1890, in view of John C. Cary's purpose to procure the erection of a cotton mill on Little river, and in contemplation that the obstruction in said stream by a dam across would affect the lands of plaintiff, the plaintiff granted "unto John C. Cary, his heirs and assigns, the full power and privilege to make such obstruction in Cane Creek and Little River by building a dam or dams across the same for the purpose above named to any height he or his assigns may desire, provided that the said dam or dams may not raise the water higher or above the top end of a perpendicular iron pin which is permanently stationed in a large rock at the water's edge on the east side of Little River and a short distance below the mouth of Cane Creek." This deed was duly executed and delivered, under seal, in the presence of two witnesses. On June 1, 1893, John C. Cary duly executed a deed conveying to the Courtenay Manufacturing Company "all those easements, rights, powers and privileges granted to said John C. Cary . . . by James T. Reid by deed dated June 30th, 1890, and recorded in O. 9; said easements, rights, powers and privileges consisting in making such obstructions in Cane Creek and Little River by building a dam or dams across the same for manufacturing purposes to any height which does not raise the water higher than or above the top of a perpendicular pin which is permanently stationed in a large rock at the water's edge on the east side of Little River and at a short distance below the mouth of Cane Creek." Thereafter a controversy arose between plaintiff and defendant which ended in the execution of the following instrument:

"State of South Carolina, County of Oconee.

"Whereas, The Courtenay Manufacturing Company has erected a dam across Little River, in Oconee County, State of South Carolina, and has built a cotton factory which is now being operated at Newry, in said county and State; and, whereas, the obstruction of the flow of the water in the stream known as Little River, has caused to be overflowed and injured a portion of the land which I, James T. Reid, now own, situate, lying and being on the north side of Cane Creek, waters of Little River, waters of Keowee River, adjoining lands formerly owned by Jesse

McMahan, J. L. Boyd and others, being the place whereon I now reside, containing five hundred acres, more or less, to wit: about twelve acres of creek bottom land lying on Cane Creek aforesaid; and, whereas, the Courtenay Manufacturing Company and I, James T. Reid, have agreed upon the amount of damage to said land to be fifteen dollars per acre for twelve acres, aggregating the sum of one hundred and eighty dollars, which the said Courtenay Manufacturing Company has this day paid me, the said James T. Reid (the receipt whereof I hereby acknowledge).

"Now, therefore, know all men by these presents, that I, James T. Reid, in consideration of the premises and the said sum of one hundred and eighty dollars to me in hand paid, by the said the Courtenay Manufacturing Company, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said the Courtenay Manufacturing Company, its successors and assigns, the right to overflow and back water upon the said twelve acres, situate, lying and being on Cane Creek, waters of Little River, the said twelve acres being the lower portion of the creek bottom land on the tract above described, and situate nearest the dam aforesaid.

"Together with the full power and privilege to maintain and keep the dam of the said the Courtenay Manufacturing Company at its present height across Little River aforesaid for the purpose of operating its cotton mills and other machinery as it and its successors and assigns may deem advisable. And I, the said James T. Reid, do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend the aforesaid power and privilege unto the said the Courtenay Manufacturing Company, its successors and assigns.

"In witness thereof, I, the said James T. Reid, have set my hand and seal, this 23d day of December, A. D. 1897.

"[Signed] James T. Reid. [L. S.]

"Signed, sealed and delivered in the presence of J. D. McMahan, St. John Courtenay."

The court correctly construed this deed as not only granting the right to overflow and back water upon the 12 acres named, but also granting the additional right to maintain the same across Little river at the height of the dam as it existed on December 23, 1897. The construction contended for by appellant, viz., that the deed only gave the right to overflow the 12 acres, would require that the sentence beginning with the words "Together with" should be in effect stricken from the deed, which would violate the plainest rules of construction. The testimony was undisputed that there had been no change in the height of the dam since December 23, 1897. Under these circumstances the court committed no error in directing a verdict for the defendant. There was no evidence even that defendant's backwater had overflowed more

than the 12 acres mentioned, although there was evidence that a larger portion of contiguous bottom land had been rendered unfit for cultivation. When one grants an easement to overflow a portion of a described tract of land, or when one grants a right to maintain a dam at a specified height, he cannot claim damages for injury resulting naturally and necessarily from the proper use of the easement. *Lynn v. Thomson*, 17 S. C. 188. See, also, *Nunnamaker v. Water Power Co.*, 47 S. C. 485, 25 S. E. 751, 34 L. R. A. 222, 58 Am. St. Rep. 905, where the same general principle was stated and applied in a case where the right to erect and maintain a dam at a specified height was acquired by a statute under eminent domain for the purpose of constructing a canal.

The judgment of the circuit court is affirmed.

(98 S. C. 479)

KENNINGTON et al. v. CATOE et al.

(Supreme Court of South Carolina. April 19, 1904.)

LEGITIMACY—CHASTITY OF WIFE—EVIDENCE—
WITNESS—IMPEACHMENT—TRIAL—
NEW TRIAL.

1. Where the issue is as to the legitimacy of a child born during coverture, evidence as to the chastity of the wife before marriage and after the child's birth is incompetent.

2. Reputation of the wife as to chastity before and at the time of the marriage is properly excluded as hearsay.

3. Question attacking character for chastity of witness on cross-examination, for purpose of discrediting her, is properly excluded.

4. Under Cir. Ct. Rule 59, defendant has the right to open and reply only where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof.

5. Prior to the passage of Civ. Code, § 2864, on December 12, 1879, a colored child born after emancipation of a free colored woman married to a white man would take property under the will of the husband, as a child.

6. A new trial for newly-discovered evidence will not be granted where the party moving for the same knew of such evidence after the close of his testimony, but before the close of the other side, but made no effort to introduce it.

Appeal from Common Pleas Circuit Court of Lancaster County; Dantzler, Judge.

Action by Elizabeth Kennington and others against Eddie Catoe and others. From a judgment for defendant Dell McManus, plaintiffs and other defendants appeal. Reversed.

R. E. & R. B. Allison, for appellants. R. E. Wylie, for respondent.

JONES, J. This action was brought to partition land in Lancaster county, on the theory that plaintiffs and defendants, other than Dell McManus, were heirs at law of Rily Catoe, deceased, and as such were the sole owners of the land, as a lapsed devise, and that Dell McManus, who was claiming the land, had no interest therein. Rily Ca-

toe had devised the land to his son Minor Catoe for life, and after his death among such of his children as he may leave surviving him. The complaint alleges that Minor Catoe died unmarried and leaving no children. Dell Catoe answered, asserting that he was improperly styled Dell McManus in the complaint, and that his true name was Dell Catoe; that he was the only child of Minor Catoe, deceased; and that, as such, the land belonged exclusively to him. The main contest on the trial was whether Dell Catoe was a legitimate son of Minor Catoe. The case was tried before Judge Dantzler and a jury, and resulted in a verdict and judgment in favor of Dell Catoe for the land in dispute.

The exceptions from 1 to 9, inclusive, impute error in the rulings of the court as to the admissibility of testimony.

1. In behalf of Dell Catoe, testimony was offered to show that about the year 1870 Minor Catoe was married to Ann McManus, in the presence of several witnesses, in Lancaster county, S. C., by the Reverend Nathan Falle, a reputable Baptist minister; that they lived together as man and wife for a short time, when Minor Catoe left her; and that said Ann gave birth to Dell Catoe 11 months, or a little over, after the said marriage. The court permitted appellant's counsel to assail the legitimacy of Dell Catoe by showing the reputation of Ann for chastity and her unchaste conduct with other men from the time of the alleged marriage to the birth of Dell Catoe; but appellant's counsel sought to go further, and show such reputation and conduct before her marriage, and after the birth of Dell Catoe, which the court excluded. This ruling, as applied to several witnesses, is the basis of the first, second, third, fifth, sixth, and seventh exceptions. We think the testimony was properly excluded, as it had no tendency to show that Minor Catoe was not the father of Dell Catoe. A child born during coverture is presumed to be legitimate. This presumption is rebuttable, but, as declared in *Wilson v. Babb*, 18 S. C. 69: "Where a child is born after lawful wedlock, and after the lapse of the usual period of gestation, it should require a very strong state of circumstances to overthrow the presumption of legitimacy—such as impossibility of access, absolute nonaccess, abandonment, or something equally as conclusive." Therefore, in order to render testimony admissible to overthrow such presumption, it should have tendency in a reasonable mind to establish some such conclusive circumstance. It is manifest that mere reputation of the wife for unchastity, especially when such reputation was before marriage, or after birth of the child, would have no such tendency; nor would her unchaste conduct with reference to other men have such tendency, unless it related closely to the period when the child was begotten. We have assumed in this

that there was a lawful marriage, and birth of Dell Catoe 11 months thereafter. The fact of the marriage was not contested in evidence. There was some evidence tending to show that Minor Catoe was not mentally capable of contracting matrimony, but this issue was not submitted to the jury, and we must assume it was found against the appellant by the verdict of the jury. Nor was there any conflict in the testimony as to the time when Dell Catoe was born. Hence, in determining the admissibility of this testimony, we have treated the case as one in which the testimony was offered to show adulterine bastardy.

2. The eighth exception alleges error in refusing to allow the witness Joseph Kennington to testify as to the reputation of Ann McManus for lewdness between the dates of the alleged marriage and alleged birth of Dell Catoe. The record shows, as has already been stated, that counsel was permitted to ask as to the general reputation of Ann McManus for chastity between said marriage and said birth. The court simply refused to allow the same question to be repeated by merely substituting the word "lewdness" for the word "chastity," and in this there was no prejudicial error.

3. The ninth exception imputes error in refusing to allow witness Kennington to testify that it was the general report that Ann McManus had a child a short time after her alleged marriage to Minor Catoe, and before the birth of Dell Catoe, and it was the general reputation that she was pregnant when she married Minor Catoe. The testimony was properly excluded. It does not fall within any of the exceptions rendering hearsay testimony competent.

4. There was no error, as alleged in the fourth exception, in refusing to allow appellant's counsel, on cross-examination of Laura McManus, to ask her how many children she had, and whether white or black, she having had no husband—the object being to discredit the witness. The general rule permits a witness to be cross-examined by questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character, but the extent of such cross-examination is very largely left to the discretion of the court (*State v. Williamson*, 65 S. C. 247, 43 S. E. 671), and we see no reason for interfering with the court's exercise of discretion in this instance.

5. The tenth, eleventh, and fourteenth exceptions allege error in the ruling of the court in denying plaintiffs the right of reply both in evidence and argument. The cases of *Addison v. Duncan*, 35 S. C. 171, 14 S. E. 305; *Beckham v. Railway Co.*, 50 S. C. 36, 27 S. E. 611; *Thompson v. Insurance Co.*, 63 S. C. 290, 41 S. E. 464—show that defendant acquires the right to open and reply when by his pleadings he admits the plaintiff's cause of action as stated in the complaint, and relies solely upon an affirmative defense

based upon the facts stated in the answer, so that, if no evidence is adduced on either side, the plaintiff is entitled to a verdict on the pleadings. The fourth paragraph of the complaint alleged that Minor Catoe died unmarried and leaving no children. This was denied by the answer. The fact alleged was essential to plaintiffs' cause of action, and the denial raised the real issue in the case. Had it been admitted by the answer, plaintiffs would have been entitled to a judgment on the pleadings. Under rule 59, Cir. Ct., the defendant has right to open and reply only "where he admits the plaintiffs' cause by the pleadings and takes upon himself the burden of proof." The plaintiffs, as matter of fact, opened the case by offering testimony, and, at the close of plaintiffs' testimony in chief, respondent moved for a nonsuit, which was declined. It is true that counsel for respondent, after swearing a witness, did state that he assumed the burden of proving affirmatively the marriage of Minor Catoe, and that defendant Dell Catoe was the only issue of such marriage, but the declaration could in no wise alter the status fixed by the pleadings. The ruling of the court in allowing respondent to reply in evidence and argument deprived plaintiffs of a substantial right, material to their case, and thereby necessarily affected the judgment. *Bennett v. Sandifer*, 15 S. C. 420.

6. The fifteenth exception alleges error in charging the jury that before the year 1879 a white man had a right to marry a negro free-woman. The statute entitled "An act to prevent and punish the intermarriage of races," and now section 2664, Civ. Code, was approved December 12, 1879. At the time of the alleged marriage, about 1870, there was no law in this state making it illegal. It is argued under this exception that Dell Catoe, being a negro, could not take as remainderman under the devise in the will of Rily Catoe, which went into effect in 1867, previous to the fourteenth amendment to the federal Constitution, adopted in March, 1868; that such an amendment could not, in the absence of an express provision, reach back of 1868, and clothe a negro with a right to claim and accept a devise made in 1867. This question does not appear to have been presented to the circuit court, but we fail to see the merit of the contention. According to the undisputed evidence, Dell Catoe was never a slave, but was born after slavery ceased to exist in this country; and his mother, though a mulatto, was born free, of free parents. Even if Dell Catoe had been born during slavery times, his status then as a free person of color would have enabled him, under the laws of this state, to take property under a will or deed. *Bowers v. Newman*, 2 McMul. 486; *State v. Hill*, 2 Speers, 159.

7. It remains only to consider the twelfth exception, assigning error in the refusal of the motion for a new trial based upon the

ground of after-discovered evidence. The alleged after-discovered evidence consisted of the record in the case of Ann Catoe, plaintiff, against Minor Catoe, defendant, on file in the office of the clerk of court for Lancaster county; being a proceeding for divorce on the ground of desertion. The "case" shows the following extracts from said record: Ann Catoe, in her complaint, alleges "that on the — day of October, A. D. 1870, she was married to the defendant; * * * that the defendant lived with the plaintiff at her father's house in said county for about one week after the time of said marriage, and then willfully deserted her without cause, and has never since lived with her, nor rendered her any support or pecuniary aid whatever, and the plaintiff has reason to believe that the defendant has, since his desertion of her, been guilty of adultery with other women, * * * whereupon the plaintiff demands judgment that the bonds of matrimony between herself and the said Minor Catoe, defendant, be dissolved." Minor Catoe, in his answer, says "that he married the plaintiff at or about the time stated in her complaint, and deserted her a short time after, as she alleges; that he married her when he was hardly conscious of what he was doing, being under the influence of liquor; and that after reflection he concluded that he could not live with her, and it would be best for both parties that they should separate. He admits that he has not rendered her any support, and assigns as reason therefor that he never intended to live with her again, and has never had any means with which to support her." Complaint and answer both verified. Extracts from testimony before Referee Billings: John C. Catoe, sworn, among other things testified: "Was not at the marriage [ceremony], but he knows about the time they were married. It was in the fall of the year 1870. Can't remember the particular day or month, but remembers the circumstances very well. Witness was living in the same house with the defendant at the time of the marriage. Witness says the defendant was absent a short time after he was married; living, he supposed, with his wife. Can't state positively the length of time, but thinks it was only about three days. He then came back where he was living before the marriage, and has never lived with her since." Laura McManus sworn: "Witness says she is a sister of the plaintiff. She was present at the time of the marriage of the plaintiff and the defendant. It took place in the public road, near Mr. Nathan Falle's house, and Rev. Mr. Nathan Falle performed the marriage ceremony. * * * After the marriage, plaintiff and defendant went to father's house. They lived together about a week, and then defendant left, and they have never lived together since. The defendant has no property or means to support a family." Referee made his report on these facts, and

the circuit court made a decree thereupon, and adjudged the marriage wholly null and void from the date of this decree, upon the grounds of desertion, and ordered the defendant to pay the costs. Decree dated February 6, 1875. No mention is made anywhere in this record of any child or children. The record and the information contained would doubtless have been material, not only with reference to the alleged marriage between Minor Catoe and Ann McManus, but with reference to the question whether Minor Catoe was the father of Dell Catoe, in view of the statement in the record that Minor Catoe deserted Ann about one week after the marriage, and the testimony on the trial that Dell Catoe was born 11 months after the marriage. But by the affidavits before the court on this motion, it appeared that counsel for appellant became informed of this record after he had closed his testimony, but before respondent had closed his testimony in reply, and had debated in his mind the propriety of requesting that such record be put in evidence, but had decided not to do so, as it cut both ways. Under these circumstances, we do not think the circuit court committed error in refusing the motion. But for the error in denying appellant the right to open and reply in evidence and argument, there must be a new trial.

The judgment of the circuit court is reversed, and the case is remanded for a new trial.

(68 S. C. 462)

NELSON v. GEORGIA, C. & N. RY.

(Supreme Court of South Carolina. April 19, 1904.)

EVIDENCE—DECLARATIONS—CONTRIBUTORY NEGLIGENCE.

1. In an action to recover for injuries to a passenger, declarations of the conductor immediately after the accident were not part of the *res gestæ*.

2. An instruction that the contribution to the injury which will defeat recovery is not a vague and remote contribution, but must have some bearing upon the act that was charged to have caused the injury, and must be a contribution to the particular act alleged to have caused the injury, and a direct and proximate contribution to that act, is sufficient.

Appeal from Common Pleas Circuit Court of Laurens County; Buchanan, Judge.

Action by Jas. F. Nelson against the Georgia, Carolina & Northern Railway. From a judgment for defendant, plaintiff appeals. Affirmed.

W. R. Richey and F. P. McGowan, for appellant. J. J. Glenn and N. B. Dial, for respondent.

JONES, J. This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, and resulted

in a verdict and judgment for the defendant. Plaintiff's appeal involves two questions:

1. Whether the court erred in excluding the declarations of F. H. Harold, the conductor, made after the collision in which plaintiff was injured; it being claimed that such declarations were admissible as part of the *res gestæ*, and as the statement of the representative of the defendant company within the scope of his agency.

In order to show precisely how the question arose, and the exact ruling of the circuit court, we quote from the "case" as follows: "Q. Was the conductor there? A. Yes, sir; he came down there and asked me was anybody hurt. The mail agent was knocked down, and I told him I had a lick over the head and was mashed in the stomach, but I did not know that it amounted to very much. It hurt me all the evening. Q. What were these cars shoved with? What was attached to them? A. The engine. Q. Was the engine attached to them when they struck the mail car? A. I declare, I do not know. All I know is what the conductor said. Mr. Glenn: We object to that. Mr. Richey: I think that he can tell what the conductor said. That is a part of the *res gestæ*. Mr. Glenn: I understand you to say that the conductor told you afterwards? A. I was down there, and he came there right after the accident. Mr. Richey: The conductor, may it please your honor, was there representing the master, and it was just the same as the railroad company itself speaking through the conductor. What he said there, I think, is perfectly competent to come in. Mr. Glenn: In the first place, your honor, it depends entirely upon what they were talking about. He certainly would not have the right to bind the company for matters that did not come within his business. He is not the general agent of the company. In fact, I do not understand that he has proven yet the extent of his authority, or anything of the kind. Mr. Richey: Who was the conductor in charge of the train? A. It was his first trip. He was down there the first time I ever seen him. Harold. I don't know for certain that was his name. Q. You have been connected with the railroad some time? A. Yes, sir. Q. What is the duty of the conductor? A. Running the train. Q. Who has supervision over the hands and engineer? A. The conductor. Q. Now, what was it the conductor said when he came down there to the mail car after the accident? Mr. Glenn: We object. The Court: I do not know what the answer will be. Did the conductor speak to you in reference to the accident? A. Yes, sir; he did. Mr. Richey: We can now ask him what he said. The Court: It is owing to what he said. If he was the master, and gave orders, he can state what order he gave him, but he cannot recite any words as to how it happened, in his opinion. Mr. Richey: I did not ask him how it happened. The Court: You know what his answer is going

"o be. I don't. This is your witness, and you are supposed to know what you are going to prove by him. Mr. Richey: What did the conductor say in reference to that accident? Mr. Glenn: We object to that. The Court: The objection is sustained, so far as the court is now advised by the evidence now in."

With respect to the question whether the declaration was admissible as *res gestæ*, it will be noticed that the declaration was made after the collision, although doubtless a very short time after. This subject has been fully discussed in the recent case of *State v. McDaniel*, 47 S. E. 384, and reference may be had to that case for the rule governing the admissibility of declarations not strictly concurrent with the litigated transaction. Under the rule there stated, we do not think the circuit court committed reversible error. The case of *Crawford v. Railway Co.*, 56 S. O. 144, 84 S. E. 80, was quite different from this, for in that case the question was whether cattle had been negligently injured in transportation, and the declaration, "He would kill those d—n cattle before he got to Charlotte," was made by the person intrusted with the duty of running the train which carried the cattle while the train was being loaded with the cattle. With respect to the question whether the declaration was admissible because made by defendant's agent within the scope of his agency—on this point the court was careful to advise plaintiff's counsel that the witness could give the conductor's declarations as to orders by him, but that declarations of the conductor as to how the accident happened, in the opinion of the conductor, were not admissible. The conductor was not shown to have been operating the cars which brought about the collision, except through orders, and it is clear that the hearsay opinion of the conductor as to how the collision occurred was inadmissible. Even after the suggestion of the court, counsel failed to show the court that the proposed declarations were within the scope of the conductor's agency. The ruling was not erroneous.

2. The second question relates to the charge as to contributory negligence, the exception being as follows: "Because his honor erred in charging defendant's fourth request, which was as follows: '(4) Even if the defendant was guilty of negligence, and the plaintiff was injured thereby, yet, if the plaintiff by his own negligence contributed to his injuries, he cannot recover. The plaintiff must be free from fault himself.' The error being the omission from the proposition of the requisite that contributory negligence must be a direct and proximate cause to the injury, and without which the injury would not have happened." A reference to the "case" shows that the court did not charge the fourth request unqualifiedly, for in response to the request the court said: "I have already charged you that it must be a direct contribu-

tion. It must be a contribution to the particular act that caused the injury—must be that particular transaction charged in the complaint." The charge was full and clear on this point, as the following language of the court shows: "Now, the law says with reference to contributory negligence, notwithstanding the fact somebody else was guilty of negligence, yet if you contributed to it; but it is not a vague and remote contribution that robs one of his rights to recover, because in contributory negligence the contribution must be direct and proximate, and must have some bearing upon the act that was charged caused the injury, and it must be in that particular respect—must be a contribution to the particular act alleged to have caused the injury, not about something else, not in relation to some other transaction, but must be a direct and proximate contribution to that particular act of negligence done by a person who was charged to have been the author of the wrong." The exception is therefore without foundation.

The judgment of the circuit court is affirmed.

(68 S. C. 446)

DAVIS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 19, 1904.)

RAILROADS — KILLING STOCK — EVIDENCE — NEW TRIAL.

1. That a railroad company failed to give the statutory signals at crossings may be shown to establish negligence on the part of such company.

2. A lookout for stock on the track must be kept by the engineer even in counties where stock is not allowed to run at large.

3. Where the record shows that there was some testimony on each of the points in issue, a refusal of a new trial for insufficiency of the evidence will not be disturbed.

Appeal from Common Pleas Circuit Court of Richland County; Klugh, Judge.

Action by Andrew J. Davis against the Southern Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

The charge of the presiding judge is as follows:

"The plaintiff, Andrew J. Davis, brings this suit against the Southern Railway Company to recover damages which he alleges he has suffered by reason of the railroad having killed a mule of his, as he alleges, through negligence. He alleges that the railroad running its train from Columbia to Charlotte negligently ran over and against a certain mule, the property of the plaintiff, and killed the same, to the damage of plaintiff \$150. The railroad answers that complaint with a general denial—denies everything set forth in the complaint—which puts upon the plaintiff the burden of proof, to prove by the preponderance of the evidence the facts he al-

¶ 2. See *Railroads*, vol. 41, Cent. Dig. §§ 1477, 1481.

leges, in order to entitle him to recover; and if he fails to prove them by the preponderance of the evidence then he is not entitled to recover. The railroad is charged with negligence, and negligence means the failure of a person—of a railroad company, for example—to do that which, under the circumstances of the situation, a railroad company of ordinary prudence would do, or the omission to do what a railroad company of ordinary prudence would not omit to do. So negligence means either a failure—the commission, the doing of something a prudent person would not do, or the omission to do something that a prudent person would do. It is the failure to exercise due care in any particular situation or set of circumstances.

"Now, where it appears that a railroad has, by its train, killed stock, a domestic animal, as a cow or a mule, and no other fact appears in reference to it, the law raises the presumption that the railroad was negligent. An animal has not the intelligence to apprehend danger, and to take itself out of the way of apprehended danger. As a matter of course, animals do run from what they are afraid of, but they have not the intelligence that a human being has to know what always to be afraid of and what to get out of the way of; and so the law charges these railroad companies running their trains, by the exercise of the franchise which the statute confers upon them, with the duty of looking out for the safety of domestic animals; and therefore, where it appears that the railroad, by its train, has killed a domestic animal, and nothing else appears but the fact of the killing, then the law raises the presumption that it was the result of negligence on the part of the railroad company. As a matter of course, when the facts do appear, and they negative the idea of negligence, and they show the railroad was exercising ordinary care in running its train, so that it was not the fault or its lack of care that caused the death of the animal or injury to the animal, then the implication of the presumption of negligence is withdrawn. This must appear by the facts of the case. Unless the evidence makes out, by the preponderance of the evidence, the fact of negligence in the railroad company, the plaintiff is not entitled to recover. So the facts are for your determination as to whether or not this railroad was running its train as alleged in the complaint, and whether or not the train killed the mule, as alleged, and, if so, then whether the railroad was negligent or not.

"It is the law, and therefore appears, and it may be taken notice of by the court and by you, that the general stock law is of force in Richland county; a provision of which requires the owner of stock to keep his stock fenced, not to allow them to run at large. Now, in a county where the stock law is of force everybody has the right to presume—the railroad company has the same right anybody else would have—the right to presume

that people are obeying the law, are keeping their stock fenced; and therefore the railroad is not bound to exercise as great care or vigilance in looking out and watching for stock on its track in a county where the stock law is of force as they would be where the law allows stock to run at large. That does not excuse a railroad if it knows, as a matter of fact, or if it ought to know, if it has the opportunity to know, and where a person of ordinary intelligence and ordinary observation would know, that stock were out at large—that does not excuse a railroad company for killing or injuring stock where the stock law is of force, if it knows or ought to know that stock is at large. It is true that the law is to the effect that a trespasser has no rights as against the owner of the property on which he is trespassing, except he has the right not to be willfully or wantonly injured by the owner of the property, and to some extent that might apply to trespassing stock; but it cannot apply to animals in the same sense that it applies to people, for the very reason I mentioned a moment ago—animals have not the intelligence of people—and therefore they cannot be held to the same rule of accountability or liability and the same rule of duty that intelligent beings are held to. So that a railroad has no right to wantonly or willfully injure trespassing stock; neither has it the right to injure trespassing stock through negligence. The rule is only modified by the stock law to the extent that the railroad is not bound to keep the same degree of watchful care, watchfulness for stock on its track, where the stock law is in force, as where the stock law is not in force. Where stock is on the track in a county where the stock law is not in force, and the railroad sees them, or has the opportunity and ought to see them by the exercise of ordinary watchfulness, then, if it fails to see, or if, seeing them, injures them through willful, wanton negligence, the railroad is liable for damages. So, in this case, if you find they were at large in violation of the provisions of the general stock law, and should find that the railroad company, by the exercise of ordinary vigilance—which means a less degree of vigilance in a stock law county than in a nonstock law county—if the railroad, by the exercise of vigilance, which a prudent railroad in a stock law county out to exercise, knew or could have known that stock was on the track, then the railroad was bound to exercise due care, the care of a prudent railroad to prevent injury to the stock; and if you find that it failed to exercise that degree of care, and that the stock was injured by reason of such failure, then the railroad is liable. If the evidence fails to make out those facts, the railroad then is not liable.

"If you conclude that the defendant is liable in this case, your verdict will be in favor of the plaintiff whatever you find to

be the actual value of the mule at the time it was killed. As a matter of course, if you find that the railroad is not liable, your verdict should be in favor of the defendant. You will elect one of your number to act as foreman, and write the verdict on the complaint.

"Both the plaintiff and defendant have requested the court to charge certain propositions as law, which I will proceed to give you.

"On behalf of the railroad:

"(1) At a place where the general stock, which prohibits cattle from being permitted to roam at large, is then of force, a railroad company is not required to use the same care or caution in running its trains as in localities where such law is not of force.' That I charge you, subject to what I have already given you in reference to the effect of the stock law. The stock law does not relieve the railroad from the necessity of the duty of exercising ordinary care, but merely relaxes the degree of vigilance which it is required to exercise. In that sense I charge you that.

"(2) I charge you that the general stock law was in force in Richland county at the time of the alleged accident, and the defendant railroad company was not, therefore, required to use the same care and caution in running its trains as in localities where such stock law is not of force.' I have already charged you that, and so charge you.

"(3) A railroad company is not liable for stock accidentally killed.' I charge you that. If you find from the evidence in this case that the killing of the mule was not the result of negligence, but the result of accident—the result of circumstances over which the railroad had no control, and couldn't have controlled—then the railroad is not liable.

"(4) In the running of a railroad passenger train the employes must regard the safety of the passengers and the property of the company as well as danger to cattle on the track, and the question of negligence is influenced by these considerations.' I so charge you.

"(5) All that the law requires generally in these stock-killing cases is that the railroad company shall exercise that sort of care which prudent men, influenced by personal interest, ordinarily bestow on their business and conduct; and it is the absence of this kind of care which would make the railroad company liable in a case for the killing of stock in a county where the stock law is not of force. But where the stock law is of force, less vigilance is required of the railroad company, or, as stated in the case of *Joyner v. R. R. Co.*, 26 S. O. 58 [1 S. E. 52], much less care is required of the railroad company in providing against stock on its track since the passage of the stock law than before the passage.' I charge you that.

"(6) If you find from the evidence that the engineer of the train in question was in the exercise of ordinary care; that the train

was running at a lawful rate, and had the customary appliances and force of trainmen; and the mule in question, when seen by the engineer, was so close that the train could not be stopped in time to avoid the accident—then plaintiff cannot recover.' I charge you that.

"Mr. Thomson: I want to add one as to the speed of the train: That the speed of the train was not unlawful to pass through that country, provided an ordinarily prudent company would go at that rate.'

"As to the manner of running the train, the speed at which it was run, the degree of vigilance—of watchfulness—observed, and other matters of caution, is that which a railroad of ordinary prudence and caution would be required to use; and if the railroad was running its train at the ordinary rate of speed at which that particular train was running, then the speed at which it was being run could not be considered as a circumstance going to show negligence.

"Now, on behalf of the plaintiff.

"It is negligence per se for a railroad company to fail to comply with statutory requirements as to signals at crossings.' That does not apply in a case like this. The statute, as you are aware, requires the railroad to blow the whistle or ring the bell when it is approaching a crossing, or a public highway, or traveled place; and if a person is injured at a crossing, whether the injury is to his person or to his property, because of the failure of the railroad to give the signal by blowing the whistle or ringing the bell, then it does amount to a case of negligence per se, because the law requires the railroad to give that signal at the crossing, so that people can get out of the way—keep out of the way—while crossing a crossing. That don't apply to injury to stock other than at a traveled place. The failure to give the statutory signal is a circumstance which the jury may consider in determining whether the railroad was running its train with due caution or not. Even in a case that does not arise at a crossing, a failure to give the signal would not, in a case like this we are now considering, be negligence per se—that is, negligence within itself; the mere fact of failure to give the signal would not amount to such negligence as would make the railroad liable in a case like this. Mere circumstance for you to consider. The law presumes, inasmuch as the law requires the railroad to give these signals, that it does give them. And if a party undertakes to rely upon the failure of the railroad to give the signal, then the party who alleges must prove by the preponderance of the evidence that the signal was not given; and, if that is the case, then it becomes a circumstance for the consideration of the jury to determine whether, under all the circumstances in the case, the railroad was exercising the care in running its train which the law requires. So I refuse you that first request to charge.

"(2) As great care is not required against trespassers as in other cases, but the railroad company is liable for stock negligently killed.' I charge you that. I have already charged you that the stock law does modify the extent of the duty of the railroad to keep a lookout for stock, but still it does not relieve the railroad if the stock is actually killed through the railroad's negligence.

"(3) If you find, as a matter of fact, that the railroad company killed the plaintiff's mule, then you are to presume that the railroad company was negligent; and this presumption of negligence will stand until the railroad company convinces you by the greater weight of the evidence that it was a case of accident—that is, that after the fact of the killing has been established, the burden of proof is upon the railroad company to prove that it was done by accident, and not through their negligence. This is a rule of law that has not been changed by the stock law.' I have substantially charged you, and so charge.

"(4) If you find as a matter of fact that the engineer or fireman saw, or could have seen, the plaintiff's mule on the track at any time before the killing, and that they did not try to stop the train or to frighten the mule off the track by blowing the whistle or ringing the bell, then the railroad company is guilty of negligence, and you must find for the plaintiff.' That is, you must find for the plaintiff if you find those facts to be true, in case you find they were negligent, and that such negligence was the cause of the injury. I so charge you.

"(5) If you find that the plaintiff is entitled to recover from the railroad company for the killing of his mule, then the measure of damage is the value of the mule at the time of the killing.' I have already charged you, and so charge you. It remains for you to determine whether the plaintiff is entitled to recover or not. If you conclude he is, give him a verdict for the value of the mule as you find the value to be established by the evidence in the case. If you find he is not entitled to recover, your verdict will be for the defendant."

From judgment for plaintiff, defendant appeals.

B. L. Abney and E. M. Thomson, for appellant. John S. Reynolds, R. McC. Clarkson, and Aug. M. Deal, for respondent.

POPE, C. J. This action to recover \$150 of defendant railway company for negligently killing a mule, the property of plaintiff, came on for trial before Judge Klugh and a jury on April 30, 1903. Testimony was offered by both plaintiff and defendant on the matter of the alleged negligence of the defendant. Some of this testimony was objected to, some of it was allowed over defendant's objection. This is made a ground of appeal. Both sides to the controversy

made requests to charge. His honor's charge is made a ground of appeal. After verdict found for plaintiff, a motion was made for a new trial by defendant upon the minutes, which was refused. This is made a ground of appeal after judgment entered. The grounds of appeal are as follows:

"(1) Excepts because his honor erred in allowing the plaintiff to testify, over defendant's objection, that the train which killed plaintiff's mule failed to give the signals required by statute for a public crossing 600 yards from the place where the said mule was struck, and also failed to give the signals required by statute for another crossing 400 yards from the place where said mule was struck; whereas it is submitted that this accident not having occurred at a crossing, and the complaint containing no allegation to which it could be responsive, such testimony was irrelevant to the issue, and should not have been admitted.

"(2) Excepts because his honor erred in allowing Major Cason to testify, over the objection of defendant, that the train which killed plaintiff's mule failed to give the signals prescribed by statute for a public crossing a considerable distance—some 400 yards—from the place where this accident occurred. For the reasons stated under exception 1.

"(3) Excepts because his honor erred in charging the jury as follows: 'The failure to give the statutory signal (his honor referring to the failure to give the statutory signal for the public crossing some 400 yards from the place of the accident) is a circumstance which the jury may consider in determining whether the railroad was running its train with due caution or not. Even in a case that does not arise at a crossing, a failure to give the signal would not, in a case like this we are now considering, be negligence per se—that is, negligence within itself; the mere fact of failure to give the signal would not amount to such negligence as would make the railroad liable, in a case like this. Mere circumstance for you to consider. The law presumes, inasmuch as the law requires the railroad to give these signals, that it does give them. And if a party undertakes to rely upon the failure of the railroad to give the signal, then the party who alleges must prove by the preponderance of the evidence that the signal was not given; and, if that is the case, then it becomes a circumstance for the consideration of the jury to determine whether, under all the circumstances in the case, the railroad was exercising the care in running its train which the law requires.' For the reasons stated in exception 1, and for the additional reason that, no issue being made by the pleadings to which any such charge was applicable, it was to defendant's prejudice.

"(4) Excepts because his honor erred in charging the jury as follows: 'Now, in a

county where the stock law is of force everybody has a right to presume—the railroad company has the right anybody else would have—the right to presume that people are obeying the law, are keeping their stock fenced; and therefore the railroad is not bound to exercise as great care and vigilance in looking out and watching for stock on its track in a county where the stock law is of force as they would be where the law allows stock to run at large. That does not excuse a railroad if it knows as a matter of fact, or if it ought to know, if it has the opportunity to know, and where a person of ordinary intelligence and ordinary observation would know, that stock were at large—that does not excuse a railroad company for killing or injuring stock, where the stock law is of force, if it knows or ought to know that stock is at large.’ The error consisting in this: That such charge imposed a duty upon the railroad company to keep a close lookout for stock in a county where the stock law is of force, and further imposed a duty upon defendant and authorized a verdict for the plaintiff if the jury should find that the defendant had an opportunity to know, or if it ought to know, that plaintiff’s stock were out contrary to the stock law. As to all of which the charge exacted greater care than the law requires, and imposed duties not required by law.

“(5) Excepts because his honor erred in charging the jury plaintiff’s request: ‘If you find as a matter of fact that the engineer or fireman saw, or could have seen, the plaintiff’s mule on the track at any time before the killing, and that they did not try to stop the train or to frighten the mule off the track by blowing the whistle or ringing the bell, then the railroad company is guilty of negligence, and you must find for the plaintiff.’ And further by charging with reference to the said request as follows: ‘That is, you must find for the plaintiff, if you find those facts to be true, in case you find they were negligent, and that such negligence was the cause of the injury.’ The error consisting in this: (1) In imposing the duty upon the defendant of keeping a lookout for stock in counties where the stock law is of force; whereas it is submitted that no duty arises upon the part of the railroad company in such counties until the stock is seen upon or is dangerously near the railroad track. (2) In charging that it was the duty of the company to blow the whistle or ring the bell for stock seen, or which should be seen, by its engineer or fireman, and making its failure to blow the whistle or ring the bell negligence; whereas the railroad company could fulfill its whole duty under the law, and yet fail to give such signals or alarm. (3) In charging the jury what facts would constitute negligence, and make the railroad company liable to plaintiff.

“(6) Excepts because his honor erred in refusing the motion for a new trial made here-

in upon the ground that there was no evidence to support the verdict, and that it was contrary to the law and the evidence. It being submitted that there was no evidence whatever offered in the case in any way contradicting the positive testimony of the engineer that he was in the exercise of reasonable and proper care, and did even more than the law requires, to wit, kept a careful lookout, and, when the stock was seen, exercised the utmost care to prevent injury—all the facts and circumstances corroborating such positive testimony; and, as the presumption of negligence against the defendant could not withstand such uncontradicted positive testimony, a new trial should have been granted upon such grounds.

“(7) Excepts because his honor erred in holding, on the motion for a new trial, that the jury could have found negligence on the part of defendant from the facts in evidence that the mule in question and another one were 100 feet from the railroad track, and that the engineer could have seen them for a distance of 450 yards; whereas it is respectfully submitted that the law requires no such care on the part of the engineer as that he shall keep a lookout in counties where the stock law is of force for stock 100 feet from the railroad track when he is 450 yards away; and it appearing that in his honor’s judgment this was the only evidence to support the verdict, and, it being insufficient, a new trial should have been granted upon the ground that there was no evidence to support the verdict, and that it was contrary to the law and the evidence.

“(8) Excepts because his honor erred in refusing the motion for a new trial herein upon the grounds that there was no evidence to support the verdict, and that the same was contrary to the law and the evidence.”

We will now pass upon these exceptions.

The first, second, and third exceptions cannot be sustained. The trial judge did not overrule the objection to the testimony because he realized that the killing of a mule away from a highway crossing or away from a traveled place could not make such killing to fall within the statute which makes it the duty of a railroad to sound the whistle on its engine or ring its bell when within 500 yards distance from the crossing of a street, highway, or traveled place, to prevent the railroad company from liability for injury to person or property on the crossing, still it is the law of the state that such bell should be rung or whistle blown when within 500 yards of such crossing, and it is negligence not to do so; thereby opening up the way to have it appear by testimony that as a circumstance there was this negligence. This being so, it was perfectly proper to receive the testimony of the witness or witnesses that the railroad did not sound the whistle or ring the bell. The error of appellant consists in this: that it overlooks the fact that the circuit judge refused plaintiff’s first request.

We will now consider appellant's fourth and fifth exceptions. It is the duty of the engineer to look out for stock on the track of the railroad company. It is true that his duty is less accentuated in a county in this state where the stock law exists; nevertheless it is the duty of the engineer to watch out for every danger. The engineer must do this to protect the interests of the railroad company as well as of the general public. We think the circuit judge made no mistake in declaring the law in this case. These exceptions are overruled. The report of this case should set out the charge of the presiding judge in full. These exceptions are overruled.

We will now consider exceptions sixth, seventh, and eighth. The motion for a new trial in this case was made upon the minutes of the court. The discretion of the circuit judge governs in cases like the present, unless he commits error of law. It is an error of law in the event that there is no testimony bearing upon material facts. A careful examination of all the testimony shows that there was some testimony on each point in issue. Such being the case, there was no error when the circuit judge declined to grant a new trial.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 436)

In re **ROCK HILL COTTON FACTORY CO.**
(Supreme Court of South Carolina. April 18, 1904.)

SUBROGATION—SURETY ON BOND.

1. On breach of a bond given to secure payment by a bank of a receiver's deposits, the personal representative of the surety paid the damages. *Held*, that he was entitled to be subrogated to the commissions of the receiver, who was a co-surety, and whose commissions the court had withheld until the deposit was paid in full, as against an assignee of the commissions, where the assignment was after the execution of the bond, but before the order providing that the commissions, when fixed, should be withheld.

Appeal from Common Pleas Circuit Court of York County; Dantzler, Judge.

Petition by James E. Reynolds, in re A. E. Hutchison, against the Rock Hill Cotton Factory Company and others. From the circuit decree, petitioner and certain creditors appeal. Affirmed.

Wm. J. Cherry, for appellant. Wilson & Wilson, for appellant creditors. Witherspoon & Spencer, for respondent.

JONES, J. The question presented by this appeal is, who is entitled to certain commissions of R. Lee Kerr, receiver—whether the appellant, James E. Reynolds, by virtue of an assignment thereof by the receiver, or respondent, administratrix of A. H. White, deceased, under the law of subrogation? The facts are substantially these: (1) In Jan-

uary, 1899, R. Lee Kerr was appointed receiver of the Rock Hill Cotton Factory Company in the suit of A. E. Hutchison v. Rock Hill Cotton Factory Company. (2) On December 1, 1899, a bond was executed by the Commercial & Farmers' Bank, with A. H. White, R. Lee Kerr, and others as sureties, made payable to W. Brown Wylie, clerk, in the penal sum of \$50,000, conditioned that said bank would pay any and all checks of said receiver drawn agreeably to the decrees of the court on the funds already and thereafter to be deposited in said bank by the receiver. (3) Under the call of creditors in the case of A. H. White v. Commercial & Farmers' Bank et al., on the 3d day of June, 1900, the receiver established his claim for proceeds of the sale of property of the Rock Hill Cotton Factory Company deposited in said bank to the amount of \$31,061.82. (4) On January 2, 1900, R. Lee Kerr, as collateral to his note for \$2,500, assigned to James E. Reynolds all his fees due or thereafter to become due him as receiver of the Rock Hill Cotton Factory Company. (5) On September 24, 1900, in the suit of Hutchison v. Rock Hill Cotton Factory Company, the court made a decree containing the following terms: "It further appearing from the receiver's reports to this court that the funds coming into his hands from the sale of the property of the insolvent corporation were deposited to his credit in the Commercial & Farmers' Bank of Rock Hill, S. C., and a bond conditional that said bank would pay all checks drawn against said funds by the receiver, on which bond it appears that the said Lee Kerr is one of the obligors, said receiver's compensation of three per cent. on moneys received by him—to cover all services of receiving and disbursing or otherwise by him—should be withheld until all the funds remaining in said bank are withdrawn and paid, and the said bond is satisfied. * * * Said receiver is further ordered and directed to forthwith draw his check on the Commercial & Farmers' Bank of Rock Hill, S. C., in favor of W. Brown Wylie, clerk of this court, for the amount of his deposit remaining to his credit on the books of said Commercial & Farmers' Bank of Rock Hill, S. C. If payment of said check is refused, said clerk is authorized and directed to bring suit on the guaranty bond made in behalf of the said Commercial & Farmers' Bank, as security for the deposit of receiver's funds. The amount received by said clerk, whether from the said check or from collection of said bond, to be forthwith paid over by him to said receiver for disbursement under the terms of this order." (6) On October 12, 1900, the said receiver drew his check on the Commercial & Farmers' Bank in favor of W. Brown Wylie, clerk, for \$28,314.02, which was dishonored. (7) On May 7, 1901, in an action on the bond mentioned in fact No. 2, above, judgment was entered for \$21,577.50, with costs and interest, in favor of W. Brown

Wylie, clerk, and against the obligors, Commercial & Farmers' Bank, A. H. White, R. Lee Kerr, and others. (8) A. H. White paid \$10,000 on said judgment, and after his death his administratrix, the respondent, procured the balance due thereon to be paid into court by the loan and savings bank, the present holder of the judgment, and, so far as creditors are concerned, the entire judgment on said bond has been paid into court. (9) There is no dispute that the amount of the commissions of the receiver is \$948.42; nor is it disputed that, if respondent is entitled to be subrogated to this fund, her claim would absorb the whole of it.

Judge Dantzer made a decree sustaining respondent's claim to this fund, and we do not think he erred. Subrogation, in equity, is that principle which substitutes a person who has paid a debt for which another is bound to all the rights and remedies of the creditor against that third party, provided he is not a mere volunteer, but made payment because his duty with respect to the contract, or his interest with respect to the property or securities concerned, compelled him. Thus, if a surety pays the debt of his principal, he is subrogated to the benefit of all securities, funds, liens, and equities which the creditor has against the principal. Since co-sureties have the right to call on each other for contribution, a surety compelled to pay the debt of the principal is subrogated to the right of the creditor, not only against the principal, but against the co-surety also. *Burrows & Brown v. McWhann*, 1 Desaus. 409, 1 Am. Dec. 677; 24 Ency. Law (1st Ed.) 228. "The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice." Chancellor Johnson in *Gadsden v. Brown*, Speers, Eq. 41. Therefore it should not be applied against the interest of one who has fairly acquired rights and equities equal or superior to those of the claimant under subrogation.

Applying these principles to the facts stated, the right of A. H. White or his administratrix to subrogation against the co-surety, Kerr, was not consummated, in the sense of being capable of enforcement, until actual payment of the debt; but it originated in the bond executed December 1, 1899, and after consummation goes back to that date. Thus the origin of the right of respondent to subrogation was prior to the assignment of commissions by Kerr to appellant, which was January 2, 1900. Now, did the appellant, as Kerr's assignee, acquire a right or equity equal to that of respondents? Rev. St. 1893, § 265, subd. 4, provides: "Receivers of the property within this state of foreign or other corporation shall be allowed such commission as may be fixed by the court appointing them, not exceeding five per cent. on the amount received and disbursed by them." A receiver takes only such commission as the court may order, and every assignment of funds under the control of a court must

be held subject to order of the court touching its distribution. It is true, the assignment to the appellant was previous to the order of court fixing the amount of the fees, and directing the manner of disbursement; but appellant was bound to take notice that Kerr's commissions were subject to the order of the court, as if that had been written in the assignment in so many words. The court, by its order of September 24, 1900, in effect, retained the commissions as a security for the payment of the funds deposited by Kerr, receiver, in the bank, and in compliance with the conditions of the bond of December 1, 1899. The bond having been paid by A. H. White, his administratrix, respondent, should be subrogated to the commissions as one of the securities for its payment. Kerr could not complain, and his unfortunate assignee can claim no higher right than Kerr had.

The judgment of the circuit court is affirmed.

(68 S. C. 459)

VERNER et al. v. SIMPSON et al.

(Supreme Court of South Carolina. April 19, 1904.)

RES JUDICATA—JUDGMENT AGAINST CORPORATION—EFFECT ON STOCKHOLDER.

1. A stockholder of a corporation is bound by any judgment against it.

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Bill by David P. Verner and others against Augusta A. Simpson and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Joseph A. McCullough, for appellants. Haynesworth, Parker & Patterson, for respondents.

JONES, J. On March 27, 1900, the defendants recovered a judgment against the plaintiff Mutual Insurance Company for \$296.94 and costs. Under execution issued thereon, the sheriff of Greenville county was about to levy upon certain personal property, viz., an iron safe, desk, and other office furniture, alleged to belong to said insurance company, when this action was instituted to enjoin enforcement of said execution upon the ground that said property was not subject to execution under the contract of insurance, charter, and by-laws of said association.

The circuit court, Judge Purdy, sustained the special referee, B. M. Shuman, Esq., in holding that the question was *res judicata* under the judgment mentioned in the case of *Simpson v. Insurance Co.*, 59 S. C. 198, 37 S. E. 18, 225. We think the circuit court was correct in this. In the case of *Hart v. Bates*, 17 S. C. 35, the court held that three things are necessary to sustain the plea of *res judicata*: (1) The parties must be the same or their privies; (2) the subject-matter must be

¶ 1. See *Corporations*, vol. 12, Cent. Dig. § 1024.

the same; (3) the precise point must have been ruled. In this case, the parties or their privies are the same. In so far as D. P. Verner is joined in the suit as plaintiff with the corporation of which he is a stockholder, no change in parties is effected. The interest he sets up in this case is identical with that of the corporation, and his claim is under the corporation with respect to the property of the corporation. In *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, the Supreme Court of the United States said: "A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member." The authorities generally hold that a judgment against a corporation, not impeached for fraud or want of jurisdiction, binds the stockholders with respect to corporate matters. 26 Ency. Law (2d Ed.) 90; *Nickum v. Burckhardt*, 30 Or. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; *Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 66 N. W. 1095, 34 L. R. A. 694, 62 Am. St. Rep. 698; *Bear v. Brunswick Co.*, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; *Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275, 41 L. R. A. 367, 67 Am. St. Rep. 370.

The subject-matter, the contract of insurance, is the same in both cases. The precise point decided in the former suit and involved here is the absolute liability of the Mutual Insurance Company to a money judgment for \$296.94, in favor of Augusta A. Simpson, upon the contract of insurance under its charter, and the facts stated in the complaint and admitted by the answer in the former suit. One of the necessary incidents of a money judgment is to subject to levy and sale under execution all the property of the judgment debtor not exempt under the Constitution or some valid statute. The appellant does not claim exemption of the property from levy under any statute. The claim of exemption is based solely upon the contract of insurance under the charter and the by-laws of the insurance company. The argument is that the property in question was purchased out of the annual premiums, and that, under section 12 of the by-laws, that fund is applicable to defraying the expenses of the company, and is only applicable to losses by fire, etc., where a surplus is accumulated and the directors order such surplus to be so applied, conditions which, it is claimed, do not exist, and to sustain this view appellants cite *Burdon v. Mass. Safety Fund Association* (Mass.) 17 N. E. 874, 1 L. R. A. 146; *In re Equitable Reserved Fund Life Association of New York*, 131 N. Y. 354, 30 N. E. 114. It is further argued that this point did not arise in the former suit, and could not arise until an attempt was made to enforce the execution out of such fund. This is plausible at first view, but, after all, the contention is necessarily based upon the assertion of nonliability to an absolute

money judgment for losses by fire, a question decided against appellants in the former suit, upon the case which they made. To sustain appellant's contention would practically reopen the question decided, and would destroy the legal effect of the judgment rendered.

The judgment of the circuit court is affirmed.

(125 N. C. 601)

HARRILL v. SOUTH CAROLINA & G. E. R. CO. OF NORTH CAROLINA.

(Supreme Court of North Carolina. May 27, 1904.)

MASTER AND SERVANT—DEATH BY WRONGFUL ACT—EXISTENCE OF RELATION—QUESTION FOR JURY—PARTNERSHIP—LIABILITY OF PARTNERS—ASSUMPTION OF RISK—LAW OF FOREIGN JURISDICTION—EVIDENCE—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad company for wrongfully causing the death of plaintiff's intestate, who was alleged to have been employed by defendant as an engineer, evidence considered, and *held* to justify submission to the jury of the question whether defendant and another corporation of the same name were partners in operating the portion of the road where deceased was killed.

2. This question was one of fact for the jury.

3. That a partnership agreement between railroads is ultra vires as between the public and the corporations does not relieve the company from contractual liability to third persons.

4. A railroad corporation operating a road jointly with another corporation is responsible for injury to its employes, as a natural person would be for the liabilities of a firm of which he is a member.

5. In an action in North Carolina against a railroad company for wrongfully causing the death of an engineer on a part of its road in South Carolina, an attorney from the latter state testified that, under the Constitution of that state, knowledge by the deceased of the dangerous condition of the trestle by the falling of which he was killed would not defeat recovery for his death, and cited South Carolina cases in support of his statement. On cross-examination, witness testified that any degree of contributory negligence would defeat recovery, and defined "contributory negligence." *Held* to sustain an instruction that if the trestle was defective, to the knowledge of defendant, knowledge by deceased of its dangerous condition would not defeat recovery.

6. The court charged that contributory negligence does not apply to the use by an employe of ways known by the company to be defective, and which the employe is required to use and can use in but one way, but that an employe cannot hold his employer liable for his wrongful acts, done contrary to his duty, so that culpable negligence contributing to the injury would bar recovery. It was further stated that if the contributive fault was of a negative character, and would not have existed but for the primary wrong, it is not to be charged to the injured person, but to the original wrongdoer. On the specific facts, the court charged that if it was pointed out to deceased that the trestle was dangerous, and it was in fact apparently so, and deceased went on it without exercising ordinary prudence, he could not recover, but that if he was told to examine it, and did so, without discovering that it was dangerous, and believed that he could go over it with usual safety, and violated no rule of the company, he could recover. *Held* not erroneous.

Montgomery, J., dissenting.

Appeal from Superior Court, Rutherford County; B. F. Long, Judge.

Action by R. N. Harrill, as administrator of the estate of Jake Metcalf, deceased, against the South Carolina & Georgia Extension Railroad Company of North Carolina. From a judgment for plaintiff, defendant appeals. Affirmed.

See 44 S. E. 109.

P. J. Sinclair, G. W. S. Hart, and N. W. Hardin, for appellant. E. J. Justice and Busbee & Busbee, for appellee.

CONNOR, J. The plaintiff alleged that his intestate, Jake Metcalf, was on and before April 20, 1901, employed by the defendant as a locomotive engineer, and was on said day engaged in running an engine carrying cars from Blacksburg, S. C., to Marion, N. C.; that while so engaged he was killed by the falling of a bridge or trestle, being a part of defendant's track over Buffalo creek, in South Carolina; that said trestle was on said day, by reason of defendant's negligence, in a defective and dangerous condition, and, by reason thereof, gave way and fell, causing the death of his intestate. Defendant denied that plaintiff's intestate was, on the day named, employed by or engaged for the defendant in pulling a train from the points named in the complaint. The defendant also denied the allegation of negligence, and averred that plaintiff's intestate assumed the risk of crossing the trestle, and was guilty of contributory negligence. At the conclusion of the plaintiff's testimony, defendant moved for judgment of nonsuit, for that (1) the plaintiff has failed to show that the defendant company, the South Carolina & Georgia Extension Railroad Company of North Carolina, ran its train, or built or is required in law to maintain the trestle over Buffalo creek, in South Carolina, or that the plaintiff's intestate was employed by defendant company; (2) that there was no evidence of negligence on the part of defendant; (3) that plaintiff's evidence demonstrated that his intestate was not without fault, and that he came to his death by his own negligence. The motion was refused, and was renewed upon the same grounds at the conclusion of the entire testimony, and again refused, and defendant excepted. The court submitted the following issues to the jury: "(1) Was plaintiff's intestate employed and sent by defendant on April 20, 1901, as engineer, for the purpose of running an engine, and cars attached, from Blacksburg, S. C., to Marion, N. C., over Buffalo creek trestle, as alleged in the complaint? (2) Was intestate killed by the wrongful act and negligence of defendant, as alleged? (3) Did intestate, by his own negligence, contribute to his death? (4) What damage, if any, is plaintiff entitled to recover?"

The controversy in regard to the relation which the plaintiff's intestate bore to the de-

fendant company is presented by the first ground assigned for the motion to nonsuit, and certain special prayers for instruction asked by defendant. An examination and settlement of this question lies at the threshold of the case. If the plaintiff has introduced no evidence to sustain the allegation that his intestate was in the employment of the defendant company, and that by the terms of such employment he was required to run his engine over and across Buffalo creek on the day he was killed, the motion for nonsuit should have been allowed. The testimony in regard to the status of the defendant, and its relation to the South Carolina corporation owning the railroad to the North Carolina line, is certainly unsatisfactory. To correctly understand the status of the defendant corporation, it becomes necessary to state as concisely as possible its history and relation to certain other corporations. The General Assembly of this state, at its session of 1887 (page 143, c. 77), consolidated the Charleston, Cincinnati & Chicago Railroad Company, a South Carolina corporation, with two North Carolina corporations, creating the Charleston, Cincinnati & Chicago Railway Company, a North Carolina as well as a South Carolina corporation, operating a railroad from Marion, N. C., to Blacksburg, S. C. This railroad, with all of its property, rights, franchises, etc., in both states, was sold under foreclosure proceedings in the Circuit Court of the United States, and was by the purchaser incorporated under the corporate name of the Ohio River & Charleston Ry. Co. *Bradley v. Railroad*, 119 N. C. 918, appendix. This last-named corporation executed certain mortgages, which were foreclosed pursuant to a decree of the Circuit Court of the United States for the Western District of North Carolina, and the property, rights, franchises, etc., purchased by Samuel Hunt and others. Pursuant to sections 697, 698, and 2005 of the Code, the purchasers formed a new corporation under the name of the South Carolina & Georgia Extension Railroad Company of North Carolina. At the session of the General Assembly of 1899 (Pub. Laws 1899, p. 129, c. 35) the Legislature incorporated said company under said name; conferring upon it all of the rights, powers, privileges, franchises, and immunities that at any time belonged to the Charleston, Cincinnati & Chicago Railroad Company, or to the Ohio & Charleston Railway Company of North Carolina, or to the Ohio River & Charleston Railroad Company or to any or all of their predecessors. The said corporation was authorized to operate and maintain a railroad from the said line, on the county line of Cleveland county, to the town of Marion, in the state of North Carolina, and was authorized and empowered to assign or lease its franchises, rights, and property, and to consolidate with any other corporation organized under the laws of this or any other state. The manner in which said consolida-

tion shall be made, and the evidence thereof, is fully set forth in section 8 of chapter 85 of said act, which was ratified January 31, 1899. On the 18th of August, 1898, the South Carolina & Georgia Extension Railroad Company of South Carolina was chartered, which charter was confirmed by the Legislature of South Carolina on the 1st day of March, 1899. The same persons, except P. J. Sinclair, are named as directors of the South Carolina corporation. The Constitution of South Carolina forbids any foreign corporation to do business there without the consent of the Legislature of that state. There was no evidence that said corporation had consolidated in accordance with the provisions of section 8, c. 85, p. 131, of the Laws of 1899. There was no other line of road running from Marion, N. C., through Rutherford and Cleveland county, to the South Carolina line, than the one which extends to South Carolina and across to Blacksburg. It appeared in evidence that the intestate was employed by the South Carolina & Georgia Extension Railway Company. This was shown by vouchers and checks issued to the said intestate, drawn upon the National Union Bank, Rock Hill, S. C., the National Bank of Gaffney, Gaffney, S. C., Merchants' & Planters' Bank, Gaffney, S. C., or B. Blanton & Co., Bankers, Shelby, N. C. There was also evidence tending to show that the run of said intestate was from Blacksburg, S. C., to Marion, N. C., and return; that he had been making this run for about two years; that he was working for the same company during this time. His widow testified that he was working on the road which operated trains in North Carolina from Marion along the line of what is known as the "Three C Road"; that he had the rulebook and time-tables issued by the South Carolina & Georgia Extension Railroad Company. It was in evidence on the part of the defendant that Thomas A. Smith was a section master, having under his charge a portion of the road running from Blacksburg, S. C., to Earle, N. C. It was further in evidence on the part of said witness that he had been section master of said road eight or ten years; that three miles of his section was in North Carolina, and three in South Carolina, including Buffalo creek; that it was under one management, and that he was employed by one company; that his employment covered the time of death of plaintiff's intestate. Another witness for the defendant testified that he was employed on said road, and did not know he was working for but one company. It was further in evidence by W. M. Wilkie on the 20th day of April, 1901, he was employed in repairing cars in the shop at Blacksburg for the South Carolina & Georgia Extension Railroad Company; that he had worked on trestles from Blacksburg, S. C., to Brushy Creek, N. C.; that Mr. Tripp was superintendent, Mr. Maxwell was supervisor of the track, and Mr. Nutting was supervisor of the bridges and trestles. There

was no evidence of the existence of any corporation by the name of the Georgia & South Carolina Extension Railroad Company.

The defendant denies, "on information and belief," many of the allegations of the complaint in respect to the relation the plaintiff's intestate bore to the corporation. For instance, the fifth allegation of the complaint is "that on the morning of April 20 1901, the said intestate was sent out by defendant from Blacksburg, S. C., on his regular run, with a train consisting of engine and tender, freight cars, and passenger coach, as plaintiff is informed and believes." The answer is, "It denies on information and belief the statement of facts in the fifth paragraph of the complaint." It is very doubtful whether this answer to this very material allegation raised an issue. Code, § 243, requires the answer to either deny each allegation, or "any knowledge or information thereof sufficient to form a belief." However this may be, no question was raised in regard to it by the plaintiff, and we notice it only as indicating the trend of the defendant's answer to the vital question as to its relation to the employment of the plaintiff's intestate. The entire testimony presents the very singular and anomalous spectacle of a railroad track originally built and belonging to a corporation chartered by the General Assembly of two states, running and operating in both states a continuous line, being sold, and the purchasers incorporating two companies of the same name, except that one is "of South Carolina," and the other "of North Carolina." The two roads are operated by persons who adopt the name of "The South Carolina and Georgia Extension Railroad Company." There is no evidence of any consolidation of the two corporations, or of any lease of the track of one company to the other. The two roads are operated by a common set of officers, the section assigned to one of the section masters being one-half in each of said states—one superintendent, one inspector of cars, and, in general, one set of employes. The checks given to the plaintiff's intestate indicate that the road is operated from a common treasury. There is other testimony to the same effect. There is no more evidence that the plaintiff's intestate was employed by the South Carolina than by the North Carolina corporation. If the defendant's contention be sustained, we have the anomalous condition of employes operating a railroad with no responsible head, and no one responsible for injuries sustained by them, and no one responsible to the public for breach of contracts. There must be some explanation of this condition. The plaintiff served notice upon the defendant "to produce, in a legal form, showing that it would be competent testimony, the charter of the South Carolina & Georgia Extension Railroad Company, and states that it is alleged by the plaintiff that there is no such legal charter, and that there was an attempt at consolidation of the South

Carolina & Georgia Extension Railroad Company of South Carolina, and the South Carolina & Georgia Extension Railroad Company of North Carolina, which did not have the effect of extinguishing the two former corporations and creating a new one, but which made a partnership of the two former, which did business under the name and style of the South Carolina & Georgia Extension Railroad Company; it being a partnership, and not a corporation." There was no response to this demand. There is but one possible theory upon which the operation of these roads in the manner testified to by the witnesses for both plaintiff and defendant can be explained. The plaintiff contends that there was testimony competent to be submitted to the jury tending to show that the two corporations were running and operating said roads under an arrangement or agreement which, in law, constituted them partners under the name of the South Carolina & Georgia Extension Railroad Company, and asked his honor to submit this question to the jury; the defendant objecting for that there was no evidence to sustain such instruction. His honor having refused the motion for nonsuit and submitted the question to the jury, the exception to his refusal and instruction to the jury raises the question whether there was any evidence to sustain it. Among other instructions, his honor said to the jury: "There is some evidence tending to show the corporation which is sued, and which was chartered by the Legislature of North Carolina, operated a railroad in North Carolina in 1899, 1900, and 1901, and that trains operated over this road at that time passed into South Carolina and over Buffalo creek daily. Mrs. Metcalf testified, as the court recalls, that her husband was employed by the company so operating the trains in this state, and that he was required, as such employé, in the performance of his duty, to go on to Blacksburg, and over this trestle. If you find from any evidence in this case that the plaintiff's intestate was employed by the defendant, and was required to go over the trestle at Buffalo creek, in South Carolina, you will answer the first issue, 'Yes.'" The defendant excepted to this instruction. "The jury will answer the first issue 'Yes' if they find from the greater weight of the evidence that the South Carolina & Georgia Extension Railroad Company of North Carolina and the South Carolina & Georgia Extension Railroad of South Carolina, under the name and style of the South Carolina & Georgia Extension Railroad Company, jointly or by mutual consent employed plaintiff's intestate, and made it his duty, as an engineer, to run from Marion, N. C., to Blacksburg, S. C., on April 20, 1901, and operated trains over the railroad leading from Marion to Blacksburg as one company, with a common set of officers and a common treasurer, when the said South Carolina & Georgia Extension Railroad Company had not been incorporated ac-

cording to law, and there had been no legal consolidation of the said two companies."

It is held by this court in *Rocky Mount Mills v. Railroad Co.*, 119 N. C. 693, 25 S. E. 864, 56 Am. St. Rep. 682, that where two or more connecting roads have agreed among themselves to conduct business through their systems under the name adopted by them, and have so advertised to the public, and have so contracted with persons, that each road which is a party to such agreement is liable for the negligence of the other roads. In that case it appeared that certain connecting roads had entered into an agreement to receive and transmit freight under a through bill of lading; that they adopted the name and style of the Atlantic Coast Dispatch, and issued bills of lading in that name. For the failure to promptly carry and deliver freight, it was held that either of the roads to such agreement might be sued for damages. The court, after discussing the question, says: "Upon examination and reflection, we are of the opinion that the defendants and their connecting lines are jointly liable, each for the others, on the contract before us, and that they are also entitled to the same immunity and privileges as if the contract had been made by the individual company sought to be charged under said contract; that is to say, that they are engaged in business as partners under the name of the Atlantic Coast Dispatch. They are still common carriers—none the less so because they have certain stipulations. Having jointly agreed to conduct the 'all-rail fast freight line' business, under the name above stated, between the terminal points of their connections north and south, and having so informed the public and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business, and such character cannot be thrown aside by any declarations in the contract in relation to the consequences of liabilities attaching thereto." The court again says: "Taking notice, as we are at liberty to do, that the numerous transportation lines in our country, connecting with each other, constituting continuous lines between localities, are important factors in the commercial life of the country, we can readily see that if the shipper should have to go to a distant state, and find, as best he can, the negligent party, and enforce his remedy against him there, then the expense and trouble would in many cases be ruinous. On the contrary, the carrier's remedy in a case like the present would be easy and speedy. The whole matter is this: The defendants and their associates have engaged in a public business, in the manner described, for mutual benefit and convenience, and attempted to avoid the legal consequences by adopting some fancy name, and by stipulating for limitations on the liabilities incurred in the exercise of their privileges in such business."

It would seem clear that if two natural

persons were found using their common property jointly, permitting those in the active control and management of it to make contracts, collect moneys for its use, and hold themselves out to the public as authorized to so use it, the question as to whether such use was the result of some agreement or partnership would be submitted to a jury. It is difficult to conceive that the president and directors of the two corporations would so far abdicate their powers and fail to perform their duties in respect to the property and franchises as to permit strangers, without authority, to assume control of it, employ servants and agents to operate it, assume responsible duties to the public, and, in short, to do all such things in respect to the property as the corporations were authorized to do. This will be the condition with which we are confronted, unless those who, under the name and style of the South Carolina & Georgia Extension Railroad Company, have leased this property from the corporations, are operating it as their property. In view of the entire evidence, we think that his honor properly submitted the question to the jury. It is well known, as a part of the history of this country, that railroad companies do form traffic and passenger arrangements, and otherwise operate their property jointly for their common benefit. Usually this is done by virtue of special permission granted by the Legislatures of the different states. If it be done without such authority, and is ultra vires as between the corporations and the public, they could not escape liability to persons with whom they had formed contractual relations by reason thereof. It does not appear that the South Carolina & Georgia Extension Railroad Company is a legal entity, or consists of anything more than a corps of superintendents, section masters, engineers, and other persons employed in operating a railroad. Surely such a mythical personality may not stand to the front and prevent the court laying hold upon the real owners of the property, as the jury have found real operators thereof, and fixing them with liability for breach of contracts. It would be but keeping the promise to the ear, and breaking it to the hope, to say to this engineer or his personal representative that the South Carolina & Georgia Extension Railroad Company is alone responsible for a defective condition of the bridge by which he lost his life. Questions somewhat analogous to this have come before the court, and it has been uniformly held that the jury is the proper tribunal to pass upon and ascertain the real facts, and fix real responsibility. In the case of *Muschamp v. Railroad Co.*, 8 Mees. & Wel. 421, the question was presented as to the liability of the defendant for loss of articles shipped over its own and other lines. Lord Abinger, C. J., said: "The whole matter is therefore a question for the jury to determine what the contract was, on the evidence before

them." In *Bradford v. So. Car. Railroad Co.*, 7 Rich. Law, 201, 62 Am. Dec. 411, the court held that in such cases it was a question for the jury to determine. In *Hart v. Railroad*, 8 N. Y. 37, 59 Am. Dec. 447, the court said: "I am satisfied from this evidence that the refusal of the judge to nonsuit the plaintiff was right. The court charged the jury that it was for them to say whether it was proved that the defendant, by its agents, received the baggage, and agreed to carry it to Troy, and on the decision of the motion for a nonsuit, after all the evidence was given, the court stated it was a matter to be left to the jury. The court was right, both in the charge and in the refusal to nonsuit. There were facts which it was proper to submit to the jury, who were the proper judges of the weight of evidence, and it would have been error to have refused so to submit them."

We think that his honor's ruling in the matter was correct. The jury having found, under the instructions, that the defendant corporation was, together with the South Carolina corporation, operating the road jointly, of course it becomes responsible for the injury sustained by its employé in the same manner that a natural person would be for the liabilities of a partnership of which he was a member. We have carefully examined his honor's charge upon the second issue, and find no error therein.

The principal contention is made upon the question of assumption of risk and contributory negligence. In respect thereto it is conceded that the law of South Carolina prevails. Mr. D. W. Robinson, a practicing attorney residing in South Carolina, was examined as a witness in regard to the law of that state, and, after testifying in regard to article 9, § 8, of the Constitution, was asked the following questions: "If the jury should find that the engineer of a locomotive engine, employed by a railroad company, while running a train across a trestle on the road of said company in the discharge of his duty as such employé, had lost his life by the trestle giving way on account of some defect in the trestle, and the engine falling through by the breaking down of the said trestle, would this, under the laws of South Carolina, render the railroad company liable in an action by the personal representative of deceased for damages for such death? Ans. Yes, sir." "Under the laws of South Carolina, would the defense by a railroad company to an action for damages by reason of the falling in of a trestle along the railroad track, and the consequent death of the engineer, that the engineer knew of the dangerous condition of the trestle, or had opportunity to know it, avail the railroad company anything? If not, why not? Ans. I do not think the defense of knowledge and assumption of risk in a case of this kind would avail the defendant, because the provision of the Constitution of South Carolina (article 9, § 15) makes this defense of no

avail, and this seems to be the construction placed upon this provision by the courts of South Carolina." The witness thereupon cites a number of cases decided by the Supreme Court of that state, and proceeds to say: "But if this case is not covered by the provision of the Constitution which I have above quoted, then the law applicable to it, as construed in this state, is that the question whether or not the party is to be deemed to have assumed the risk, from knowledge of the dangerous or defective character of the appliances, machinery, etc., which he uses, is a question for the jury. The cases already cited cover this doctrine." The witness was examined fully in regard to the law of South Carolina, and upon cross-examination said: "Any degree of contributory negligence, as this term is used by the Supreme Court of South Carolina, and properly understood, will defeat a recovery. The meaning of 'contributory negligence,' as defined by the Supreme Court of South Carolina, is that kind of negligence of the plaintiff which is a direct and proximate cause of the injury combining and concurring with the defendant's negligence in the same matter, causing the injury. Unless it is the direct and proximate cause, it is not contributory negligence, within the meaning of the term used by the Supreme Court of South Carolina. The distinctions and doctrines applicable to a proper understanding of contributory negligence will be found in the Bodie Case [Bodie v. Charleston & W. C. Ry. Co. (S. C.) 30 S. E. 715, 44 S. E. 943], above referred to." His honor read to the jury the constitutional provision, and said: "If this trestle was dangerous in its construction, or in any other manner, as alleged in the complaint, and if the defendant company knew this, and required and permitted its engineers, in the performance of the duties of their employment, to pass over it, then I charge you that such engineers would not be barred of their recovery, in case of injury to them, because they knew the trestle was thus defective." We think there was evidence to sustain this instruction. In regard to the issue of contributory negligence, his honor charged the jury as follows: "Contributory negligence, in South Carolina, does not apply to the use of an employé of a railroad company of defective ways of such company, when the railroad company knew the ways were defective, and the employé was required by it to use such ways in the performance of his duty, and when there is but one manner or method of using the same, and the employé is injured in so using it. An employé of a railroad company cannot hold his employer liable for his wrongful acts done, not in obedience to his duty as such employé, but contrary to it. The Constitution of South Carolina does not go this far. It is not to be assumed that a man in his senses will heedlessly imperil his own life. Culpable negligence of the plaintiff's intestate, properly so

called, which contributed to the injury, must always defeat the action. But the nature of the primary wrong has much to do with the judgment, whether or not the contributive fault was of a negative character, such as a lack of vigilance, and was itself caused by, or would not have existed but for, the primary wrong. It is not, in law, to be charged to the injured one, but to the original wrongdoer. See Kirby v. Railroad (June 24, 1902, S. C.) 41 S. E. 774. If the jury finds that when the intestate, Jake Metcalf, on the morning of April 20, 1901, arrived at Buffalo trestle, and was waved down by Tom Smith, the section master, and they went together out on the trestle, and Smith pointed out to Metcalf that the track of the railroad was out of order, and the trestle was dangerous and unsafe, and waved him not to go over it, and told the intestate that the trestle was unsafe, or if it was apparently more unsafe and more likely to fall than usual, and this could have been detected by ordinary prudence, and Jake Metcalf did not exercise such prudence, and was thereby injured as the direct result thereof, you will answer the third issue 'Yes,' or, if he willfully killed himself, you will answer the third issue 'Yes.' You will answer the third issue 'No,' if you find from the evidence that when Jake Metcalf arrived at the trestle over Buffalo creek on the morning of April 20, 1901, he was flagged down by Tom Smith, the section master, and told that the creek was high, and that he wanted Metcalf to get out and examine the trestle, and he did so, and walked out on the trestle with Smith, and the track appeared to be in alignment and surface, and there was nothing the matter with the track or trestle, so far as appeared from examination, except the water was high, and came up on the trestle as high as is represented by the red line on the picture, Exhibit 3, and that there was a raft above the trestle, and that there was nothing further unusual about the track or trestle, and that Metcalf was left by Tom Smith to rely on his own judgment as to whether he should go on the trestle, and was not warned not to go, and Metcalf believed he could go over it with as much safety as for some months before, and a man of ordinary prudence under like circumstances would have ordinarily so believed, and that Metcalf violated no rule or order of his employer in going on or over the trestle." Defendant excepted to the giving of these instructions. We think there is no error in the instructions as given. The defendant asked for a number of special instructions, the larger part of which were given with certain modifications, which we have carefully examined, and which we think were correctly made. This case is before this court for the second time, and was argued at the last term. We have given it a careful and anxious consideration. It was argued with marked ability by eminent counsel on both

sides. It is not for us to say what the verdict of the jury should have been. We can only pass upon the exceptions to his honor's rulings upon questions of law, and as to them, for the reasons hereinbefore given, we find no error.

MONTGOMERY, J. (dissenting). The plaintiff brought this action to recover damages for the killing of his intestate through the alleged negligence of the defendant company. In the complaint it is alleged that the defendant is a domestic railroad corporation in North Carolina, and that the line of its road extends through Blacksburg, S. C., through Cleveland and Rutherford counties in North Carolina, to Marion, N. C.; that his intestate at the time of his death was employed by the defendant as a locomotive engineer, and was engaged in running an engine pulling a train from Blacksburg, S. C., to Marion, N. C.; that the decedent, in the exercise of due care, undertook to cross a high trestle over Buffalo creek, in South Carolina, between Blacksburg and the North Carolina line, and was killed by the falling in of a part of the trestle, the trestle having been insecurely built, and then in a bad condition, to the defendant's knowledge. The allegation of the complaint is that the trestle over Buffalo bridge, where the intestate lost his life, is in South Carolina, and all of the evidence was to the effect that it was on the railroad track of the company organized and chartered in South Carolina as the South Carolina & Georgia Extension Railroad Company of South Carolina. The act of incorporation of the defendant company, passed on the 1st day of February, 1900 (chapter 85, p. 129, of the Acts of the General Assembly of 1899), shows that the defendant corporation was authorized to operate and maintain a railroad from the state line between the states of North Carolina and South Carolina, on the county line of Cleveland county, to the town of Marion, in the state of North Carolina, and thence to the Tennessee state line.

It was admitted by both sides on the trial, and the admission was correct in law, that there is a presumption of law, in the absence of proof, where a corporation has authority to operate a railroad, and the road is being operated, that the company authorized by the charter is in fact conducting its management, and the court so instructed the jury. The plaintiff's intestate, then, having been killed in South Carolina, on the road of the South Carolina & Georgia Railroad Company of South Carolina, there is a presumption of the law that that company was operating its own road.

The defendant at the close of all the evidence renewed its motion to nonsuit the plaintiff upon the ground that the plaintiff had failed to show that the defendant company, the South Carolina & Georgia Extension Railroad Company of North Carolina,

ran its train, or built or was in law required to maintain the trestle spanning Buffalo creek, in South Carolina, or that the plaintiff's intestate was employed by the defendant company. We think that the motion should have been allowed.

The first issue was as follows: "Was the plaintiff's intestate, Jake Metcalf, employed and sent by the defendant on April 20, 1901, as engineer, for the purpose of running an engine, and cars attached, from Blacksburg, South Carolina, to Marion, North Carolina, over Buffalo Creek Trestle, as alleged in the complaint?" After a careful scrutiny of all the evidence in this case, I find none to the effect that the intestate was either employed by the defendant company, or that he was under its direction or orders, on the 20th April, 1901, the day of his death. The only evidence offered by the plaintiff to prove that fact positively was the testimony of Mrs. Carry Metcalf, the widow of the intestate. In her examination in chief she said that the intestate's "run" was from Blacksburg to Marion and return; that he had been working for the same company all the time he was on that run; and that the road on which he, as engineer, hauled trains, was in North Carolina from Marion along the line of what was known as the "Three C Road." On her cross-examination, however, she said that the name of the company that runs to Marion is the same as that company that runs to Camden, and that, of her own knowledge, she did not know what that name was—she only knew that their literature (referring to order book and the checks in which the intestate received his monthly wages) said it was. The checks and order book were shown in evidence. The checks were drawn at Blacksburg, S. C., by A. Tripp, superintendent, and at the top of it was printed, "South Carolina and Georgia Extension Railroad Company: Pay Roll 2." The order book which was delivered to the intestate contained, as prefatory to the rules, the following printed statement: "No. 555. This book is the property of the South Carolina and Georgia Extension Railroad Company and is loaned to J. D. Metcalf, engineer, who hereby agrees to return it to the proper officer when called for, or upon leaving the service." He signed it. The evidence of that witness did not tend to show that the intestate was employed by the defendant company. E. F. Dougherty, a witness for the defendant, on the other hand, testified that at the time of the intestate's death he was train dispatcher of the South Carolina & Georgia Extension Railroad Company, and that the intestate on the day of his death was sent out by him from Blacksburg to Marion in charge of an engine and train; that he had never been employed or paid by the defendant company. There was a contention on the part of the plaintiff, both in this court and in the court below, that the defendant company and the South Carolina

& Georgia Extension Railroad of South Carolina were either partners or joint operators of the two corporations, using the name of the South Carolina & Georgia Extension Railroad Company as the name under which they operated their partnership or joint interest business; and his honor submitted that view to the jury upon the following instruction: "The charter of the defendant company, ratified on February 1, 1899 (Acts 1899, p. 129, c. 35), provides that it may consolidate with any other company in this state or any other state, and it provides further how such consolidation shall be effected, and that the consolidated company shall be a legal corporation when certain papers mentioned in the charter should be filed with the Secretary of State. If the jury find from the evidence that these two corporations were doing business over the line of road in North Carolina and South Carolina under the name of South Carolina & Georgia Extension Railroad Company, and there was no such corporation as this last-named concern, but that it was a combination of the two corporations, operated under a common set of officers and from a common treasury, then the South Carolina & Georgia Extension Railroad Company of North Carolina would be liable for torts as a joint operator of the property under the name and style of the South Carolina & Georgia Extension Railroad Company." The evidence on which that contention was submitted to the jury was: That trains of cars ran daily from Blacksburg to Marion and returned. The testimony of Dougherty, who said that he was the train dispatcher of the South Carolina & Georgia Extension Railroad Company; that A. Tripp was the superintendent of the same road; that Nutting was supervisor of bridges and building; that Maxwell was supervisor of roadway; that they all lived in Blacksburg, S. C.; that the South Carolina & Georgia Extension Railroad Company ran from Marion to Camden; and that he did not know of any different company that ran from Marion to Blacksburg. The fact, too, that the acts of Assembly incorporating the defendant company in North Carolina, and that of the South Carolina Legislature incorporating the South Carolina & Georgia Extension Railroad Company of South Carolina, with the same corporations in both, authorized each of the companies to lease, or lease to or consolidate with, any other railroad company, and the fact that no such lease or consolidation had been made or effected, were relied upon to give color and force to the contention that, instead of a consolidation between the two companies, they had agreed upon a joint management of the business of the two roads, and a division of the profits. I cannot see how that evidence tends to prove the contention. If there had been no consolidation, in law, of the two companies, and there is no evidence that there had been, and the name of the South Carolina & Georgia Ex-

tension Railroad Company is a myth, the evidence tends rather to show that the South Carolina & Georgia Extension Railroad Company of South Carolina is the real power which is operating the defendant road, for the officers who control it live in South Carolina, on its line of railway, and its trains start from Blacksburg and return the same day, and the defendant company has no cars or engines. To me it seems that the defendant company has no part in the actual management of its road, and, if it is interested in the profits, there is no evidence of it.

I think there ought to be a new trial.

(125 N. C. 27)

BARNES v. WILSON COUNTY COM'RS.

(Supreme Court of North Carolina. April 12, 1904.)

LIQUOR LICENSE — ISSUANCE — DISCRETION OF COUNTY COMMISSIONERS—MANDAMUS.

1. Under Acts 1903, p. 288, c. 233, providing that liquor shall not be sold except in cities and towns where the sale is not prohibited; providing for an election to be held in any city or town on certain conditions being complied with; declaring that, if a majority of votes be cast in favor of the sale of liquor, the board of county commissioners shall grant license to all persons applying for the same according to law, but that one may not sell liquor except on a full compliance with the conditions and requirements of law which may now or hereafter be imposed by law; and page 342, c. 247, § 66, providing that, in towns and cities where the vote shall be for license, the county commissioners shall grant an order to the sheriff to issue license, subject to the provisions of the section, one of which is that, on application duly made, and full compliance with stated requirements, the commissioners may grant an order to the sheriff to issue such license—the commissioners have a discretion in the matter of granting licenses, which cannot be controlled by mandamus.

2. The motion of plaintiff in mandamus proceedings, on the pleadings and admissions of defendant, for a mandamus, is in the nature of a demurrer ore tenus to the answer, involving the admission of the facts set out therein.

Douglas, J., dissenting.

Appeal from Superior Court, Wilson County; Moore, Judge.

Action by L. A. Barnes against the commissioners of Wilson county for mandamus. Judgment for plaintiff. Defendants appeal. Reversed.

This is an action brought by the plaintiff, in which he seeks to have issued a writ of mandamus, directed to the commissioners of the county of Wilson, requiring them to issue to him a license to retail liquors. As the case was heard on complaint and answer, it will be necessary to set out the substance of the pleadings. The plaintiff alleges that he is a bona fide resident and citizen of the said county, and a legal voter therein; that the town of Black Creek is and has been an incorporated town in said county for many

¶ 1. See Intoxicating Liquors, vol. 29, Cent. Dig. § 74.

years, and that on the 19th of October, 1903, in accordance with the provisions of chapter 233, p. 283, of the Public Laws of 1903 (Watts Law), an election was duly held in said town to determine whether or not liquor should be sold, a majority of the votes having been cast in favor of the sale of liquor; that in the following January the plaintiff applied to the board of commissioners of the town of Black Creek for a license to sell liquors for six months from the first Monday of January, 1904, which license was granted. Afterwards an application was made by him to the defendants for an order to be issued to the sheriff of said county, directing him to issue license to the plaintiff to retail liquors in Black Creek; the plaintiff, at the time of, his application to the defendants, having exhibited to them his license issued by the commissioners of Black Creek. Plaintiff then alleges that, in making his said application to the defendants, he accompanied it with the necessary affidavits of six freeholders, who were taxpayers and residents of Black Creek, as to his being a suitable person, and as to the suitability of the place at which he proposed to conduct his business, and that he presented sufficient proof of all the other facts required to be shown in order to entitle him to a license, and, further, that in all other respects he complied with the law, and was ready and willing to pay to the sheriff the fees and tax required by law to be paid in such cases. The plaintiff's application was refused by a vote of three against and two in favor of issuing license. Plaintiff further alleges that no evidence was introduced before the board to show that plaintiff was not a proper person to sell liquors, nor that the place where he proposed to sell was not a suitable one, and that the majority of the board who voted against granting him license did not exercise their discretion, if under the law they have the right to do so, but, on the contrary, arbitrarily refused to grant license to all parties who applied for license to sell liquors in the other incorporated towns of said county. Plaintiff prayed for a mandamus to compel the defendants to order the sheriff to issue to them a license to sell liquors at the place designated in his application. The defendants answered, and admitted the allegations of the complaint, except the allegation that the majority of the board did not exercise their discretion, but arbitrarily refused to grant a license, and this was denied. The defendants further averred: "That on the first Monday in January, 1904, at the regular meeting of the board of county commissioners of Wilson county, the plaintiff filed with said board an application, in the manner and form required by law, asking for an order from said board to the sheriff of Wilson county, directing and commanding said sheriff to issue to the plaintiff a license to sell spirituous, vinous, and malt liquors in the town of Black Creek, in the county of Wilson. That

at said meeting a number of other applications were also filed with said board for a like order. That, in order to expedite the investigation and consideration of said applications, the defendant board set the hour of 2 p. m. on said day as the time at which the investigation and consideration of said applications should be taken up. That at said hour the said board entered into investigation and consideration of said applications, and the balance of the day was taken up in such investigation and consideration. That said board then adjourned to meet at 11 o'clock a. m. of the next day to continue such investigation and consideration, and that said board met at said hour on the following day, and continued such investigation and consideration. That, after an extended investigation and consideration, the application of this plaintiff and the application of each of the other parties applying for license as aforesaid were separately balloted upon by the members of said board. That, when the ballot on the plaintiff's application was counted, it appeared that four of the members of the said board had voted against the granting of the order asked, and that one of the members had voted in favor thereof, whereupon the chairman of the board announced that the plaintiff's application had been rejected." A copy of the minutes of the said meeting and the adjourned meeting is attached, and asked to be taken as a part of the answer. "That the application of this plaintiff and the application of each and every other person filed with said board for the purpose of obtaining a license to retail liquors as aforesaid was separately considered and investigated by said board, and that the ballot taken thereon was in each case separate. That said defendant, board of commissioners of Wilson county, is advised, informed, and believes, and upon such advice, information, and belief aver, that the law imposes upon said board the duty and responsibility of granting or refusing to grant all licenses to retail spirituous, vinous, and malt liquors in the county of Wilson, and that the law further imposes upon said board the duty and responsibility of investigating and considering and passing upon the suitability of each and every application, and the fitness of the place at which said applicant proposes to carry on business, and the duty of investigating and considering all other matters and things pertaining to the issuing of said license, and the proper regulation thereof, and that the law also vests in said board a legal discretion in passing upon such application. That the refusal of the defendant, the board of commissioners of Wilson county, to grant to the plaintiff a license to retail liquors as aforesaid, was based upon the exercise of such legal discretion; and the defendant expressly alleges that it did exercise such discretion in refusing to grant the application of the plaintiff, and that such refusal was based upon, and was for, reasons

which to said board seemed proper. That said board of commissioners expressly deny that the members thereof, either as a board or as individuals, or jointly or severally, or by any agreement, express or implied, arbitrarily refused to grant to the plaintiff, or to any other person applying therefor, a license to retail liquor. On the contrary, the defendant alleges that each application was separately considered and voted upon, and that, in each and every case where license was refused, the said board, considering the responsibility and duty imposed upon it by law, carefully considered each application in all its phases, and that the refusal to grant the applicant a license as aforesaid was in the careful and diligent exercise of the legal discretion which said board is advised, informed, and believes is vested in it by law, and was the result of a careful investigation and consideration of facts known to the members of said board."

The case came on to be heard, whereupon the following judgment was rendered: "This cause coming on to be heard, and having been heard, now, upon motion of the plaintiff for judgment upon the pleadings in the cause, and the admission of the defendants in open court that the plaintiff, L. A. Barnes, is a proper person to sell spirituous, vinous, and malt liquors, it is considered, ordered, and adjudged that the defendant, the board of commissioners of Wilson county, forthwith assemble at the courthouse in the town of Wilson, North Carolina, and, after due notice to the plaintiff, hear such testimony as may be offered at said meeting as to the question whether the building specified in the plaintiff's application is a suitable place for carrying on the business of selling spirituous, vinous, and malt liquors, and, after hearing such testimony, find whether the said building is a proper place for carrying on said business or not, and record its finding upon said question upon the records of the said board of commissioners of Wilson county. It is further ordered and adjudged that if the said board of commissioners shall find that the building specified in plaintiff's application for license to sell spirituous, vinous, and malt liquors is a suitable place for carrying on said business, the said board of commissioners of Wilson county forthwith issue its order to the sheriff of Wilson county to issue to the plaintiff license to sell spirituous, vinous, and malt liquors, as prayed for in his application heretofore filed with said board, upon the payment by the said plaintiff of the taxes and fees required by law. It is further ordered and adjudged that if for any cause the said board of commissioners of Wilson county, after hearing testimony as to the suitability of the said building for the purpose aforesaid, shall fail or refuse to issue the said order to the sheriff of Wilson county, the said board of commissioners shall on Friday, the 19th day of February, 1904, show cause before the un-

dersigned judge of the superior court at Wilson, N. C., why a peremptory mandamus should not be issued against the said board, commanding the said board to issue the said order to the sheriff of Wilson county." To the judgment the defendants duly excepted and appealed.

Connor & Connor, F. A. Daniels and W. A. Lucas, for appellants. Shepherd & Shepherd and F. A. & S. A. Woodard, for appellee.

WALKER, J. (after stating the case). The discussion of this case may be conveniently divided into three parts: (1) What was the law in regard to the nature of the discretion of the commissioners in granting licenses prior to the passage of the act of 1903, p. 288, c. 233 (Watts Law)? (2) Has the law been changed by that act so as to limit their discretion, and, if so, to what extent? (3) Was the particular judgment rendered by the court erroneous in any view of the case?

It was provided by Rev. St. c. 83, § 7, that every person wishing to retail liquors by the small measure shall apply to the court of pleas and quarter sessions, and obtain an order therefor, which order shall be granted by the said court upon the applicant showing satisfactorily to the court his good moral character by at least two witnesses of known respectability. This statute was reviewed by this court in *Attorney General v. Justices of Guilford County*, 27 N. C. 315, and a substantial statement of what was therein decided will shed much light upon the question now in hand. The true meaning and signification of the language used in the Revised Statutes was elaborately considered by the court, and the conclusion it reached, and the reasons for it, were stated with great learning and ability by Ruffin, C. J. We understand these to be the principles of law settled by that decision: The justices of the county court were not bound to grant a license to retail spirituous liquors to every one who proved himself of good moral character; nor had they, on the other hand, the arbitrary power to refuse, at their will, all applicants for license who had the qualifications required by the statute. They had the right to exercise only a sound, legal discretion, referring itself to the wants and convenience of the people, to the particular location in which the retailing was to be carried on, and to the number of retailers that were required for the public accommodation. The justices having a discretion, to a certain extent, in granting licenses to retail, a mandamus will not lie to compel them to grant a license to any particular individual, though he may have been improperly refused a license. But if magistrates, fully informed that they have discretion to regulate a branch of the public police (as, in this case, in granting licenses to retailers), perversely abuse their discretion by obstinately resolving not to exercise it at all,

or by exercising it in a way purposely to defeat the legislative intention or to oppress an individual, such an intentional, and therefore corrupt, violation of duty and law must be answered for on indictment. In regard to the right of the courts to review this discretion of the commissioners—in that case the justices—Ruffin, C. J., says: "A mandamus lies only for one who has a specific legal right, and is without any other specific remedy. 1 Chitt. Genl. Pr. 790; State v. Moore County, 24 N. C. 430. If, in this case, the sheriff were to refuse to give a license after the court had made an order for it, the redress would be by mandamus, as the specific remedy, as well as by action for the damages, for the party has a positive right to it from the sheriff. But when we decide that the justices have a discretion, under circumstances, to refuse a license to the relator, although he be a fit person, we, in effect, decide that he cannot have a mandamus. For it is the nature of a discretion in certain persons that they are to judge for themselves, and therefore no power can require them to decide in a particular way, or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not then be their own, but that of the court under whose mandate they gave it." He cites several cases from the English courts, showing that they had steadily refused to review or revise a decision based on the discretion or judgment of the justices, either by an appeal or by mandamus or any other remedial process. Discussing the right of review by an appeal, he refers to Lord Mansfield as disclaiming any power to review the reasons of the justices or to overrule the discretion intrusted to them, and as holding that, if they were partially, maliciously, or corruptly influenced in the exercise of their discretion, and abused the trust reposed in them, they are liable to prosecution by indictment, and possibly even to a civil action for damages. Again says the chief justice: "The distinction between the different methods of proceeding is perfectly intelligible. The mandamus will not lie, because by law the justices, with local knowledge, are to judge for themselves, and the judges of a higher court are not to dictate to them. But the indictment will lie, because, although the law allows the justices to judge for themselves, it requires an honest judgment, in subordination to the law, and punishes a dishonest one; that is, one given in opposition to the known law."

It is settled, therefore, that the discretion confided to the commissioners is not merely a personal and arbitrary one, and that they cannot convert the discretion to refuse a license to unfit persons, or, after enough have already been granted, to refuse further applications, into an arbitrary discretion and despotic resolution to grant a license to no person under any circumstan-

ces. "There is no arbitrary power that would be felt to be more unreasonably despotic, and galling than that under which a small body of inferior court magistracy should undertake, upon their mere will, without any plain mandate from the lawmaking power, to set up their taste and habits as to meat, drink, or apparel as the standard for regulating those of the people at large. For ages past, sumptuary laws have been abandoned. The Legislature does not affect to assert that policy." Attorney General v. Justices, 27 N. C. 321, 326.

But while their discretion is not an arbitrary one, this is far from proving that the courts can by the writ of mandamus coerce the commissioners into exercising that discretion in favor of any particular person or in any particular way. If the case of Attorney General v. Justices decides anything, it certainly decides that a mandamus will not be issued for the purpose of compelling the body invested with the discretion of granting or refusing a license to issue a license to a person whose application has been rejected by them. In that case the justices refused the application upon the single ground that their power to do so was absolute. No stronger case for a mandamus, if one can issue in any case, could have been presented, and yet the court adjudged that, "because this is not a case for a mandamus, the judgment of the court must be reversed, and the motion for a peremptory mandamus is refused." The case of Attorney General v. Justices was reviewed at some length in Muller v. Commissioners, 89 N. C. 171, and was approved. It is true that Ashe, J., who wrote the opinion of the court, did not refer specifically to the question whether the decision of the commissioners was the subject of review, or whether their discretion could be controlled by mandamus, for it was not necessary to do so, as the court held that the commissioners certainly had a discretion, which in that case was shown to have been properly and legally exercised by them. In Tapping on Mandamus (Ed. 1853) at pages *14 and *41, we find it stated generally that mandamus will not lie to command the exercise of a discretionary or voluntary act or right of what kind soever; so neither does it lie to influence or control the exercise of such a discretionary act, power, or right. It must, however, be clearly understood that, although there may be a discretionary power, yet, if it be exercised wrongfully or with manifest injustice, the court is not precluded from commanding its due exercise. So, when one is to act according to his discretion, and he will not act, nor consider the matter, the court will by mandamus command him to put himself in motion to do it; that is, to hear and determine or to inquire so that he may exercise a considerate discretion. "There is therefore no instance of a mandamus to compel an 'approval,' but the court will by its writ compel an inquiry, and in so doing it

does not at all interfere with the exercise of such discretion." Tapping, p. *15. The writ does not lie to command the justices to license a victualer to sell ale, notwithstanding it was suggested that the refusal proceeded from a mistaken view of their jurisdiction, and also notwithstanding a very strong case of partiality was made out, for it is a matter entirely within their discretion. The proper course in such a case is to move for a criminal information. Nor does it lie to rehear an application for license which they have refused because of a mistaken notion as to the law. Tapping, p. 41. The rule is thus stated by another author: "We come next to consider of a fundamental rule underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And whenever public officers are vested with power of a discretionary nature as to the performance of any official duty, or, in reaching a given result of official action, they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion, and to require their action upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given." High on Extraordinary Legal Rem. p. 50, § 42 et seq.

Where discretion had been given to commissioners in selecting and locating a site for the seat of justice for a county, and it was sought by mandamus to compel them to change the location already made, this court, after stating that the business had been intrusted to the discretion of the commissioners, said: "If the defendants had neglected or refused to execute the power intrusted to them, we certainly might call upon them to show cause why they had been so negligent, and, upon insufficient return, might have issued a peremptory mandamus. Here, all we could do would be to command them to select the site for the permanent seat of justice for the county according to law, which, under their oaths, they say they have done." *State v. Bonner*, 44 N. C. 257. In a case similar to the last one cited it was said by this court that "it may be conceded that they ought to have selected the lot on Coleman's land, but, not having done so, and having passed on and made a different selection, the writ will not lie, because it would be but a command to make a different selection from the one which they had thought proper to adopt." *Herbert v. Sanderson*, 60 N. C. 282. In *Buckman v. Com.*, 80 N. C. 128, the doc-

trine is thus stated: "Upon the commissioners alone devolves the obligation, and upon them rests the responsibility, of deciding upon the sufficiency of the bond, under the penalty of incurring a personal liability as a surety for taking a bond known or believed to be insufficient. We can compel them to proceed and act, but we cannot control or interfere with the honest exercise of their judgment and discretion." That case cites and approves what is said by Tapping and High, which has already been mentioned by us. See, also, *Young v. Jeffries*, 20 N. C., at page 221; *State v. Moore*, 46 N. C., at page 279; *Taylor v. Commissioners*, 55 N. C., at page 145, 64 Am. Dec. 566; *Railroad v. Jenkins*, 68 N. C. 504; *County Board v. State Board*, 106 N. C. 81, 10 S. E. 1002. Consulting the English cases, we find that there are many in which this precise question has been presented for adjudication. The uniform course of decision has been to deny the writ when there is any discretion. In *Rex v. Justices of Nottingham*, Sayer, Rep. 216, Ryder, C. J., presiding in the court of King's Bench, and speaking for the court upon a rule to show cause why an information for a misdemeanor should not be filed, said: "It has been truly said that the power of licensing public houses is so absolutely in the discretion of the justices of the peace that this court will never award a mandamus for the licensing of a public house, but it is equally true that the abuse of a discretionary power ought to be more severely punished than the abuse of a power which is not discretionary. In the present cases it appears manifestly that the power of licensing public houses was very grossly abused." The rule was made absolute; that is, the refusal, under the circumstances, was held to be indictable, but not to present a case for mandamus. In *Rex v. Young*, 1 Burrows, 560, Lord Mansfield, sitting in the same court, made a like ruling, and said: "There was no pretense upon any other foot than that of criminality, to make a rule upon the justices, who have a discretionary jurisdiction given them by the law. But though discretion does mean and can mean nothing else but exercising the best of their judgment upon the occasion that calls for it, yet, if this discretion is willfully abused, it is criminal, and ought to be under the control of the court." He then states that the court cannot review the reasons of the justices by appeal, or by overruling their discretion, but that the control of the court could be exercised only by an indictment, or perhaps by civil action at the instance of the party injured.

The Supreme Court of the United States has frequently had similar questions before it for decision, and has invariably held that, when there is discretion, mandamus will not lie to control or reverse it. In *Gaines v. Thompson*, 7 Wall. 847, 19 L. Ed. 62, that court, through Miller, J., said: "The court could not entertain an appeal from the deci-

sion of one of the secretaries, nor revise his judgment, in any case where the law authorized him to exercise judgment or discretion. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary exercise of his official duties. [Citing cases.] It may, however, be suggested that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone; and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the court, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine therefore is as applicable to the writ of injunction as it is to the writ of mandamus." To the same effect are *Cox v. U. S. ex rel McGarrahan*, 9 Wall. 298, 19 L. Ed. 579, and numerous cases therein cited.

The rule is strongly stated in a recent treatise (Bailey on Jurisdiction, vol. 2, § 572) as follows: "That the writ will not lie to control judgment or discretion which has been reposed elsewhere is a principle of universal recognition. The judgment and discretion thus conferred is personal to the court, body, or person, and no court can substitute its own judgment and discretion for theirs."

This court, in *Eubank v. Turner*, 134 N. C. —, 46 S. E. 508, was required to pass upon the right of the plaintiff to a mandamus to compel the defendants, the examining board of the State Dental Society, to issue to him a certificate of proficiency, so that he could practice dentistry in this state. We denied his right to any such relief by mandamus; Chief Justice Clark, for the court, saying: "The granting a certificate to practice involves matters of judgment and discretion on the part of the board, and will not be enforced by mandamus," which "cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal, and the court 'will not and cannot look into the evidence of facts upon which the judgment of the board was based for the purpose of determining whether the conclusions drawn from it were correctly or incor-

rectly formed.'" See, also, *Wise v. Bigger*, 79 Va. 269.

While there may be authorities to the contrary elsewhere, the result of judicial decision in this state is that the body clothed with the discretion cannot by any process of the court be compelled to do anything but exercise that discretion—to act in accordance with the law—and, while the court may do this, it has no power or jurisdiction to direct the course the exercise of the discretion shall take, in order to bring about any given result. It cannot order a license to issue, but its coercive power is exhausted when it requires them to inquire and decide, by the fair and honest exercise of their judgment, whether the applicant is entitled to license or not.

The next question to be considered is whether the act of 1903, called in the argument the "Watts Law," has changed the law in any material respect, so as to render the foregoing principles inapplicable. After a careful examination of that act, our conclusion is that it has not, but that in all material respects, so far as the question now under consideration is concerned, the law in every essential particular is the same now as it was before that act was passed. The act of 1903 provides that liquors shall not be sold except in incorporated cities and towns wherein the sale is not now or hereafter prohibited by law, with certain exceptions not applicable in this case. It then provides for an election to be held in any city or town upon certain conditions being complied with, and declares that, if a majority of votes be cast in favor of the sale of liquors, "the board of county commissioners of the county and the governing board of such city or town, shall grant license to sell liquors in such city or town to all proper persons applying for the same according to law," the license to be granted until another election reversing the result of the voting; but no person is authorized to sell liquors, even when such an election has been held, and resulted in favor of the sale of liquors in the city or town, "except upon a full compliance with the conditions and requirements which may now or hereafter be imposed by law." We think it clearly appears from the language of the act that it was not intended to change the method of granting license to sell liquors. The mere fact that there has been a majority of votes cast at an election in favor of the sale of liquors does not make it mandatory upon the commissioners to grant license upon the mere compliance with certain requirements of the act, but it merely authorizes the board to grant license under the general law, when, if there had been an unfavorable vote, they could not do so. They have now the same discretion that they had before the act was passed. The words "shall grant license," used in the act, do not withdraw from the

board the discretion it had under the general law, but were intended simply to confer authority which should be exercised in strict subordination to the general law. This is so on principle and authority, as we think. A statute will not be construed to repeal or even to modify another statute unless the intention so to do appears, or unless such a construction is required on account of a conflict between the provisions of the two statutes; but, if they can be reconciled so that both can have effect, this will be done, as that is presumed to have been the intention. There is everything in this statute to show that the intention was as we have above stated it to be. There is no conflict, and the two acts may well stand together, and have full force and effect in every part of each of them.

But the question as to the true interpretation of the act has, it seems to us, been virtually decided by this court in a case presenting facts substantially the same as those in the case at bar. In *Commissioners v. Commissioners*, 107 N. C. 335, 12 S. E. 92, an election had been held in the town of Maxton, under and by virtue of the provisions of sections 75 and 76 of chapter 25, p. 822, of the Private Acts of 1887, to determine whether liquors should be sold in that town. The act provided that, if the majority of the votes be "for license," then the commissioners shall grant license, but not otherwise. It was contended in that case, as it is now contended in this, that these were words of command, but this court held that they did not change the law in respect to the discretion of the commissioners under the general act. The case is directly in point, and must control in the construction of the act of 1903. Indeed no two cases could be more alike in respect to the precise question presented in each. But if we did not have the authority of that case to support our ruling, we would not hesitate to hold, upon other considerations than those already stated, that the act of 1903 clearly did not, and was not intended to, change the law, so as to require the commissioners to issue license without exercising their discretion, when a majority of the votes cast at any election held in accordance with its provisions were in favor of the sale of liquors. Section 2 of the act makes it unlawful for any person to sell liquors in any incorporated town without first obtaining a license as provided by law both from the county and town commissioners, and, even when a favorable vote has been cast at an election held under the act, an application must be made "according to law," and there must be "a full compliance with the conditions and requirements which may now or hereafter be imposed by law" (section 11); and by section 68 of the revenue act (Acts 1903, p. 342, c. 247) it is further provided that "in such towns and cities where the qualified voters shall hereafter, under a special act of the General Assembly, vote in

favor of license, then the county commissioners shall grant an order to the sheriff to issue license, subject to all the provisions of this section," one of which provisions is that upon application duly made, and a full compliance with the requirements as therein stated, "the commissioners *may* grant an order to the sheriff to issue such license." (*Italics ours.*) Even if the word "shall" had been used throughout, instead of the word "may," we have seen that it would have reposed a discretion in the commissioners. *Attorney General v. Justices*, *supra*, and *Muller v. Com'rs*, *supra*. It is interesting to note the varying phraseology used in the statutes concerning the sale of liquor, denoting, perhaps, the fluctuations of public sentiment upon this question. The law as contained in the Revised Statutes and the Revised Code, which was construed in the cases of *Attorney General v. Justices* and *Muller v. Commissioners*, remained as it was there written, without any substantial alteration, until by the act of 1893, p. 251, c. 294, § 83, it was changed so as to read, "Upon the filing of such application and affidavit, the commissioners shall, without the exercise of discretion, grant an order to the sheriff to issue such license." And this continued to be the law until by the act of 1897, p. 238, c. 163, § 34, the words "without the exercise of discretion," were stricken out, and the words "may grant" substituted for the words "shall grant." Whether this change in the form of expression was intended to confer upon the commissioners an absolute discretion—that is, a larger discretion than they before had—as contended by defendant's counsel, we will not undertake to decide, as it is not necessary to do so in order to dispose of this appeal. It is sufficient for us now to hold, as we do, that the commissioners still have a discretion to grant or refuse license, and, while this discretion must be exercised in a manner fair, candid, and unprejudiced, and not arbitrary, capricious, or biased—much less, warped by resentment or personal dislike—it cannot be controlled by mandamus. The court can only insist on a conscientious judgment being used in the exercise of the power of choosing or rejecting, but cannot itself exercise the power, nor substitute its own conscience for that of the board, or its own sense of fitness for the approval or disapproval of that other tribunal, for to do so would be in direct violation of the statute. In passing upon the question whether they will or will not grant a license, "they have," in the language of this court, "a limited legal discretion, and may consider all questions and matters which pertain to the welfare of the community." *Mathis v. Commissioners*, 122 N. C. 419, 30 S. E. 23. But this does not mean that they may use this discretion for the purpose of advancing or vindicating their own views or opinions upon the general policy of selling liquor. This policy has been

settled by the decision of the Legislature and the vote of the people, to which they must yield a ready obedience; and the discretion must therefore be exercised by them in strict submission to this declared policy, and with a scrupulous regard to the right of the applicant to have a fair and impartial hearing, and a just decision, whether for him or against him, and, subject to those limitations, they are a law unto themselves.

Counsel for the plaintiff, in their well-prepared brief, urge upon our attention the case of *Loughran v. Hickory*, 129 N. C. 281, 40 S. E. 46, as an authority sustaining the ruling of the court below, but we do not agree with the counsel. In that case the court distinctly recognizes the right of the board, in the exercise of its discretion, to pass not only upon the fitness of the applicant and the suitability of the place, but also upon "other matters which might possibly arise." Surely the court in that case did not intend to overrule *Attorney General v. Justices, Muller v. Commissioners*, and the other cases holding that the commissioners had a discretion which could not be taken from them by mandamus, without even referring to those cases. We rather think that in that case the court intended to adhere to its previous decisions upon the same question.

One question still remains to be considered: Was the particular judgment rendered by the court erroneous in any view of the case? We think it was, even if the court could control the discretion of the commissioners. In the first place, the court required the board simply to find whether the building is suitable, and, upon the finding that it is, commands the board to issue license upon the payment of the tax, and if, after hearing testimony as to the suitability of the building, they refuse or fail to make an order for the license to issue, then to show cause why a peremptory writ of mandamus should not issue. The judgment of the court is based entirely upon the theory that, after finding that the applicant is a fit person, and that the building is suitable, and the other recited facts, the commissioners have no discretion left in the matter. This is an error, for the statute expressly provides that, even when those facts are found, the commissioners may grant license, and not that they must do so. If it had been intended to take away from them all discretion upon such a finding, the Legislature would have used not merely a word importing permission, or one implying the exercise of a discretion, but a word of command. It was therefore in contravention of the statute thus to deprive them of their right to exercise that discretion. In the second place, the defendants have made a full and frank avowal in their answer of what they did in passing upon the application, and they aver that each application was fully and fairly investigated and carefully considered by them,

and that they refused to grant the order for the license to issue to the plaintiff in the exercise of the sound legal discretion vested in them by the law. It appears from the answer that the defendants have done their full duty in the premises.

The mandamus act (Code, § 623) provides that when an issue of fact arises before the judge who has jurisdiction in a case like this, which is not brought for the enforcement of a money demand, it shall be the duty of the court, upon the motion of either party, to continue the action until said issue of fact can be tried by a jury. The plaintiff did not see fit to avail himself of this provision of the law, but elected rather to move, upon the pleadings, and the admission of the defendants that plaintiff is a proper person to sell liquors, for a mandamus. This was in the nature of a demurrer *ore tenus* to the answer, which involves the admission of the facts set out in the answer. The plaintiff had the right to adopt this course, but he must, in this court, be held to the course he saw fit to pursue in the court below; and this was the view taken by the judge as to the effect of plaintiff's motion, for it was held that, notwithstanding the averments of the answer, the plaintiff was entitled to a mandamus, if it was found by the board that the proposed place of sale is a suitable one. In *Com'rs v. Com'rs*, 107 N. C. 335, 12 S. E. 92, a similar answer was filed, and the plaintiff demurred to the answer. The demurrer was overruled and the action dismissed, and that ruling was affirmed by this court. There is no difference, in principle, in such a case as this, between a demurrer to the answer and a motion for judgment upon the answer, which, as we have said, is a demurrer *ore tenus*. In *Attorney General v. Justices*, supra, the plaintiff filed his petition for a mandamus, and an alternative writ was issued. The return to the writ was not traversed by the plaintiff, but he moved for a peremptory writ upon the ground that the return or answer to the alternative writ, which merely stated that the justices had refused to grant a license to any person, although plaintiff was admitted to be a proper person, was insufficient, and entitled him to a license if one were to be granted at all; but the court refused to issue the writ, and dismissed the action, with costs against the plaintiff. When, as in this case, the plaintiff moves for judgment upon the pleadings, and introduces no evidence to sustain the allegations of his complaint, we must, under the mandamus act, necessarily assume the facts to be as stated in the answer; and, upon those facts, we now adjudge that the plaintiff is not entitled to the writ of mandamus, and the case must therefore be remanded, with directions to dismiss the action.

Error.

DOUGLAS, J., dissents.

(135 N. C. 453)

HUNTER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 17, 1904.)

TELEGRAPHS—FAILURE TO DELIVER—DAMAGES—MENTAL ANGUISH—TRAVELING EXPENSES—RELATIONSHIP OF PLAINTIFF AND DECEASED—KNOWLEDGE OF DEFENDANT—APPEAL AND ERROR—DEFECTIVE ISSUE.

1. In an action against a telegraph company to recover damages for mental anguish suffered by plaintiff by failure of defendant to deliver a message, the issues and answers thereto were, first, was the defendant guilty of negligence as alleged in the complaint? which was answered in the affirmative; and, second, what damages, if any, has the plaintiff sustained on account of mental anguish? which was answered, "\$150." Held, that the second issue was defective for failure to directly present the causal relation between the negligence of the defendant and the damages sustained.

2. Such defect is not cause for reversal by the court of its own motion, where both parties acquiesced in the form of the issues, and no exception was taken.

3. In an action against a telegraph company to recover damages for failure to deliver a message announcing the death of a person, the plaintiff cannot recover his expenses in going to the deceased.

4. In an action against a telegraph company for damages for mental anguish suffered by plaintiff from the failure of defendant to deliver a message announcing the death of a person, the fact that the deceased is only a second cousin of plaintiff does not, as matter of law, bar a recovery.

5. In an action against a telegraph company for damages for failure to deliver a message announcing the death of a person and date of burial, the lack of knowledge on the part of the company of the relation between plaintiff and deceased is immaterial.

Connor, J., dissenting.

Appeal from Superior Court, Guilford County; W. R. Allen, Judge.

Action by T. A. Hunter against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action brought by the plaintiff to recover damages caused by the non-delivery of a telegram addressed to the plaintiff, announcing the death of a second cousin, a child five years of age. The telegram was as follows: "Scott died last night; will be buried to-morrow morning." The plaintiff, T. A. Hunter, was allowed, under objection and exception by the defendant, to testify, among other things: "That he came to Greensboro many years ago, and that for several years next thereafter he lived in the family of his cousin, J. S. Hunter, who was the father of the child Scott, mentioned in the telegram. That he married seven years before the death of the child. That he had not lived in J. S. Hunter's family for six years last before the death of the child, but had lived across the street from him. The child was only five years old

when he died. That he was born a year after he quit living in the family of J. S. Hunter. That by reason of the relationship and close association he saw a great deal of the child from time to time, and loved him very much. That he stood next to his own children in his affections. That he thought a great deal of the little fellow. He was a bright little chap. That he had him on his knee often, and naturally thought a great deal of him. He was very dear to me." That he could have gotten home to the funeral if the message had been delivered any time prior to 12 o'clock on the night of the 15th, and that his failure to be at the funeral caused him great pain and anguish of mind. The witness figured up his actual traveling expenses and other things in coming and going to a sum not exceeding \$18.80, and claimed damages in addition thereto for mental anguish caused by not being at the funeral of the child Scott. The defendant objected and excepted to the action of the court in allowing the plaintiff to testify in regard to his affection for the child, and his anguish and suffering, and insisted that the degree of relationship was too remote to be regarded as an element for damages in this case. The defendant presented in writing the following prayers for special instructions, which were refused: "(3) It being admitted that Scott, referred to in the pleadings and in the message, was a second cousin of the plaintiff, such relationship was so remote that the failure to get the message in time to be present at the funeral is not the basis for a claim for damages, and the consequent mental anguish therefrom is too remote. You will therefore not consider that in making up your verdict. (4) Mental anguish on the part of the plaintiff is not an element of damages in this case, it being admitted that the relationship between plaintiff and Scott mentioned in the telegram was second cousins. (5) There is no evidence that the defendant had any knowledge of any peculiar or intimate relations existing between plaintiff and the child Scott, and, in the absence of such, it being admitted that Scott was the son of a cousin of the plaintiff, the plaintiff cannot recover anything for or on account of mental anguish. (6) If the plaintiff is entitled to recover anything, it is only his actual expenses in coming to Greensboro and returning to his business." Upon the second issue the court charged the jury, among other things, in substance, that, if they believed the evidence, they would find that J. S. Hunter was the father of the Scott referred to in the telegram, and that the plaintiff and J. S. Hunter were first cousins, and that from such relationship there is no presumption that the plaintiff suffered mental anguish on account of his inability to be present at the funeral of the child, Scott; but that the burden was upon the plaintiff to show by the greater weight of evidence that there

¶ 5. See *Telegraphs and Telephones*, vol. 45, Cent. Dig. §§ 49, 65.

existed between the plaintiff and the said Scott such tender ties of love and affection that his inability to be present at the funeral caused him to suffer mental anguish, and that such inability to be present was caused by the negligence of the defendant. The issues and answers thereto were as follows: "(1) Was the defendant guilty of negligence as alleged in the complaint? Yes. (2) What damage, if any, has the plaintiff sustained on account of mental anguish? \$150. (3) If so, what damage, if any, has plaintiff sustained on account of expenses incurred? \$18.80." The defendant appealed from the judgment rendered. The former opinion in this case is reported in 130 N. C. 602, 41 S. E. 796.

King & Kimball and F. H. Busbee & Son, for appellant. Scales, Taylor & Scales, for appellee.

DOUGLAS, J. (after stating the facts). Although there is no exception to the issues, and apparently no misunderstanding as to their meaning, we think it better to call attention to the inaccuracy of the second issue. It should read as follows: "What damage, if any, has the plaintiff thereby sustained on account of mental anguish?" Or, "What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence?" The exact form of the issue is immaterial, but it should directly present the causal relation between the negligence of the defendant and the damages sustained therefrom by the plaintiff. This is especially important in suits involving mental anguish. The defendant did not contribute to the death of the child in any way, and cannot be held responsible for any anguish or sorrow directly resulting from his death. All that it can be held liable for is the additional anguish caused by its own negligence, which in this case seems to be only the anguish resulting from the failure of the plaintiff to be present at the funeral. We use the word "anguish" as indicating a high degree of mental suffering, without which the plaintiff should not recover substantial damages. Mere disappointment would not amount to mental anguish, or entitle the plaintiff to more than nominal damages. In all cases damages for mental anguish are purely compensatory, and should never exceed a just and reasonable compensation for the injury suffered. As this court has said in *Cashion's Case*, 124 N. C. 459, 466, 32 S. E. 740, 45 L. R. A. 160: If the defendant has been negligent, it is the duty of the jury "to give to the plaintiff a fair recompense for the anguish she has suffered from such negligence, but from that alone; and in determining the amount they should render to each party exact and equal justice; without the shadow of generosity, which is not a virtue when dealing with the property of others." As both parties seemed to be content with

the issues, which may not have caused any confusion in the minds of the jury, we do not feel authorized to set aside the verdict. However, as there might be cases in which such issues would be fatally defective, we deem it better to again call the attention of the profession to the importance of having issues which, either in themselves, or in connection with admissions of record, are sufficient to sustain the judgment. *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45.

We do not think that the plaintiff can recover his expenses coming to Greensboro, as they do not appear to have been caused in any way by the defendant's negligence. If the defendant had been guilty of no negligence whatever, and the telegram had been promptly delivered, the plaintiff would apparently have incurred the same travelling expenses in coming to Greensboro. Therefore the amount of \$18.80, found in the third issue, must be stricken out of the judgment.

The defendant contends that, as a matter of law, the plaintiff cannot recover on account of simple inability to attend the funeral of a second cousin, and that, if he can so recover, he can do so only upon the absolute prerequisite that the defendant knew or was informed of the peculiar relations existing between him and the child. Both of these questions have been decided by this court adversely to the defendant. In *Cashion's Case*, 123 N. C. 267, 31 S. E. 493, it was held that, while the relation of brother-in-law is not sufficiently near to raise any presumption of mental anguish, the actual existence of said anguish, if found as a fact by the jury, would entitle the plaintiff to recover substantial damages. In that case the court says: "It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart. * * * But beyond the marriage state this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder in the family circle. It is true that with him such affection may exist, and in the present case doubtless does exist; but it must be shown." In *Bennett v. Tel. Co.*, 128 N. C. 103, 38 S. E. 294, the court, speaking through Clark, J., says: "The objection that the relationship of the sendee [father-in-law] does not entitle the plaintiff to recover for mental anguish by reason of failure to be at his daughter's funeral is answered by the discussion and decision in *Cashion v. Tel. Co.*, 123 N. C. 267 [31 S. E. 493]." This line of decisions has been so recently affirmed and followed in the well-

considered opinion in *Bright v. Tel. Co.*, 132 N. C. 317, 43 S. E. 841, that further discussion seems useless. The court, speaking through Walker, J., says on pages 322, 323, 132 N. C., and pages 842, 843, 43 S. E.: "The law does not regard so much the technical relation between the parties, or their legal status in respect to each other, as it does the actual relation that exists, and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but, if mental suffering does actually result from the failure to deliver a message where there is only affinity between the parties, it may be shown, and damages recovered. A woman suddenly bereft of her husband, and who has no father or other relative or friend to whom she can turn in her distress, except the uncle of her husband, might well call upon him for consolation and assistance, especially when, as is abundantly shown in the evidence in this case, he was her husband's nearest living relative, and had reared and educated him and was devoted to her husband and herself, and stood toward them in the place of a parent. She had every right to expect that, as soon as the sad news of the death of her husband had reached him, he would come at once to her, and give her that comfort, consolation, and assistance which she sorely needed. If he was not her father, he entertained for her all of the tender regard and affection of a parent, and was as much interested in her welfare as if he had been her father; and she could therefore reasonably expect that he would do, under the circumstances, precisely what her father would have done if he had been living. It is needless to discuss the question further, as this court has settled it against the defendant. 'We do not mean to say,' says Douglas, J., speaking for the court, 'that damages for mental anguish may not be recovered for the absence of a mere friend, if it actually results; but it is not presumed. The need of a friend may cause real anguish to a helpless widow left alone among strangers with an infant child and the dead body of her husband. In the present case the plaintiff seems to have received the full measure of Christian charity from a generous community; but it may be that she did not expect it, and looked alone to her brother-in-law, whose absence she so keenly felt. If so, she may prove it'—citing *Cashion v. Tel. Co.*, 123 N. C. 267 [31 S. E. 493]."

It will be seen that the cases all proceed upon the principle that the nearness of the relationship is material only where the presumption is relied on; but that mental anguish may exist as a fact where there is no such presumption. In such cases it is a matter of proof, and may be inferred from all the surrounding circumstances, as well as the personal testimony of the plaintiff. The plaintiff is, of course, an interested witness, and his testimony, like that of all such wit-

nesses, should be scrutinized with care; but if, after such scrutiny, the jury believe he has testified truthfully, they should give to his testimony the same weight they would to that of any other credible witness. There is no reason why a party should not become a witness in his own behalf, especially in matters peculiarly within his personal knowledge; and the law does not discredit him for doing so, but simply provides for that just scrutiny by which alone the motives of human conduct can be interpreted.

The second exception is to the refusal of the court to charge that the plaintiff could not recover in the absence of any evidence that the defendant knew or was informed of the peculiar and intimate relations existing between the plaintiff and the deceased child. Such instructions were properly refused, as has been repeatedly held by this court. *Sherrill v. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Lyne v. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Cashion v. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Id.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Laudie v. Tel. Co.*, 124 N. C. 528, 32 S. E. 886; *Hendricks v. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Laudie v. Tel. Co.*, 126 N. C. 481, 35 S. E. 810, 78 Am. St. Rep. 668; *Bennett v. Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Meadows v. Tel. Co.*, 132 N. C. 40, 43 S. E. 512; *Bright v. Tel. Co.*, 132 N. C. 317, 43 S. E. 841. In *Sherrill's Case* the telegram was: "Tell Henry to come home; Lou is bad sick." In *Lyne's Case* it was: "Gregory met accident; not live more 24 26 hours." In *Cashion's Case* it was: "To J. W. Mock: Come at once, Mr. Cashion is dead, killed at work. John Payne." In *Laudie's Case* it was: "Frank dead. Meet depot at Wadesboro 8 a. m. Bury him in Chesterfield, grave 3 feet." In *Hendricks' Case* it was: "Fresh died this morning," and "Come quick, will bury Fresh to-morrow." In *Meadows' Case* it was: "Will Phillips' wife at point of death." In *Bright's Case* it was: "Mr. Bright is dead, will bury at Liberty Sunday morning." In that case—132 N. C., at page 324, 43 S. E. 843—Walker, J., speaking for the court, says: "It is not a valid objection to the plaintiff's right of recovery that the message did not sufficiently disclose its purpose, or show that the plaintiff desired Cooper to come to Wadesboro. It has been repeatedly decided by this court in cases where the relationship of the parties was not disclosed, and the special purport of the message could not possibly have been understood, that it was not necessary for the company to know the relation between the sender and sendee from the terms of the message, or to know anything more than that the message is one of importance, and that this should always be inferred from the fact that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice that a failure to deliver will result in mental suf-

fering for which damages may be recovered."

The judgment of the court below is affirmed.

CLARK, C. J. (concurring). Mental suffering is as real as physical. Every one who has suffered either is a competent witness that there is no fiction about it. There is the same practical difficulty in measuring compensation for physical anguish as for mental, but the same difficulty arises also in nearly all cases of estimating unliquidated damages. Juries, under the instruction of learned and just judges, who will restrain excessive verdicts, must, upon consideration of all the evidence, award fair compensation. All courts allow compensation for mental suffering, not only when accompanied by physical pain, but in many cases when there is no physical suffering; as in actions for seduction, slander, libel, breach of promise of marriage, and perhaps some others. The courts in the several independent state jurisdictions in this country have not been agreed as to the allowance of damages for mental suffering when it has been caused by the wrongful or negligent conduct of a telegraph company in the delay or nondelivery of what are known as "death messages," but the uniform and unbroken decisions of this court place it among those that allow recovery in such cases. The legal rule laid down is clear and just. "In all cases damages for mental anguish are purely compensatory, and should never exceed a just and reasonable compensation for the injury suffered." And we have just repeated in *Bowers v. Tel. Co.* (at this term) 47 S. E. 597, that mere disappointment will not amount to mental anguish. When the relationship of the parties is close, the law presumes some mental anguish from the fact that the telegram was sent, the amount of the compensation for the mental suffering caused by the failure to deliver being a matter for the jury upon the evidence. The nearness of the relationship is only material when this presumption is relied upon. There is no better statement of the rule on this point than that to be found in the clearly reasoned opinion of Mr. Justice Walker in *Bright v. Tel. Co.*, 132 N. C. 317, 43 S. E. 841: "The law does not regard so much the technical relation between the parties, or their legal status to each other, as it does the actual relation that exists, and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but, if mental suffering does actually result from the failure to deliver a message (of this nature) where there is only affinity between the parties, it may be recovered. * * * It is not necessary for the company to know the relation between the sender and the sendee from the terms of the message, or to know anything more than that the message is one of importance; and this should always be inferred from the fact

that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice that a failure to deliver will result in mental suffering for which damages may be recovered." Since it is established as a fact in this case that there was mental suffering caused by the defendant's failure to deliver the telegram, and there was evidence to prove it, this case does "not fall beyond the limits of the law" which holds the defendant liable to render just compensation for the injury it has inflicted.

WALKER, J. (concurring). The doctrine of mental anguish, which has been recognized and applied in this court for many years, either has no scientific or rational basis upon which to rest so as to justify a recovery by father, brother, husband, or any other person bound to another by a close tie of blood or marriage, of damages from a telegraph company for the negligent failure to deliver a message, or the rulings and judgment in this case must be free from error. We cannot deny to the plaintiff the right to recover any damages which he may have sustained, unless we completely repudiate the doctrine, reverse our former decisions, and deny to everybody the right to recover damages for mental anguish caused by the negligence of a telegraph company in delivering messages. When we once admit the correctness of the principle upon which such recoveries have been based (and this has been done at the present term in *Cogdell v. Tel. Co.*, 47 S. E. 490, and *Hood v. Tel. Co.*, 47 S. E. 607, and at the February term, 1902, in *Meadows v. Tel. Co.*, 132 N. C. 40, 43 S. E. 512, and *Bright v. Tel. Co.*, 132 N. C. 317, 43 S. E. 841, by a unanimous court), we must carry this admittedly correct principle to its legitimate and logical conclusion, and to its necessary consequence, and permit a recovery by any one, without regard to the closeness of relationship, who can show the negligence, and that mental anguish proximately resulted therefrom. The doctrine, as stated in the former decisions of this court, could not have been restricted to close relationships, but in its very nature extended to those which are remote, as it was founded upon a breach of public duty by the telegraph company, which duty required that messages should be transmitted and delivered with reasonable care and dispatch, and with due regard for the rights of the patrons of the company. The public is vitally interested in the performance of this duty, and, whenever there is a breach of it, the right to recover damages flowing from the breach depends upon the ability of the party who alleges that he has been injured by the failure of duty to prove his actual damages, which include damages for mental anguish and may consist solely of such damages. *Cashon v. Tel. Co.*, 123 N. C. 267, 31 S. E. 493. It is a question of proof, and not one of close relationship, which determines the right to recover damages for

the injury. We can imagine a case where there is no relationship, and yet where the parties are quite as closely united and bound to each other by ties of affection as if a close relationship existed. The closeness of the relationship does not of itself necessarily prove that there has been mental anguish where there has been a negligent failure to deliver a message. It is a circumstance to be considered by the jury in determining whether or not there has been any mental suffering, and this court has said that the relationship of the parties may be so close as to raise a presumption of mental anguish and consequent damage. The doctrine, as established by the former decisions of this court, is that mental anguish may be the basis for the recovery of damages, without regard to the particular relationship of the parties. The relationship was referred to merely as being evidence of mental anguish, which is strong or weak, according to the degree of relationship. It was never intended to assert that a person who is not closely related by blood or marriage to the person whose sickness or death is announced in the message cannot recover if mental anguish actually resulted from the default of the defendant. Take the case of a person who is but slightly related to the person whose sickness or death is announced in the message, but who stands towards him in loco parentis. Should he be denied the right to recover, when a son, between whom and his father there has been long estrangement and bitterly hostile feelings, is permitted to recover for failure to deliver a message announcing his father's sickness or death, merely because he and his father are closely related by blood? I go back to my first proposition: The doctrine is either fundamentally wrong, or, if it is right, the idea that it is confined to close relations must be abandoned, as, in my judgment—and I say so with the utmost respect for the opinion of others—it has nothing to sustain it. If the doctrine established by our former decisions is wrong, it should be promptly reversed, and the cases in which it was established should be overruled; but, if it is right, it should be enforced by a reasonable, and, above all things, a logical, application of the principle on which it rests to the facts of each case as presented. I can see no middle ground upon which we can safely stand. We are either right in this particular case, or we are wrong altogether. If the doctrine is limited in its operation, as suggested, I cannot give my assent to it at all; for there must be something radically wrong in a principle which cannot be safely carried to its logical results, so as to reach all cases coming fairly within its scope. If the reason upon which the doctrine is founded applies to one case, it must apply to all, leaving the degree of kinship to affect only the amount of the damages. The insuperable difficulty which, it is admitted, will be encountered in drawing the line at which the doctrine must cease to have

any application, is a cogent reason for the assertion that there is no limit to the doctrine if it was a sound one in its origin. It is replied that the line at which there ceases to be a presumption of mental anguish cannot be drawn with any accuracy. This may be a reason, not for questioning the correctness of the doctrine, nor for limiting it in its operation, but merely for denying that there is any such presumption. It may be that it would be more correct to say that relationship is a fact or circumstance to be considered by the jury as evidence of mental anguish, which will be stronger or weaker in its probative force in proportion to the degree of relationship, whether near or remote. My conclusion is that, if we are to continue to recognize and enforce the right to recover for mental anguish, the principle, which underlies and supports that right, cannot be confined to any merely arbitrary limit, but must be applied to any case in which a negligent failure to deliver a message may cause mental suffering. If the principle has no proper place within the borders of our jurisprudence, we should drive it out at once as an unwelcome intruder, and not expel it by gradually limiting its sphere of operation or by a slow process of elimination. I repeat: The doctrine of mental anguish, as it is called, is either radically wrong, or it applies to the facts of this case.

CONNOR, J. (dissenting). The doctrine by which the sendee of a message was held to be entitled to recover for failure to deliver promptly, in addition to nominal damages, compensation for mental anguish, was first established by this court in *Young v. Tel. Co.*, 107 N. C. 371, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883. The message in that case announced the extreme illness of the sendee's wife, and urged him to "come in haste." As the facts appeared in the record, they appealed strongly to the feelings of the court. The negligence was gross. The doctrine then established has been fruitful of much litigation. Many of the cases have shown gross negligence, and some of them most aggravating and intense suffering caused thereby. Whatever may be my opinion of the scientific basis of the doctrine, I have no disposition to regard it as an open question in this court. It is settled here. No one who has given the question careful thought can fail to be impressed with the difficulty of giving it a satisfactory practical operation. To estimate and separate in dollars the quantum of suffering, mental and otherwise, a person experiences by reason of learning of the death and of being unable to attend the funeral of a deceased relative, must give to a conscientious juror much difficulty. I cannot but think that if the judge who, with great lucidity, lays down the principle, were called upon to apply it, the doctrine would not find so much favor. However this may be, the best answer to the ob-

jection that it is difficult to do is found in the fact that it is done. The only question presented by the appeal in this case is whether a doctrine originating in the case of an absent husband summoned to the death bed of a dying wife, and applied to other and more distant relatives, is to have any limit whatever. I fully recognize how difficult it is to fix the limit. As I understand the cases, within a certain limit there is a presumption that the plaintiff sustained mental anguish; as in case of a brother. *Cashion's Case*, 124 N. C. 459, 32 S. E. 748, 45 L. R. A. 160. Beyond this limit there is no presumption, but the plaintiff must retain in his memory, and, months after the injury, unfold his mental condition to the jury, to enable them to say how many dollars will compensate him. The court says, "Damages for mental anguish are purely compensatory, and should never exceed a just recompense for the anguish." If it be said—as it certainly is—that it is difficult to say within what degree of relationship the sendee has a cause of action, it may be answered that it is not more so than to say within what degree there is a presumption of mental anguish. It is said that fictions in the law "have had their day," and "have been dead 35 years." It would seem, with all possible deference, that the doctrine of mental anguish, with its logical results, is not very far removed from the domain of legal fiction.

I cannot concur in the conclusion reached by the court in this case. It may be that the court is committed to an unlimited field of litigation in these cases. I do not care to review the cases. I simply wish to say that, in my opinion, if any limit is ever fixed, the plaintiff's case will fall far beyond the outside boundary. It is difficult to discuss these cases. Men view such matters so differently that they may not easily make themselves understood. If it is desired to compel the defendant company to discharge its duty to the public with all reasonable promptness and dispatch, there can be no doubt that the Legislature has the power by appropriate legislation to do so.

I do not think that the plaintiff, in any respect of the testimony, is entitled to recover for mental anguish.

(134 N. C. 735)

STATE v. LILES.

(Supreme Court of North Carolina. April 19, 1904.)

BASTARDY—NATURE OF PROCEEDING—MARRIED WOMEN—LEGITIMACY—ISSUES OF FACT.

1. A proceeding in bastardy under Code, § 32, to compel the father or mother of a bastard child to give bond to indemnify the county from the subsequent maintenance of such child, is a civil proceeding, and not a criminal prosecution.

2. In a bastardy proceeding the legitimacy or illegitimacy of a child born of a married

woman is an issue of fact depending on proof of the impotency or nonaccess of the husband, and this whether the child was begotten or born in wedlock.

Appeal from Superior Court, Union County; Bryan, Judge.

Proceeding by the state against Lester Liles for bastardy. From a judgment in favor of the state, defendant appeals. Affirmed.

Redwine & Stack and Williams & Lemon, for appellant. Adams, Jerome & Armfield and the Attorney General, for the State.

CLARK, C. J. This is a proceeding in bastardy. The prosecutrix was a married woman at the time of the birth of the child, which was born four or five months after marriage. The court charged the jury that "this is a criminal action, and the offense is completed when the child is begotten." To this the defendant excepted. The object of the proceeding, as stated in Code, § 32, is to require the mother, if she shall refuse to declare the father, to "give bond payable to the state with sufficient surety to keep such child or children from being chargeable to the county," and, if she shall accuse any man with being the father, if he admit the charge, or, denying it, shall be found to be the father of such child, he shall give bond with sufficient surety to indemnify the county from charges for the maintenance of such child, with a provision that from the judgment "the affiant, the woman or the defendant, may appeal to the next term of the superior court of the county where the trial is to be had de novo." The law as to proceedings in bastardy first appears in the Laws of North Carolina of 1741, c. 14, § 10, and may be found at page 174 of volume 23, State Records, in which volume the laws still extant from 1686 to 1791 are collected and reprinted. Some slight changes were made in 1799. Chapter 531, § 2, and other statutes mentioned in the heading to section 32 of the present Code (of 1883). The statute is also codified in Rev. St. c. 12, § 1, and Rev. Code, c. 12, § 1. Clearly, the object of the statute is in no sense criminal, but is expressed on its face to be a fiscal regulation to compel the mother or (if the father was declared by her, and proved to be such) the father to give sufficient surety "to keep such child from being chargeable to the county" for its maintenance. Accordingly we find that in an unbroken line of decisions down to and including *State v. Edwards* (1892) 110 N. C. 511, 14 S. E. 741, in which the authorities are collected, and which was a unanimous opinion, it is held that the proceeding, though it has some anomalous features, was civil in its nature, and not even quasi criminal; citing with approval, among other cases, *State v. Higgins*, 72 N. C. 226, to that effect. Among the long line of cases holding that the proceeding was civil in all essential

¶ 1. See *Bastards*, vol. 6, Cent. Dig. § 354.

features are, besides *State v. Edwards*, *supra*, the following: *State v. Peeples*, 108 N. C. 768, 13 S. E. 8; *State v. Crouse*, 86 N. C. 617; *State v. Bryan*, 83 N. C. 611; *State v. Wilkie*, 85 N. C. 513 (all these being cases subsequent to the act of 1879); *State v. Higgins*, 72 N. C. 226; *State v. Hickerson*, Id. 421; *State v. McIntosh*, 64 N. C. 607; *State v. Waldrop*, 63 N. C. 507; *Ward v. Bell*, 52 N. C. 79; *State v. Thompson*, 48 N. C. 365; *Adams v. Pate*, 47 N. C. 14; *State v. Brown*, 46 N. C. 129; *State v. Pate*, 44 N. C. 244; *State v. Carson*, 19 N. C. 368; and "there are others." All these were unanimous opinions, and the point was presented. In *State v. Pate*, 44 N. C. 244, *Pearson, J.*, calls attention to the fact that this proceeding was not begun by presentment or indictment, and could not be criminal in its nature. In *Myers v. Stafford* (1894) 114 N. C. 234, 19 S. E. 764, it was held for the first time, and by a divided court (dissenting opinion, 114 N. C. 689, 19 S. E. 764), that bastardy was a misdemeanor; the dissent calling attention to the fact that, if it was a crime, and not a police regulation, as theretofore held, then the woman must be equally guilty. This case was followed by *State v. Ostwalt* (1896) 118 N. C. 1208, 24 S. E. 680, 32 L. R. A. 396, and *State v. Ballard* (1898) 122 N. C. 1024, 29 S. E. 899, both by a divided court, two judges dissenting each time. These cases have not been affirmed since, and, indeed, seem to have been questioned in *State v. Pierce*, 123 N. C. 748, 31 S. E. 847. The result of these cases, all by a divided court, has been practically to destroy almost entirely the efficacy of the proceeding by requiring proof beyond a reasonable doubt, a disparity of challenges, a denial of appeal by the woman or the state, and of the competency of the woman's affidavit (though all these are expressly given in the statute), and by exacting other incidents of a criminal trial. We feel impelled, as the point is now presented for the first time since *State v. Ballard*, *supra*, to review these latter cases, and give some of the reasons why we cannot sustain them as authority. The above three cases were followed by two or three others of like purport, in which the point was not discussed, as it was not deemed necessary to reiterate the dissent. The cases named were put on the ground that the act of 1879, incorporated into the Code, § 35 (not section 32), a provision that, if the issue of paternity shall be found against the father, there should be, in addition to the bond for maintenance and the allowance to the woman, a fine of \$10 imposed upon the father for the benefit of the school fund. But this contention overlooked the fact that in the very section 32 there was, and had been since its first enactment in 1741, a provision that, if the woman should not declare the father, she should give the bond to prevent the child from being chargeable on the county, and "shall pay a fine," which the statute of 1799 made "five dollars," at which it still

stands. Yet during all these years the proceeding had been held a civil remedy. If the fine of \$5 against the woman in the same section did not make the proceeding a criminal action, the fine of \$10 laid in a different section upon the man could not have that effect. Furthermore, three opinions by unanimous courts, subsequent to the act of 1879 (which imposed the fine of \$10), held that this provision did not have the effect to change the proceeding into a criminal action. One of these only (*State v. Crouse*, 86 N. C. 617) was called to the attention of the court, and, though that case was in point, the other two by some oversight were not called to the eye of the court in either of the three cases (*Myers v. Stafford*, *State v. Ostwalt*, and *State v. Ballard*) in which the majority of the court held that the action had been changed into one to punish a misdemeanor. Had the other two cases, to same effect as *State v. Crouse*, been then called to the attention of the court, doubtless they would have been followed. In one of these—*State v. Giles*, 108 N. C., at page 396, 9 S. E. 435—*Smith, C. J.*, speaking for a unanimous court, says: "The remaining exception is to the judgment itself as inconsistent with the Constitution, though following the statute, in that it imposes upon the defendant the payment of fifty dollars for the use of the woman and a fine of ten dollars besides, and imprisons for an indefinite period in case of a default in making payment. The fine is quasi penal, but the payment of the residue is not, and the proceeding is not in the exercise of a criminal, but of a civil, jurisdiction in providing for the present support of the child and an indemnity to the county in case of its becoming a further public charge. * * * The error in this contention consists in regarding the requirement of the payment of these amounts and an enforcement of imprisonment as an award of punishment for a criminal offense, which in no sense they are, unless the \$10 fine may be so considered. It is but the exercise of a power to compel obedience to the order of the court, and an imprisonment from which the party may be relieved under the insolvent law, as if committed for fine and costs in a criminal prosecution. Code, § 2967; *State v. Davis*, 82 N. C. 610; *State v. Bryan*, 83 N. C. 611." This was followed in *State v. Edwards*, 110 N. C. 511, 14 S. E. 741, in which (at page 512, 110 N. C., page 741, 14 S. E.) it is said that, though "a fine is imposed by the statute," the action remains a civil proceeding. Although this case was cited in *State v. Ostwalt* and *State v. Ballard*, this direct ruling on the point was overlooked. The true principle applicable is thus stated by *Ruffin, J.*, in *State v. Snuggs*, 85 N. C. 541 (upon another section of the Code): "The statute not only creates the offense, but fixes the penalty that attaches to it, and prescribes the method of enforcing it; and the rule of law is that, wherever a statute does this, no other remedy exists than the one expressly

given, and no other method of enforcement can be pursued than the one prescribed." This case is cited as authority in *State v. Pierce*, 123 N. C., at page 748, 31 S. E. 847.

Among the reasons why we return to antiquas vias is that the cases of *Myers v. Stafford*, *State v. Ostwalt*, and *State v. Ballard* were decided by a divided court upon the effect of the statute of 1879, imposing (in another section) a fine of \$10, which it is held per se changed the proceeding into a criminal action; whereas three opinions of a unanimous court (two of which were not cited in the three cases just named) had held that the statute of 1879 did not change the nature of the action. Further, because section 32 from 1741 had contained a provision for a "fine of five dollars" against the woman, and, notwithstanding this, our unbroken line of decisions had held the proceeding to be civil in its nature. Because, also, to construe the statute criminal in its nature is contrary to its express provisions, which declare its object to be to secure sureties to prevent the child becoming a charge on the county; and that, if the action were changed into a criminal proceeding, this might negative appeals by the woman and by the state and the use of the woman's affidavit as presumptive evidence (all of which are given by the statute, and are essential to its enforcement), and by further requiring a disparity of challenges and proof beyond a reasonable doubt and other incidents of a criminal action, which would practically make the statute nugatory, and would also repeal the statute of limitations of three years provided by section 36. We do not think such radical changes can fairly be inferred to have been caused by the incidental authorization in another section of a fine of \$10. If the fine cannot be levied as an incident in the civil action like the fine of \$5 upon the woman authorized by section 32, or the fine of \$2,500 authorized to be taxed against a sheriff when judgment is rendered against him on his bond for failure to pay over the taxes in full (*Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545), then under the rule, "*Magis quam valeat quam pereat*," either the fine in section 35 should be held invalid, rather than the destruction of the efficacy of the ancient proceeding under section 32, or the \$10 fine can be levied in a subsequent and independent criminal proceeding begun under section 35, but based upon the verdict and judgment thereon rendered under the provisions of section 32. Besides, there being already the criminal action for fornication and adultery, there is no need to abolish this proceeding, which was enacted to protect the county against being charged with the maintenance of the child. If it were a criminal proceeding, it is singular that the woman is not made liable when the man is, for, if tried for a criminal offense, both are guilty, since she was present aiding and abetting in its commission. In construing statutes the mischief to be remedied must be

considered, and there was in this matter no defect of criminal proceeding, for fornication and adultery was already a complete remedy.

The weight of authority elsewhere recognizes bastardy as a civil proceeding to enforce a police regulation. *Bishop's Stat. Crimes*, § 691; 2 *McLain, Cr. Law*, § 1186; 3 *Am. & Eng. Enc. (2d Ed.)* 874; 3 *Enc. Pl. & Pr.* 277—which cites numerous cases to that effect from Arkansas, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Nebraska, New Hampshire, New York, North Carolina, Rhode Island, and Vermont; and among the states which hold the proceeding neither strictly civil nor strictly criminal, but quasi civil to enforce a police regulation, are cited Alabama, Florida, Michigan, Ohio, and Wisconsin. To similar effect is 9 *Cyc.* 644, which adds to states holding as above, Minnesota, New Jersey, Ohio, Oklahoma, South Dakota, Tennessee, and Wisconsin, and sums up the doctrine thus: "The object of these proceedings is not the imposition of a penalty for an immoral or unlawful act, but is merely to compel the putative father to provide for the support of his offspring, and thus secure the public against such support."

We are constrained to return to the former uniform rulings of this court that proceedings in bastardy are essentially civil in their nature, though with some anomalous features. *State v. Edwards*, 110 N. C. 511, 14 S. E. 741, and cases there cited. *Myers v. Stafford*, *State v. Ostwalt*, and *State v. Ballard* are overruled as to this point, together with any other cases based on the holding by them that bastardy is a criminal proceeding. The presumption in bastardy proceedings is that the woman is single. *State v. Peeples*, 109 N. C. 768, 18 S. E. 8; *State v. Allison*, 61 N. C. 346. Here it affirmatively appears that the woman was married both when she made the affidavit and when the child was born. But it was held by Taylor, C. J., in *State v. Pettaway*, 10 N. C. 623, and by Ruffin, C. J., in *State v. Wilson*, 32 N. C. 131, cited with approval in *State v. Allison*, 61 N. C. 346, that, though the statute specifies "any single woman big with child or delivered of a child," the subsequent language in the section that the object is to protect the public against the charge of maintaining bastard children, includes married women, since a bastard child can be begotten upon a married woman as well as upon a single woman. Formerly, a child born of a married woman was conclusively presumed to be legitimate, but now, legitimacy or illegitimacy is an issue of fact resting upon proof of the impotency or nonaccess of the husband. See *Woodward v. Blue*, 107 N. C. 407, 12 S. E. 453, 10 L. R. A. 662, 22 *Am. St. Rep.* 897, where the subject is fully discussed and authorities given. This is true even when the child is begotten as well as born in wedlock. For a stronger reason this is true when, as in this case, the child was begotten four or

five months before the marriage, and the jury believed the evidence that the husband had no intercourse with the prosecutrix prior to the marriage. The evidence to that effect, and to show the paternity of the defendant, and his admissions, were properly admitted. This disposes of all the other exceptions.

Though there was error in holding the action to be a criminal proceeding, it was harmless error in the view we have taken, and upon the whole case the judgment below is affirmed.

DOUGLAS, J., concurs in result only.

(135 N. C. 218)

JONES v. MADISON COUNTY COM'RS.*
(Supreme Court of North Carolina. May 3, 1904.)

VENUE—WAIVER—COUNTIES—INDEBTEDNESS—
ISSUE OF BONDS—STATUTES—CONSTRUCTION.

1. An objection that the summons was made returnable at chambers, instead of at term, is waived by failure to move to transfer the case to the proper docket.

2. Laws 1903, p. 490, c. 289, declaring that for the purpose of funding the floating indebtedness and refunding certain bonds of Madison county the county commissioners are thereby "authorized and empowered" to issue new bonds to the amount of \$75,000, etc., is not mandatory.

Connor and Montgomery, JJ., dissenting.

Appeal from Superior Court, Madison County; E. B. Jones, Judge.

Action by W. W. Jones, as receiver, against the commissioners of Madison county. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff, as receiver of the Western Carolina Bank, is the owner of 18 coupon bonds of Madison county, aggregating \$21,000, issued by the county of Madison by virtue of an act of the General Assembly of North Carolina entitled "An act to settle the indebtedness of Madison county," ratified March, 1887 (chapter 398, p. 696, Laws 1887). They were issued to pay the necessary expenses of said county. The interest upon said bonds is payable as stated therein, and they mature and become due in the year 1907. In addition to said bonds, the plaintiff is the owner of a certain warrant of indebtedness duly issued by said county for the sum of \$5,155.16, which represents interest due and unpaid upon said bonds up to and including the 1st day of June, 1901, but upon this warrant of obligation there are certain credits, as stated in the findings of facts embraced in the judgment of his honor. There is likewise interest due and owing to the plaintiff upon the coupons yet attached to said bonds and upon said warrant, as stated in said judgment and findings of fact of the court below. Under Pub. Laws 1903, p. 490, c. 289, entitled "An act to liquidate and settle the outstanding indebtedness of Madison county, and to author-

ize the issue of a series of bonds for the purpose of paying off floating debt, old bonds, etc., contracted for the necessary expenses of said county," it is claimed by the plaintiff that it became the duty of the defendants, the board of commissioners of Madison county, to issue certain bonds, not to exceed the amount of \$75,000, with which, or the proceeds of which, to refund and pay off and discharge said bonds and certain other indebtedness of the county of Madison therein mentioned. The plaintiff and those under whom he derived his title to said bonds and other indebtedness against the county of Madison at various times demanded of the board of commissioners of Madison county that they issue said bonds as provided by said act of 1903; and at a meeting of said board held in April, 1903, it was resolved by the same that said bonds be issued to an amount sufficient to pay off said indebtedness of said county, not to exceed \$75,000; but at a subsequent meeting of said board, held on or about the first Monday in May, 1903, the said board revoked its order of April 20, 1903, and then refused, has since refused, and still refuses to issue said bonds; whereupon the plaintiff again made demand upon said board that they issue said bonds, and in all things comply with the provisions of said act of 1903. Said board again refused to issue said bonds for the reasons stated in their exceptions filed to the judgment, whereupon this proceeding was instituted by the plaintiff against the defendants for the purpose of compelling them by mandamus to issue said bonds, and in other respects comply with the provisions of said act of 1903. Upon the hearing of this case before his honor the judge of the superior court, it was adjudged that the plaintiff was entitled to the relief demanded in his complaint. The defendants duly excepted to said judgment and appealed.

T. S. Rollins and Gudger & McElroy, for appellants. Chas. E. Jones and Davidson, Bourne & Parker, for appellee.

CLARK, C. J. The first exception is that the summons was returnable before the judge at chambers, when the action, being for a money demand, should have been returnable before the court at term. But, if that be conceded, yet, as held in *Eqbank v. Turner* (N. C.) 46 S. E. 508, whether an action is returnable before the judge at chambers or at term or before the clerk, it is all before the same court, and, if brought before the wrong department, the remedy is the same as when action is brought in the wrong county. There is no defect of jurisdiction, but an error as to venue merely, and the remedy is for the court either *ex mero motu* or on motion to transfer the case to the proper docket. The defendant, not having made such motion, has waived his objection. Here, the summons is returnable at chambers, but on a day during

*See, also, *Battery Park Bank v. Madison County Com'rs*, 47 S. E. 1616.

the term of court. Authorizing an action to be brought before the judge at chambers is simply intended as a convenient practice in cases where no jury is required, in order to expedite a decision. If it turns out that there are issues of fact requiring a jury, there is nothing to be gained to any one by dismissing the action. It should simply be transferred to the docket at term time for trial. It would seem, moreover, that this action was properly made returnable at chambers. The amount is determined, and it is not sought to recover judgment therefor. The relief asked is a mandamus, not against the treasurer to pay any money, but to compel the county commissioners to issue bonds. *Ducker v. Venable*, 126 N. C. 447, 35 S. E. 818; *Railroad v. Jenkins*, 68 N. C. 503. A better founded exception is that the act (Laws 1903, p. 490, c. 289) is not mandatory. The preamble recites that the county has an outstanding bonded indebtedness of \$21,000, bearing 6 per cent. interest, and the county will be unable to pay the same at maturity, and that it is to the best interest of the taxpayers that the bonds shall be renewed before maturity at a lower rate of interest, and also that the floating indebtedness of the county incurred for necessary expenses should be funded by issuing a new series of bonds to cover the entire indebtedness of the county, and it is thereupon provided by section 1 that the board of commissioners are "authorized and empowered" to issue not exceeding \$75,000 in bonds bearing 5 per cent. interest. Section 3 "authorizes" the commissioners to lay an annual special tax to meet the interest and principal. By section 8 the county commissioners are "authorized, empowered, and directed" to audit and ascertain and adjust the amount of the floating debt, and no bonds to be issued for any part of said debt unless two (of the three) commissioners shall pass upon and allow the same. Section 10 "authorizes" the county commissioners to retire the outstanding bonds by selling so many of the bonds issued under this act as may be necessary. Section 19 provides, "If the bonds authorized by this act are issued," the board of county commissioners shall levy a sufficient tax to pay the principal and interest, as already stated in section 3.

It would be a singular proceeding, and without precedent, we believe, in this state, if the Legislature should assume to know the wishes and interests of the people of any county better than the county commissioners, elected by them to administer county business, and should peremptorily command the commissioners to issue bonds to fund a floating indebtedness, and in advance of the maturity of the bonded debt should order it refunded by new bonds for a time and at a rate fixed by the General Assembly. The long-settled custom has been to authorize and empower the local legislature, the board of county commissioners, to take such steps as

may be necessary to fund or refund the debts, with certain limitations upon the rate of interest and duration of the bonds to be issued. Certainly, if the Legislature can order a county to issue bonds, it could as easily fix the interest at one figure as another. If the Legislature had this power, a casual majority could practically confiscate all property in any county by directing the issue, by counties named in the respective acts, of large amounts of bonds, and at an excessively high rate of interest, regardless of the wishes of taxpayers of such county. Unlike state bonds issued by legislative authority, action could be brought in the courts on county bonds thus required to be issued by legislative authority, and payment coerced. The assumption of a power so unprecedented, so contrary to the spirit of local self-government, and so liable to abuse, should be carefully scrutinized by the courts. We are relieved, however, in this case, of the necessity of passing upon the power of the General Assembly to compel a county to issue bonds against its will, for it will be seen from the above extracts from the statute that the Legislature clearly intended no more than to authorize and empower the county commissioners to issue "not exceeding seventy-five thousand dollars." It is for the courts, not the General Assembly, to order the payment of debts, whether by counties or individuals. The courts certainly could not compel the issuance of these bonds unless the Legislature has both ordered the county peremptorily to issue the bonds and had authority so to do.

In *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352, the court, speaking of counties, says: "They are but agencies of the state government. * * * They are subject to legislative authority which can direct them to do as a duty all such duties as they can empower them to do." The court was there speaking of counties in respect to their governmental functions as to which the counties are merely agencies of the state government, and can be abolished, created, or changed at the legislative will. The making of public roads is a public governmental function, and it was held that the Legislature could either empower or order the making of these roads, in which the people of the state generally have an interest, and direct that the county shall lay a tax to pay for the construction of the road. But, so far as the counties are business agencies of the people of a locality, whether county or municipality, the state cannot interfere to make them create a debt or contract, or extend it (as here), or change the terms of the contract, or authorize its violation. This distinction in the double function of counties and municipalities as governmental agencies on the one hand, in respect to which they cannot be sued, and as to which they are subject to legislative control, and, on the other hand, their liability as business agencies of the people of the locality, as to which hence they can be sued, and the

Legislature has no power to control nor to create, or relieve from liability, has been drawn in many cases. See *McIlhenney v. Wilmington*, 127 N. C. 146, 38 S. E. 1007, 50 L. R. A. 470, and cases there cited. The Constitution (article 5, § 6) uses the words "with the special approval of the General Assembly," and not "by special command of the General Assembly."

The plaintiff relies upon an expression in section 11 of chapter 289, p. 493, Laws 1903, that, if any creditor shall desire to exchange his bonds or other evidence of indebtedness "for one or more of the bonds hereby authorized," it shall be the duty of the commissioners to make such exchange at par. But, construed with the contest, this means no more than the expression in section 19 of the act, "If the bonds authorized by this act are issued," the board of commissioners shall levy a tax, etc. If the General Assembly has power to order a county to issue bonds, those acquainted with practical legislation and "senatorial courtesy" know that this important power will be, in effect, placed in the hands solely of those who, for the moment, represent the county in the General Assembly, and at a time when they will have small opportunity to consult the wishes and interests of their constituents, and when, on the other hand, the agents and attorneys of those who desire to receive the bonds will be not only present in person, but very ready with their arguments and advice. It is true the Legislature can abolish counties at will (*Mills v. Williams*, 33 N. C. 558), and repeal municipal charters, so far as counties and municipalities are governmental agencies; but so far as they are business agencies of the people of the locality to create indebtedness the Legislature cannot impair the obligation of the contract. Can the Legislature then compel the creation of a contract by a county by ordering the issue of bonds for 30 years when the people thereof may prefer a shorter or longer term, and may be able to secure a lower rate of interest. Whether the Legislature has the constitutional power to take such a departure from precedent, and can itself order the issuance of bonds, instead of authorizing and empowering the county commissioners to do so (subject to the restraining power of the court if an excessive amount or an excessive interest is contemplated; a restraint which would not attach to an issue made by legislative command), is happily a matter not before us, for the General Assembly in this statute has explicitly and clearly, and in the usual form, merely authorized and empowered the board of county commissioners to issue "not exceeding \$75,000" to fund the floating indebtedness (the amount thereof to be ascertained by the commissioners), and to refund the bonded indebtedness which will mature in 1907. The General Assembly has not attempted to force the hands of the defendant board of county commissioners. It is true that the county commissioners, at a

called session on April 20th, being advised by counsel that the act was mandatory, and that they had no discretion, did resolve to issue said bonds, but no action was taken thereon which conferred upon the creditors any vested rights, and at the first regular meeting immediately thereafter on the first Monday in May, the board, being then of opinion that the act merely "authorized and empowered" them to issue bonds, the order was revoked for reasons which they must have deemed good and sufficient, but which are unknown to us.

The mandamus was improvidently granted. Reversed.

WALKER, J. I concur in the conclusion of the court in this case for the reasons stated in my opinion in *Bank v. Commissioners* (decided at this term) 47 S. E. 1016.

CONNOR, J. (dissenting). The only respect in which this case differs from *Bank v. Commissioners*, in which I have expressed my views, is that the plaintiff's claim consists of certain bonds, with the coupons representing accrued and past-due interest thereon, issued by the defendants pursuant to the provisions of the act of 1887, and maturing 1907. It is recited in the preamble to the act of 1903, and admitted in the record, that these bonds were issued for an indebtedness incurred for necessary expenses. The liability of the county of Madison for them because of the consideration is settled by this court in *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554. It is contended that the act of 1903 is invalid in so far as it directs the issuance of new bonds to run 30 years, carrying interest at 5 per cent., to redeem unmatured bonds. If I am correct in the conclusion reached in respect to the power of the General Assembly to direct the payment of county indebtedness incurred for necessary expenses, I cannot perceive why, if, in its judgment, the best interest of the state, in respect to that portion thereof set off for governmental purposes as Madison county, will be promoted by funding its debt rapidly approaching maturity, and for which it is evident no other provision has been made, at a lower rate of interest, it may not so direct. In the establishment of the county, as pointed out by Pearson, C. J., in *Mills v. Williams*, 33 N. C. 558, there is no contract—"no party of the second part." I do not care to repeat what I have said in *Bank v. Commissioners*. The distinction between contracts of private persons or corporations and public agencies is clearly pointed out in *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948. On page 72, 170 U. S., and page 519, 18 Sup. Ct., 42 L. Ed. 948, Mr. Justice Shiras says: "Usually, where a contract not contrary to public policy has been entered into between parties competent to contract, it is not within the power of either party to withdraw

from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. When, however, the respective parties are not private persons dealing with matters and things with which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and when the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health, and morals. That clause of the federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked." See, also, *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047. In *New Orleans v. Water Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, it is said that a corporation created for purposes of government is to be governed according to the law of the land, and may be controlled, its constitution altered and amended, by the government in such manner as the public interests may require. "Such legislative interference cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it; the trustees or governors of the corporation being merely the trustees for the public, the *cestuis que trust* of the foundation." Mr. Tucker, discussing this question, says: "These charters are based upon no contract with the people, but created by the political authority for its convenience, and for motives of public policy. The relation between the sovereignty and the municipality is not contractual, but is one of delegation by a principal to an agent." Tucker, *Com. on Const.* 833. For a very able discussion of this subject, see *Sharswood, J.*, in *Philadelphia v. Fox*, 64 Pa. 160. When, therefore, the state established Madison county with its territorial limit, and conferred upon the inhabitants certain governmental powers, and imposed corresponding duties, it in no manner parted with its rights through the Legislature to exercise that constitutional, governmental dominion and control which is essential to the carrying out of its general policy. It could not abrogate or ever put in abeyance this power, or the exercise of it, without to that extent parting with its sovereignty. This the state never can do in respect to any of its political agencies. They are always subject to legislative control. *Mial v. Ellington*, 134 N. C. —, 46 S. E. 961. If the contention of the defendant is correct, and the state occupies the status towards the county which is contended for, it would be difficult to justify the appropriation of money from the public treasury to counties for the aid and support of public schools, the sending at the charge of the

people of the state of convicts into counties for opening highways and other internal improvements. If each county may assert its own will in respect to assuming the burdens and providing for the costs imposed upon it as an integral part of the state by the General Assembly—as, for instance, making provision for holding the courts at the appointed times, or having a jail, or providing or maintaining a home for the poor—it would be impossible to carry on our governmental system, the wisdom of which has been vindicated by long experience. As is said by Merrimon, J., in *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534: "The leading and principal purpose in establishing them is to effectuate the political organization and civil administration of the state in respect to its general purposes and policy, which requires local direction, supervision, and control; such as matters of local finance, education, provision for the poor, the establishment and maintenance of highways and bridges, and in a large measure the administration of justice. They constitute a distinguishing feature in our free system of government." They have been termed "an involuntary civil division of the state created by statute to aid in the administration of the government." An interesting and instructive discussion may be found in Smith, *Modern Law of Municipal Corporations*, §§ 1-65. The Legislature, finding the condition of Madison county, in respect to its indebtedness, such that some provision was necessary to enable it to meet its past-due interest and the approaching maturity of the principal, together with its floating debt, enacted the statute of 1903. No injustice is done the taxpayers of the county. The interest at 6 per cent. on the bonds is overdue and compounding. The credit of the county must soon be seriously impaired. The course pursued is that which all prudent business men, corporations, and governments adopt. The debt is funded at a lower rate of interest by a bond issue extending through the usual period for such bonds. An examination of our statutes for the past 10 years will show that the rate of interest and time fixed for maturity are the same as that of a large majority of the county bond issues authorized. The acts passed at the session of 1903, providing bond issues for other counties, are of the same character in these two respects, and include several of the wealthiest counties in the state. The creditors, of course, cannot be compelled to surrender a 6 per cent. bond maturing in 1907 for a 5 per cent. bond running 30 years, but, as they elect to do so, it is difficult to see how any injustice is done the taxpayers. It will be observed that the treasurer is not permitted to sell the bonds at less than par, and, while the election is given the creditor to take the new bonds in exchange for the old ones, I cannot see why, if the bonds can be sold at more than par, he can complain if his bond

be paid him in cash. I think that the judgment below should be affirmed.

I have not discussed the question presented in the record and briefs that the commissioners, having met and adopted a resolution directing the bonds to be issued, have no power to rescind this action, that the power in the nature of a trust once exercised was extinct. This view is not advanced as an estoppel. While, from the view which I take of the case, it is not necessary to decide the question, there is, in my opinion, much force in it.

MONTGOMERY, J., concurs in the dissenting opinion.

(135 N. C. 742)

J. L. ROPER LUMBER CO. v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. June 2, 1904.)

DUE PROCESS OF LAW—FORFEITURE OF STATE SWAMP LAND ON GRANTEE'S FAILURE TO PAY TAXES—VALIDITY OF STATUTE.

1. Laws 1889, p. 256, c. 243, § 3, amending Code, § 2522, so as to provide that on the failure of the grantee of state swamp lands to pay the arrearages of taxes levied and assessed thereon, or which ought to have been levied or assessed, on or before January 21, 1890, all the title to and interest in the swamp land vested in the grantee, or his heirs or assigns, shall be forfeited, and vested in the State Board of Education, without any proceeding or judicial determination, is invalid, because depriving the grantee, his heirs or assigns, of property without due process of law, in violation of Const. art. 1, § 17.

2. Where, in an action for trespass on lands, the jury found that plaintiff owned a portion of the lands described in the complaint, but that the defendant had not trespassed on that portion, it was error to include in the judgment a decision that the title to such portion was in plaintiff.

Appeal from Superior Court, Camden County; Justice, Judge.

Action by the J. L. Roper Lumber Company against the Elizabeth City Lumber Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

E. F. Aydtlett and W. W. Clark, for appellant. Rodman & Rodman and W. M. Bond, for appellee.

DOUGLAS, J. The main question on this appeal, to which nearly all the exceptions are directed, is the constitutionality of section 3, c. 243, p. 256, of the Laws of 1889, amending section 2522 of the Code. This act was held to be unconstitutional in *Parish v. Cedar Co.*, 133 N. C. 478, 45 S. E. 768, and, after renewed consideration, we deem it our duty to reaffirm our decision to that effect. This destroys the defendant's chain of title, but does not necessarily perfect that of the plaintiff, or render the defendant liable for trespass. The plaintiff brought a civil action in the nature of trespass, alleging its ownership of the land in question,

and the defendant's trespass thereon. The jury found, in substance, that the plaintiff owned a part of the lands described in the complaint, but that the defendant had not trespassed upon those particular lands. This was the practical result of the verdict, and its legal effect was to entitle the defendant to a judgment that it go without day, and recover its costs incurred in the action. We do not think that any judgment should have been given, deciding the title to the land, as that was not the essential question involved in the action. Trespass is essentially an offense against the possession, and an action therefor can be maintained by one not holding the fee. On the contrary, it makes no difference who owns the fee, if the defendant has committed no trespass thereon. If both issues had been found in favor of the plaintiff, it may be that he would have been entitled to a judgment on his title, as a necessary requisite to his recovery; but, as he is not entitled to a recovery, a simple judgment for the defendant should have been entered.

The judgment of the court below will be modified by striking out that part decreeing the plaintiff to be the owner of the lands therein described, and then affirmed. Modified and affirmed.

(135 N. C. 744)

J. L. ROPER LUMBER CO. v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. June 2, 1904.)

TRESPASS—TITLE—ISSUES—PREJUDICIAL EFFECT OF ISSUE.

1. In an action for trespass on lands, counsel agreed that if the jury should answer the first issue, as to title, "Yes," then it was admitted that defendant had trespassed, and that the amount of damages should be ascertained under the Code. The first issue was whether plaintiff was the owner of the lands described in the complaint, or any part thereof. The second was, "If so, what part?" Held, that it was not error to submit a third issue, as to whether defendant had trespassed on lands described in the complaint, and which were inside a certain grant to plaintiff, where it appeared to the court that the evidence raised a question as to whether defendant might not have trespassed on lands described in the complaint, but which it might be found were not within the grant, and did not belong to plaintiff.

2. The jury having answered "Yes" to the first issue, and having found that plaintiff owned all the lands within the grant, but that defendant had not trespassed on such lands, it was proper to deny a motion to strike out the finding on the third issue; the finding thereon having set aside the agreement as inapplicable.

3. Plaintiff was not prejudiced by the submission of the third issue, since, if it had not been given, the jury could not have answered the first one in the affirmative.

Appeal from Superior Court, Camden County; Justice, Judge.

Action by the J. L. Roper Lumber Company against the Elizabeth City Lumber Company. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

Rodman & Rodman and W. M. Bond, for appellant. E. F. Aydlett and W. W. Clark, for appellee.

DOUGLAS, J. The exceptions on this appeal all refer to an agreement by counsel which is in the following words: "In this cause it is agreed that if the jury should answer the first issue, as to title, 'Yes,' then it is admitted that defendant has trespassed, and the amount of damages is reserved, to be ascertained by a reference under the Code." The issues were submitted and answered as follows: "(1) Is the plaintiff the owner of the lands described in the complaint, or any part thereof? Ans. Yes. (2) If so, what part? Ans. All the lands conveyed to Weeks and Valentine by accurate measurement, except the M. D. Gregory and Jos. Burgess grants. (3) Has the defendant cut timber or committed other acts of trespass on the lands described in the complaint, and inside the Weeks and Valentine grant? Ans. No." Upon the coming in of the verdict, the plaintiff moved to set aside the finding upon the third issue, and moved that the cause be referred, under the aforesaid agreement, to ascertain the damage, and moved the court to sign the judgment tendered. It further appears from the record that after all the evidence was in, and after all the speeches had been made, except the last speech on each side, the court decided to submit the third issue, and to submit to the jury under the first issue only the question of title as conveyed by the deeds, and under the third issue the location of the grant under which the plaintiff claimed; that the speeches prior to this argued the location under the first issue. To the submission of the issue, and the question of location of the Weeks and Valentine grant under that issue, plaintiff excepted. The plaintiff insisted that the submission of the third issue under the agreement of counsel heretofore set out, and referred to in section 3 thereof, was an error, and that the court should instruct the jury, under that admission, to answer the third issue "Yes." Upon the return of the verdict, the plaintiff moved to strike out the third issue, and the finding thereon by the jury, upon the ground that the same had been submitted contrary to the agreement of the counsel on record in the cause.

We see no error in the action of his honor. We think he had the power to submit such issues as were necessary to properly present the facts of the case. *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45. The finding of the jury upon the issues submitted was, in effect, that the plaintiff owned a part of the lands mentioned in the complaint, but that the defendant had not trespassed on those particular lands. This finding necessarily set aside the agreement as inapplicable. If the defendant had not trespassed upon the plaintiff's lands, it made no differ-

ence in this suit if it had trespassed upon lands belonging to some one else. Nor was the plaintiff hurt in any way by the division of the first issue, even under the agreement. The agreement was to be operative only in the event that the jury answered "Yes" to the first issue as then constituted. If that issue had been left so as to include the lands—that is, all the lands—mentioned in the complaint, it could not have been answered "Yes," in view of their actual finding. Their answer would necessarily have been "No," as they found that only a part of the lands were owned by the plaintiff. If upon a division of the issues the jury had found that the plaintiff owned all the lands in question, then it might have become the duty of the court below to enter judgment for the trespass non obstante veredicto, upon the admissions in the agreement, but unfortunately the facts as found do not fit the plaintiff's theory.

The judgment will be modified and affirmed as directed in the defendant's appeal. In this appeal we see no error. Modified and affirmed.

(155 N. C. 244)

MCGRAW et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 3, 1904.)

CARRIERS—PASSENGERS—PERSONS ON PLATFORM OF BAGGAGE CAR.

1. A person who, though having a ticket, boards a train by getting on the platform of the blind baggage car, has no right of action, as a passenger, because of the conductor pulling him off the car, he not having told the conductor, when ordered to get off, that he had a ticket, and the conductor not having seen a ticket, or supposed that he has one.

Clark, C. J., dissenting.

Appeal from Superior Court, Mecklenburg County; McNeill, Judge.

Action by Theodore McGraw against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

The plaintiff, together with one White, purchased a ticket from the defendant's agent at Charlotte, entitling him to go to Huntersville. He and White, while the train was standing at the station, went across the street for the purpose of buying a melon. The train moving off, they ran to catch it, and got upon the platform of the first car they reached, being the "blind baggage" car. The train moved slowly until it reached the crossing of the Seaboard Air Line track, where it was required by law to stop. The conductor, finding the plaintiff and White on the platform, pulled them off. The plaintiff alleges that he was a passenger on the defendant's train, and that the conductor violently and wantonly assaulted him, whereby he was greatly injured. He sues to recover damages for his

injuries. White also brought suit, and the cases were consolidated. The plaintiff, having testified in regard to the purchase of the ticket and boarding the train, said: "After we crossed the crossing, Tom Rowland [the conductor] came through. I was on the side of the platform next to the door, and White on the right side. When he came up, he said, 'Fall off.' I said, 'I have got a ticket,' and he said, 'You have like hell.' I had a ticket in my hand. He caught me by the left arm, and jerked me off. The train was moving." He was corroborated by White. The defendant introduced the conductor, who testified: "There is a state law requiring all trains to stop at the crossing. My porter, as usual, went over to the engine to see if there were any tramps or people on the train who had no business. On this occasion we stopped as usual. The porter did not come back as usual, and I thought there was something wrong. I jumped on the ground and ran around the mail car. I was on the back of the first-class car. When I got to the front end of the mail car, the train had begun to move, and I saw these two men up there. About the time I got there the baggage master stepped up on the other side. I told the men to come down. They did not get down, and, in order to get them on the ground before the train got up too much speed, I reached up and pulled them down, and let them light on the ground. When I put the second one down, I caught on the back end of the same car. * * * I just caught hold of them and pulled them down. They did not resist. I had no conversation with them. Did not see any ticket. Did not suppose for a moment that they had any ticket, or they would not be there, because it was not a place for passengers, and they could not pass from that end of the car to the other. There is no doorway between the mail car and the baggage car. Passengers are not allowed to go through them at all." He was corroborated by the porter. It was also in evidence that the rule of the defendant company forbade passengers from riding on the platform. The evidence in regard to the injury sustained by the plaintiff was contradictory. His honor directed the jury to answer the first issue "Yes." The defendant excepted, and from a judgment for the plaintiff the defendant appealed.

Geo. F. Bason and L. C. Caldwell, for appellant. Montgomery & Crowell and M. B. Stickley, for appellee.

CONNOR, J. There are a number of exceptions in the record to the instructions given by the court and to the refusal to give special instructions, all of which are duly assigned as error. We are of the opinion that the first exception should be sustained. His honor charged the jury as a conclusion of law that upon all of the evidence the plaintiff was a passenger on the defendant's train;

meaning, of course, that he was such for the purpose of maintaining this action. If he was correct in this, the jury must, as a conclusion of law, have answered the second issue "Yes"; thus eliminating the question whether the conductor used excessive force from consideration, except upon the character and amount of damages which should be awarded the plaintiff. For the purpose of disposing of this first exception, we must assume that the conductor's account of the transaction is correct. The instruction is necessarily based upon that assumption. When the relation of passenger is established by entry upon the defendant's premises for the purpose of purchasing a ticket or taking passage on the defendant's train, or entry into the cars for such purpose, the relative rights and duties of the passenger and carrier are fixed and well settled. There is a presumption that a person who enters a passenger car, nothing appearing in his conduct to the contrary, is or intends to become a passenger. *Railroad v. Books*, 57 Pa. 339, 98 Am. Dec. 229. No such presumption arises when the entry is upon a baggage or mail car, or upon any other portion of the train not assigned to passengers. *Elliott on Railroads*, § 1578, says: "The presumption may, of course, be rebutted, and it will not ordinarily arise when the person occupies a position on the train which passengers have no right to occupy, or goes upon a train on which passengers are not carried." The general rule is that a person can take passage on such trains only, and only in such places, as the rules of the company provide that passengers shall be carried; and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or trespasser cannot impose upon a railroad company the high duty which a carrier owes to its passengers." *Id.* § 1581. It was the duty of the plaintiff, when found upon the platform of the baggage car, to promptly inform the conductor that he had a ticket, so that he could be given an opportunity to go into the car provided for passengers. He says that he did so. The conductor says that he did not do so, that he said nothing about having a ticket, and that he (conductor) saw no ticket. The truth of the matter should have been ascertained by the jury. If the plaintiff's version of the transaction is true, he is entitled to maintain his action. If the conductor's version is correct, he is not entitled, as a passenger, to recover. If the jury should find the conductor's version to be true, the plaintiff could recover damages for his ejection only by showing that the conductor used excessive force. *Railroad v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123; *Fetter on Carriers*, 359. His right to recover punitive damages, if he shows himself entitled to compensatory damages, depends upon well-settled principles. *Holmes v. Railroad*, 94 N. C. 319.

There must be a new trial.

DOUGLAS, J., concurs in result only.

CLARK, C. J. (dissenting). The plaintiffs testified that they bought tickets, went across the street, still on the defendant's premises, and bought a musk melon, and, the train starting, they ran and got upon the platform of the baggage car, and the assistant ticket agent of the defendant testified that the "tickets were all right." There is no evidence whatever to contradict this, and his honor, in his charge, said: "I understand that counsel for both sides do not substantially disagree as to the facts of the first issue ('Were plaintiffs passengers?'). They say that this is a deduction of law from the whole of the cause; so, upon the evidence, I advise you that you answer the first issue 'Yes.'" The counsel do not appear to have corrected or objected to this statement of the judge at the time, as they should have done if they did not assent thereto; nor could they have shown any contradiction in the evidence as to the first issue. Their exception, entered after the trial, is clearly to the conclusion of law that those facts made the plaintiffs passengers, but in this there is no merit. The defendant's brief expressly says, "The court was asked to instruct the jury that the plaintiffs were not passengers in contemplation of law;" thus concurring in the uncontradicted testimony as to the purchase of the tickets, but going on to argue that, being on the platform, the plaintiffs were not in law entitled to be treated as passengers, and therefore that the judge instructed the jury wrongly upon the first issue. In both briefs filed by the defendant it is stated that the plaintiffs bought tickets, and the argument is that the judge charged wrongly on that issue because the plaintiffs were not in the car. Whether, in the absence of this direct and uncontradicted evidence that the plaintiffs bought tickets, and the ticket agent's evidence that the tickets were "all right," there would be a presumption that the plaintiffs were or were not passengers because of their being on the platform and not in the car, is a different question, and one which does not arise on the first issue upon this evidence. The tickets were conclusive evidence that they were passengers. Code, § 1963. How far the company should be excused for the conductor's mistake in jumping to the conclusion that the plaintiffs were not passengers because they were on the platform, and not in the car, is a matter to be urged, and doubtless was urged, to the jury on the third issue as to the measure of damages. But such mistaken inference by the conductor did not and could not destroy the effect of the uncontradicted evidence that the plaintiffs had bought and paid for and had "all right tickets," and were in fact on the train, in consequence, as passengers. There could, therefore, be no error in the view taken by the judge as to the first issue. The plaintiffs both say they showed the conductor

their tickets. He denies this, but does not say they did not have tickets; nor does he testify that he asked for their tickets before he pulled them off the train, while it was in motion, as he himself testifies. This was a violation of Code, § 1962, and also of the rules of the company, No. 442, which was in evidence.

The following citations are from the very excellent brief filed by the plaintiffs' counsel, and are exactly in point: Section 1963 of the Code says that "on the due payment of freight or fare, legally authorized therefor," railroads "shall take, transport, and discharge such passengers." As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence. *Frederick v. Railroad*, 37 Mich. 342, 26 Am. Rep. 531; *Hufford v. Railroad*, 53 Mich. 118, 18 N. W. 580. In *Creed v. Railroad*, 86 Pa. 139, 27 Am. Rep. 693, the plaintiff was traveling on a passenger train and on a car "not intended for the use of passengers," and in a suit for damages it was held that the plaintiff was prima facie a passenger, though violating the rules of the company. *Brooks v. Railroad*, 57 Pa. 346; *Thompson Carriers of Passengers* (1880) 51. Irregularity in boarding the train does not sever the relationship of carrier and passenger. *Smith v. Railroad* (Com. Pl.) 18 N. Y. Supp. 759. To get upon the platform of a baggage car does not sever the relationship, nor subject the passenger to the assaults of the conductor. Neither the carrier nor its employees can assume that a person on any car of a passenger train is a trespasser merely because he is not in one of the cars provided for, and usually occupied by, a passenger. *Railroad v. Williams* (Tex. Civ. App.) 40 S. W. 350. In that case the plaintiff was on the front platform of a baggage car, and had not paid his fare. In *Martin v. So. Ry. Co.* (this same defendant) 51 S. C. 150, 28 S. E. 303, quoting and approving *Williams' Case*, it is decided that: "When one having a ticket, and with the intention to ride as a passenger, goes upon the train upon which his ticket entitles him to ride as such, even if he board the train at an unusual time and at an unusual place, he is entitled to the rights of a passenger at least to the extent of not being mistreated by the employees of the company." In *Compton v. Van Volkenburgh*, 34 N. J. Law, 134, the plaintiff had a ferry ticket, but, instead of passing through the small gate, which was for passengers, he entered the ferry through the large gate, intended for horses and vehicles, and in doing so violated the rules of the company. For this offense he was seized by the collar, and jerked from the railing, and dragged from the boat, not while the boat was moving, however. Chief Justice Beasley, in writing the opinion of the court, says: "This agent of the railroad company had no right to expel this plaintiff from the boat without

first informing him of the existence of the regulation of the company; nor had he any right to touch his person without first notifying him that, unless he left the boat, he would resort to such extreme means to put him off. The facts stand thus: A passenger is told by a subordinate officer of a railroad company to get off a boat. The passenger replied, 'I will not; I have a ticket.' The reply is, 'It makes no difference; you must get off here,' and, without more, he is seized by the collar, and, in the presence of many onlookers, he is ignominiously expelled. I do not see but all reasonable men must unite in condemnation of such precipitate violence and indignity." In order to make Compton's Case exactly like the case at bar, the boat should have started off, and then the plaintiff seized and thrown into the water. The learned chief justice further says that "these agents of incorporated companies must be taught that personal violence must not be used except as a last resort, and after explicit notification."

(136 N. C. 328)

REYBURN v. SAWYER.

(Supreme Court of North Carolina. May 3, 1904.)

PUBLIC NUISANCES—OBSTRUCTIONS TO NAVIGATION—PRIVATE REMEDY—PECULIAR INJURY—ACTION FOR DAMAGES—INJUNCTION—GROUNDS—INSOLVENCY OF DEFENDANT.

1. The placing of pound nets in a navigable sound so as to obstruct the channel and interfere with the customary navigation under certain conditions of tide and weather, constitutes a public nuisance.

2. While the ordinary remedy for public nuisance is by indictment, one who has suffered unusual and peculiar damages by the erection of such a nuisance distinct from the grievance common to the public may sue to redress his injury.

3. One who suffers peculiar damages through the erection of a public nuisance is not confined for his remedy to an action for damages, especially where the damages arise from the injury and obstruction to the free use and enjoyment of his property, but may maintain a suit for an injunction.

4. The insolvency of defendant, so that a recovery would be of no avail and the injury irreparable, furnishes ground for an injunction to abate a nuisance erected by defendant.

5. Plaintiff was the owner of an island in a navigable sound. Defendant erected fish nets across the channel, which was the natural approach to the island, so as, under certain conditions of tide and weather, to obstruct the approach from that direction. There was, however, a reef extending at right angles to the fish nets, which could be crossed by the craft ordinarily in use on the sound under ordinary conditions, so that the obstruction of the channel in general did plaintiff no harm. On one occasion, however, plaintiff's attorney went to the island to see plaintiff on a matter of business, and while he was there a stiff breeze blew up, and continued to blow for two days, and the waves broke over the reef to such an extent that the boatmen would not cross it, and, owing to the difficulty of crossing the reef and the stakes in the channel, they were afraid to venture out, and the attorney could not leave for two days. *Held*, that this circumstance en-

titled plaintiff to an injunction restraining defendant from maintaining fish nets in the channel.

Appeal from Superior Court, Dare County; Justice, Judge.

Action by John E. Reyburn against D. C. Sawyer. From a judgment refusing an injunction, plaintiff appeals. Reversed.

Action to restrain by injunction the defendant from maintaining a nuisance, referred to have decided all issues of fact and law. The referee, from the evidence, finds the following facts, to wit:

"(1) Durant's Island is a body of land lying in Dare county, surrounded by the waters of Albemarle Sound, Alligator river, East Lake, and the Haulover, and is well known by the name of Durant's Island. All of said waters and land lie wholly within the state of North Carolina.

"(2) Durant's Island is swamp or marsh land, except a little around the shore—sand ridge.

"(3) That on the southern side of the island is a creek or bay making into said island from Albemarle Sound, which creek or bay is known as 'Tom Mann's Creek.'

"(4) On the 18th day of April, 1890, the state board of education made and executed a deed unto John E. Reyburn, the plaintiff, which deed was recorded in Dare county. Said deed describes and the boundaries include Durant's Island.

"(5) Near the shore of Tom Mann's creek the plaintiff has erected several houses, which are now, and have been continuously since April 18, 1890, occupied by plaintiff and his servants or agents.

"(6) The plaintiff has a house known as an icehouse, which is situated over the waters of Tom Mann's creek, which house is connected with the land by a wharf or pier.

"(7) The plaintiff has cut a canal about 10 feet wide and 30 inches deep, which canal connects the waters of Tom Mann's creek with the waters of Frying Pan, and has built some roads on the island. The said canal was cut prior to the erection of the nets hereinafter referred to.

"(8) Since 1890 the plaintiff has continuously kept on said island at least two men, who have lived in the houses which were built by plaintiff, and has also kept thereon a stock of cattle and some poultry.

"(9) In 1890, after the execution of the deed by the state board of education, the plaintiff posted notice on Durant's Island forbidding others from trespassing thereon, and has kept others from trespassing upon said island.

"(10) There is a channel leading from Tom Mann's creek into Albemarle Sound, which channel, after leaving the creek, turns eastwardly and westwardly nearly parallel with the general curvature of the shore of the island, and running eastwardly until it gets near the northeastern end of the island abreast of the Haulover, where it connects

with the deep water of Albemarle Sound, which lies to the northward.

"(11) From near the mouth of Tom Mann's creek going eastwardly to where it connects with the deep waters of Albemarle Sound this channel is from 5 to 6 feet in depth, and varies from 175 to 600 feet in width. There are shoals in this channel upon which the water is only 4 feet deep.

"(12) On the northern or sound side of this channel is a reef or shoal running nearly parallel with the shore or island, which reef or shoal terminates nearly opposite the Haulover. This reef or shoal varies in width from 30 to 150 feet. The water on this shoal or reef is from 3 to 4 feet deep, and deeper abreast of Tom Mann's creek than at other parts, except where the shoal terminates nearly abreast the Haulover.

"(13) The channel above mentioned extends to the west of the mouth of Tom Mann's creek.

"(14) On the southern or shore side of this channel the water gradually shoals until it approaches the shore, but in some places it is as deep as in the channel.

"(15) The waters on the southern or shore side of the above-mentioned reef are navigable for boats drawing from three to four feet of water. That part of Albemarle Sound on the inside or shore side of the above-mentioned reef or shoal is usually and almost entirely navigated and used by boats called 'shad boats' or 'sprit-sail boats,' which boats, when loaded, draw about 30 inches of water. Boats of smaller size are also used inside of the said reef or shoal, and occasionally boats of larger size, drawing from 3 to 4 feet, come inside this reef or shoal. Boats drawing as much or more than 7 feet of water can navigate the waters of the Albemarle Sound on the outside of the said reef or shoal, and can pass from Albemarle Sound through connecting waters to the Atlantic Ocean.

"(16) When it is calm, or in moderate weather, boats drawing 30 inches can cross the reef or shoal. In rough weather, and especially when the wind is from the north, northeast, or northwest, boats drawing as much as two feet of water cannot cross the reef or shoal with safety, and in such weather boats of smaller size are not safe in Albemarle Sound. When the wind is from the north, northeast, or northwest, this reef has the effect to break the force of the waves beating upon the lee shore, and it is smoother on the inside of the reef than on the outside, and safer for such boats as usually go on the inside, than it would be on the outside of the reef.

"(17) The defendant, prior to the institution of this suit, placed a line of stakes in the waters of Albemarle Sound, which stakes are from $2\frac{1}{2}$ to 4 inches in diameter at the water's edge, and larger at the bottom, and extend 4 or more feet above the water, and are firmly set or driven in the soil under the wa-

ter. These stakes are nearly abreast of the Haulover, and run across the mouth of the above-mentioned channel, and are 140 feet from its mouth and 140 feet from the eastern end of the reef, and run parallel with the channel as it empties into the sound, and runs nearly at right angles to the reef. The first pocket or pond is from 100 to 150 yards from the reef on the sound side.

"(18) These stakes for the nets originally began about 100 yards from the shore, and from that point extended out into the sound a distance of from 1,000 to 1,200 yards. There were two stakes between the shore end of said net stakes and the shore, which two stakes have been removed since this suit began. The stakes starting from the net stake nearest the shore are placed about 60 feet apart, running out a distance of 200 to 300 yards. These stakes are called "lead stakes." At about a distance of 200 to 300 yards from the shore end of the line of stakes a square 36 feet each way is formed by stakes of similar size, the stakes forming this square are about 36 feet apart, and have smaller stakes from 12 to 18 feet apart between them. This forms the pocket of the net. From the outer side of this pocket another line of lead stakes starts and runs out about 250 yards, when another pocket is formed, and this continues until four pockets have been formed. The whole row of stakes extend into the sound about 1,200 yards from the stake nearest the shore.

"(19) At certain times during the year a net is attached to these lead stakes running from the stakes nearest the shore to the pound stakes. This net is made of net twine, and is hung upon ninethread manilla rope, which is about three-eighth inches in diameter, which manilla rope is tied to the lead stakes at about the level of the water with marlin. The net drops down in the water. These lead lines sag so as to drop about 12 to 18 inches below the top of the water in the center between the stakes. This is the usual method of setting Dutch nets.

"(20) There is attached to the pocket or pound stakes a pocket or pound net made of similar twine, with smaller meshes, tied to similar ropes, which ropes are tied to the pocket or pound stakes with marlin. This pocket or pound of the net is about 28 feet square, and is level with the water, and is tied to the stakes so as to be kept level with the water and to prevent sagging. About two feet above the pocket another line of rope is tied to the pocket stakes. This line of rope, which is tied to the pocket stakes, is called a 'hand line,' and is about 2 feet above the level of the water line. The mouth of the pocket is on the side next to the lead. This is the usual method of setting Dutch nets.

"(21) When these stakes are broken off and left in the water so that they do not show above it, a boat might run on one of them, and they become more or less dangerous, as

they are liable or might knock a hole in the bottom or side of boat.

"(22) The nets are usually set, in that section, about seven months in the year. The referee is unable to find from evidence when the nets in question were hung upon the stakes, or how long they remained, or when taken up. The referee finds that the nets in question were hung to the stakes, or set, and have been taken up at least once, and have been put down again. The stakes have not been taken up since set.

"(23) Boats such as are commonly used and such as can be used in navigating the waters of Albemarle Sound when the nets are not set can with ease and safety pass between the stakes in the lead of the nets, and, should one of such boats strike one of the stakes, it would not necessarily injure or delay the boat. If the stake was rotten, or broken off at or below the water's edge, it would be more apt to injure the boat than if it were sound, and as originally set.

"(24) Shad or sprit-sail boats, and such other boats as usually navigate the waters of that part of Albemarle Sound lying inside of the reef or shoal, can, when the nets are not set, pass between the stakes of the pocket or pound, but not with ease, and these stakes are more apt to injure or delay a boat than the stakes in the lead.

"(25) When the nets are set, shad or sprit-sail boats or smaller boats, and boats as large as any that usually or can navigate the waters of that part of Albemarle Sound lying south of the reef, can, and generally with safety and without delay or hindrance, pass over the nets of the defendant by going over the lead.

"(26) When the nets are set, boats can pass through the pocket or pound, but are liable to be delayed, obstructed, and hindered in their passage.

"(27) There are times when the tide is low, the water rough, and the wind blowing hard, that boats such as are commonly used in that part of Albemarle Sound cannot cross these nets with ease and safety, and might be hindered or delayed by them.

"(28) There are times when there is but little wind, when, in order to pass over the nets, one would have to push down nets so as to let a boat go over. This can be done with safety, and with but little inconvenience, and without any practical delay.

"(29) Plaintiff cannot anchor his yacht where nets or stakes are placed, or so near thereto as will permit her to swing on the nets or stakes. There are no special advantages had by anchoring at the place where the nets are situated, or so near thereto as to permit the yacht to swing on the stakes. The usual, customary, and best anchorage is in or near the Frying Pan. Occasionally the plaintiff anchors his yacht on the outside of the reef or shoal, which he can still do.

"(30) The post office from which plaintiff gets his mail while on the island, and from

which the servants of plaintiff get their mail, is Mashoes, four miles to the eastward. In going to this post office, or going to Manteo from the island, you will have to cross the nets of the defendant or go around them.

"(31) In October, 1900, or 1901, Mr. B. G. Crisp, who is the attorney and representative of plaintiff in Dare county, went from Manteo to Durant's Island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatman who carried Mr. Crisp to the island would not cross the reef. Owing to the rough water on the reef and difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were afraid to venture out, and Mr. Crisp did not leave for two days. No attempt was made to start.

"(32) There are 11 stands of nets between Durant's Island and Mashoes, and in going to Mashoes from Durant's Island you cross 11 stands of nets besides the nets of the defendant.

"(33) None of the boats of the plaintiff, his servants or agents, have been delayed or obstructed in any passage which they have undertaken, or have been compelled to change their course, or been damaged on account of the stakes or nets of this defendant, and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant.

"(34) The plaintiff has access to his island from the waters of Albemarle Sound through the western end of the channel inside of the reef just to the west of Tom Mann's Creek; also through the channel at the east end of the island. In coming from the post office or points east of Durant's Island the plaintiff would have to go around or over the nets. In passing from Tom Mann's Creek to the Haulover the plaintiff would have to cross the nets or go around them.

"Upon the foregoing facts the referee finds the following conclusions of law:

"(1) That the plaintiff is the owner of Durant's Island. Code, § 2527; *Aycock v. R. R. Co.*, 89 N. C. 321.

"(2) That the nets and stakes are a public nuisance.

"(3) That as to the plaintiff neither the nets or the stakes are a private nuisance.

"(4) That the plaintiff is not entitled to recover damages for the setting and maintaining said nets, or to have the same abated."

J. W. Hinsdale & Son and B. G. Crisp, for appellant. Ward & Thompson and E. F. Aylett, for appellee.

MONTGOMERY, J. The referee's conclusions of law upon the facts found by him

that the action of the defendant in the placing of pound nets in the manner in which they were set constituted a public nuisance was a correct one. *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618. To prevent a multiplicity of private actions, the law provides a remedy for public nuisances in the way of an indictment, by which the nuisance can be abated, or the offender punished by fine or imprisonment, or in both ways. The plaintiff in this action, however, alleges in his complaint that he has suffered, and, further, that he has shown by the proof that he has suffered, an unusual and special damage on account of the erection of the nuisance by the defendant, and that he therefore is entitled to redress by a civil action; that is, to have the nuisance abated at his own suit. The plaintiff's contention rests upon a sound principle of law, and where the facts go to show that a public nuisance has been the cause of unusual and special damage to an individual or a class of persons, as contradistinguished from a grievance common to the public, that person may bring a civil action for the redress of the injury. In *Mfg. Co. v. Railroad*, 117 N. C. 579, 23 S. E. 43, the defendant, by erecting a bridge across a river so low as to obstruct the passage of boats plying up and down the stream, thereby prevented a steamboat from carrying a cargo of merchandise for a consignee up the river and beyond the bridge. The court held that the defendant was liable in damages for the injury done to the plaintiff on the ground that the damage was special, and unusual to the plaintiff. The court said there: "It is not material whether this particular boat was licensed, or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from a point below the obstruction to a place located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier, as well as for the manufacturer who owned it." The same principle was announced in *Downs v. City of High Point*, 115 N. C. 182, 20 S. E. 385. It is a principle of law found stated in all of the text-writers on the subject of nuisance, and in the decisions of many of the courts of the states. If the facts be such as the plaintiff claims he has shown them to be in this action, his right to relief by a civil action appears to be clearer in principle, and more necessary to the peace and order of society, than were the plaintiff's rights in the cases we have cited.

The plaintiff here is the owner of a tract of land (Durant's Island) situated in the midst of navigable waters, and it is necessary to the full and free enjoyment of his property that his access over the waters to that property and his egress from it should not be

obstructed by nuisances erected athwart the channels of approach. The claim of the plaintiff is that not only was the erection of the fish nets in the manner in which they were constructed by the defendant a public nuisance, but that it prevented the free use and enjoyment of his private property, which was a damage and an injury to himself not in common with the public at large, but as extraordinary and special in its effects upon him. In *Blanc v. Klumpke*, 29 Cal. 156, the court said: "Undoubtedly, if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action; but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with and to some extent prevented, can it be said he suffers in common only with the public at large? Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance, and the subject of an action; and it is further provided that such action may be brought by a person whose property is injuriously affected." In *Wilder v. De Cou*, 26 Minn. 10 [1 N. W. 48], the court decided that the owner of a town lot suffers a peculiar damage by the obstruction of a portion of a public street immediately in front of his lot, and that he might therefore maintain an action to prevent such obstruction, although the same may be a public nuisance. In *Rex v. Dewanap*, 16 East, 196, Lord Ellenborough said: "I did not expect that it would have been disputed at this day, though a nuisance may be public, yet that there may be a special grievance arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influences of it. In the case of stopping a common highway which may affect all the subjects, yet if any person sustains a special injury from it he has an action. This must necessarily be a special grievance to those who live within the direct influence of the nuisance, and are therefore parties aggrieved within the statute allowing such parties costs." In *Wood on Nuisances*, pp. 886, 887, it is said: "Redress may be had through the medium of a private action in behalf of each person specially injured, although the same damage is inflicted upon many persons at one and the same time—as an obstruction of a highway leading to one's premises, or so as to obstruct access thereto, or otherwise producing special damage. The obstruction of a navigable stream so as to hinder or delay passage over the same, or producing actual damage to vessels, or by cutting off the approach to a private wharf or premises so as to injure one's premises, is such a special injury as enables the person so injured to maintain an action." In *Park v. Railroad*,

43 Iowa, 636, a correct syllabus of the decision may be stated as follows: "Injuries resulting from the obstruction of highways leading to the premises of the party complaining and interfering with access to them are proper grounds of recovery by the injured party, and this is so although many others sustain similar injuries from the same cause." And we are of the opinion that one who suffers damage, through the erection of a public nuisance, unusual and special to himself, is not confined in his remedy to an action merely for damages, especially where the damage arises from an injury and obstruction to the free use and enjoyment of one's property—lands and tenements, as in this case. In 2 Wood on Nuisances, p. 1159, the author says: "Any person injuriously affected by a nuisance, who could maintain an action at law therefor, can maintain a bill in equity for an injunction;" and Barnes v. Hathorn, 54 Me. 127; Thebaut v. Canova, 11 Fla. 143, Peck v. Elder, 3 Sandf. (N. Y.) 126, Dana v. Valentine, 5 Metc. (Mass.) 8, are cited in support of the text. Indeed, in a case like the present, it would be impossible to fix with any degree of certainty the damages which the plaintiff ought to recover for the obstruction of his access to his property, and this court has said in Jolly v. Brady, 127 N. C. 142, 37 S. E. 153: "But when the damage cannot be reasonably compensated in a suit at law, or the injury is irreparable, the court will stay the injury by injunctive order until the parties shall have the main facts determined by a jury." In Wood on Nuisances, p. 119, it is said that: "When the injury is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will interpose by injunction." In Works v. Junction R. Co., 5 McLean, 425, Fed. Cas. No. 18,046, the court said: "If such injury exists, no adequate remedy can be found by an action at law. From the nature of the injury its extent cannot be ascertained with precision. It is permanent. Consequently the suits of law for redress must be endless. In such case adequate relief can be given only by injunction. It prevents the wrong. To establish this wrong it need not be measured by dollars and cents. It must be shown to exist; it must be material, but the particular amount of damage need not be shown." But, besides, in this case it appears that, if damages could be made a sufficient compensation for the injury done to the plaintiff, a recovery would be of no avail on account of the insolvency of the defendant, and the injury would therefore be irreparable. In 1 Beach on Injunction, § 34, it is said: "A court of equity, in the exercise of its discretion, may grant an injunction to prevent a breach or an injury for which there can be no other redress on account of the defendant's insolvency," and in Kerlin v. West, 4 N. J. Eq. 449, it was declared that an injury may be irreparable either from its nature or the want of respon-

sibility in the person committing it. 10 Enc. Pl. & Pr. p. 956.

So far we have considered this case on the theory that the referee had found the facts as the plaintiff insisted they should have been found from the evidence. The referee, however, found as a fact that "none of the boats of the plaintiff, his servants or agents, had been delayed or obstructed in any passage which they have undertaken, or had been compelled to change their course, or been damaged on account of the stakes or nets of this defendant, and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant." If there had been no other finding of fact by the referee on the subject of the obstruction of the plaintiff's access to his premises, the judgment of the court below upon the referee's report would have to be affirmed. But there was another finding of fact on that subject, and one totally inconsistent with the finding which we have quoted above, which will result in a reversal of the legal conclusion upon those findings. The inconsistent finding of fact referred to is in these words: "In October, 1900, or 1901, B. G. Crisp, who is the attorney and representative of the plaintiff in Dare county, went from Manteo to Durant's Island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatmen who carried Crisp to the island would not cross the reef. Owing to the rough water on the reef and the difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were afraid to venture out, and Crisp did not leave for two days. No attempt was made to start." We are of the opinion that upon that finding of fact the court should have given judgment that the plaintiff should have his injunction for the abatement of the nuisance.

Error.

DOUGLAS, J., concurs in result only.

(135 N. C. 682)

McNEILL v. DURHAM & C. R. CO.

(Supreme Court of North Carolina. June 1, 1904.)

CARRIERS—ILLEGAL PASS—CONDITIONS—PASSENGERS—EXISTENCE OF RELATION—NEG-LIGENCE—PERSONAL INJURIES.

1. Conditions printed on the back of a pass which was void because in violation of Laws 1891, p. 277, c. 320, § 4, forbidding discrimination, have no application in an action by the holder of the pass against the railroad company for injuries received while riding on the pass.

2. The rights, privileges, and protection attaching to the relation of a passenger are imposed by law upon common carriers upon considerations of public policy, independent of contract, and arise from the nature of their public employment.

3. Laws 1891, p. 277, c. 320, § 4, provides that, if a common carrier charge any person a greater or less compensation than it charges any other person for a like service, the carrier shall be deemed guilty of unjust discrimination liable to fine. Plaintiff was injured by the negligence of the railroad company while riding on a pass which was void under the statute. *Held*, that he was a passenger, and entitled to recover as such, not being in *pari delicto* with the company in the violation of law.

Clark, C. J., and Montgomery, J., dissenting.

On Rehearing. Petition allowed, and judgment below affirmed.

For former opinion, see 44 S. E. 34.

DOUGLAS, J. This is a rehearing of the case originally decided in 132 N. C. 510, 44 S. E. 34, 95 Am. St. Rep. 641. We fully concur in our former opinion as to the illegality of the contract by which the defendant agreed to give to the plaintiff free personal transportation to an unlimited extent in consideration of certain advertising. The only ground on which we allow the petition is that the plea in *pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

The plaintiff testified as follows: "Marshall called on me for my ticket. I told him I had a pass for 1899, and showed it to him, and told him I would pay the regular fare if he wanted it. He said it was all right. I was the editor of the Carthage Blade, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900. The contract was not in writing."

The superintendent of the defendant company, testified that there was no such contract, but that the pass was a gratuity. This raised a question of credibility, which in the view we take of the case becomes of no practical importance. In any event it would be a question of fact for the jury. The contract for transportation was rendered absolutely void by the statute, founded upon public policy, whether based upon no consideration or upon the inadequate consideration of printing a time-table. The pass, issued in pursuance of an illegal contract and for the purpose of carrying out its unlawful purpose, inherits its invalidity. The defendant was free at all times to decline to carry the plaintiff except upon the payment of the usual fare, and to eject him from its train upon his refusal to pay. The fact that the pass had expired makes no difference, as, in its character as a contract, it never had any legal existence. Being without legal existence, it was equally devoid of legal effect, and, conferring no rights upon the plaintiff, imposed upon him no obligations which the law will enforce. A void contract is thus defined in Lawson on Contracts, § 350: "A void contract is one destitute of legal effect. It is a mere nullity, and good for no pur-

pose whatever. It is binding upon neither party, and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded, and it cannot be ratified and made valid."

The pass itself being worthless, the conditions on the back thereof could have no application. They were not independent contracts, and, if they had been, were totally wanting in a legal consideration. Therefore this case does not come within the principle laid down in *Northern Pac. R. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. —, where the pass was recognized as a lawful and valid contract for free transportation. By citing and distinguishing that case, decided by a divided court, we do not mean to express our approval of its argument or conclusion. It is not necessary for us to consider it in the case now before us.

We may here repeat that it is not the unlawful contract for free transportation which renders a railroad company liable to the penalty, but it is the transportation itself. In the view of this statute a free pass is a mere incident, as the same result could be obtained by issuing a thousand-mile ticket or one in ordinary form. The offense consists in the free carriage of a passenger, whether with or without a pass or ticket; and the offense is complete when such passenger is carried any appreciable distance. The railroad company may have issued to him a free pass or ticket from Raleigh to New York with impunity, but would become liable to the full penalties prescribed by the statute as soon as it had transported such passenger to the first station out of Raleigh. In using the term "free transportation," we mean to include all transportation which justly comes within the forbidden principle of discrimination. A mere colorable consideration will neither evade the penalties of the statute upon the one hand, nor confer any rights upon the other.

We must bear in mind that while the statute renders absolutely void any contract for free transportation, so that neither party thereto can acquire any rights thereunder, it imposes the penalty only upon the transportation company. The act of free transportation alone is criminal. The party accepting such transportation is not guilty of a criminal act, whatever moral blame may attach to the reception of unlawful favors. Therefore, in contemplation of law, the parties cannot be considered in *pari delicto*. This difference is well expressed by Pearson, C. J., speaking for the court in *Melvin v. Easley*, 52 N. C. 356. That was an action for deceit and false warranty in the sale of a horse on Sunday by a horse trader, in violation of Rev. St. c. 118, § 1. The court says, on page 358, 52 N. C.: "It is said that the plaintiff knew the defendant was a horse trader and concurred in his violation of the statute, and, consequently, was *particeps criminis*. Does this consequence follow? In crimes, there are accessories; in misdemeanors, all who

aid or concur are held to be equally guilty, and are subject to like punishment with the party who commits the offense. This plaintiff is not guilty of violating the law, and is not subjected to a penalty, so he cannot be particeps criminis in the legal sense of the term. He is not in *pari delicto*, and it is against the policy of the law, and will defeat its object, so to consider him. The court will not aid any person who violates the law; therefore the defendant could not maintain an action. This rule is adopted on the ground of policy, for the purpose of preventing a violation of the law, and, if confined in its operation to the actual offender, its application will be salutary; but if it be extended to the party who is not an offender, so far from checking, it will encourage a violation of it, by letting it be known to 'horse traders,' 'shopkeepers,' and 'all whom it may concern,' that they may cheat with impunity, provided always it may be done on the Lord's Day."

The plaintiff was lawfully upon the defendant's train, and testifies that he offered to pay his fare if required by the conductor. The conductor permitted him to ride free, not as a personal favor to him, but in furtherance of a contract between him and the company itself, acting through its superior officers. There is no suggestion that the plaintiff was seeking to defraud the company in any manner, or that there was any collusion between him and the conductor. He was in every respect a bona fide passenger, and entitled to all the protection incident thereto, unless deprived thereof by the acceptance of free transportation.

The cases relied on to sustain the defense of in *pari delicto* are chiefly of two classes, those involving a violation of the Sunday laws, and those growing out of the relation of the plaintiff towards the national government during the Civil War. The latter class, evoked from conditions now happily passed away forever, furnishes no criterion for the determination of the case at bar. It is enough to say that in both classes of cases the plaintiffs were actually engaged in the performance of an act expressly denounced as criminal by the law of the land, as construed by the courts in which the actions were necessarily brought. The following are illustrative cases: *Turner v. Railroad*, 63 N. C. 522; *Martin v. Wallace*, 40 Ga. 52; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Railroad v. Redd*, 54 Ga. 83; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Smith v. Railroad*, 120 Mass. 491, 21 Am. Rep. 538; *Lyons v. Desotelle*, 124 Mass. 387; *Holcomb v. Danby*, 51 Vt. 428. While entertaining the highest respect for the Lord's Day, the Sunday of the new law, we have not deemed it our duty to enforce its observance, so as to make it the shield of wrong. *Rodman v. Robinson* (at this term) 47 S. E. 19.

In the case at bar the plaintiff is certainly neither a tramp nor a trespasser, as both of

those terms imply an unlawful presence against the will of the owner. Hence it is needless to examine the cases dealing with such relations. If the plaintiff's evidence be true, he was not a gratuitous passenger in the full sense of the term, inasmuch as he printed in his paper the schedule of trains in consideration of his otherwise free carriage. This was an inadequate consideration which rendered the contract void as an unlawful discrimination, but it was none the less a consideration of some actual value. But while this might, as between the plaintiff and the defendant, bring the case within the principle of *N. Y. C. R. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, we deem it proper to treat the plaintiff as a gratuitous passenger, in view of the unlawful consideration, and will cite the able opinion in that celebrated case only in so far as it relates to this view of the case at bar.

It is often said that one becomes a passenger by virtue of a contract. This is not always so. A contract is a voluntary agreement between two parties, a coming together of two minds to a common intent, and yet a passenger may become such without a contract, and, indeed, against the will of the carrier. A common carrier has no right to refuse a passenger without sufficient reasons, and such reasons so rarely occur, and are so exceptional in their nature, as to vary the general rule too slightly for practical consideration. Suppose the carrier without legal excuse should refuse to sell a ticket to one having the bona fide intention of becoming a passenger, and that the passenger should then enter the carrier's train in an orderly manner, take his seat in the proper car, and tender his fare to the conductor, would the refusal of such fare deprive him of his legal status as a passenger? Assuredly not. He would be a passenger in the fullest meaning of the term, entitled to all the rights, privileges, and protection attaching to that relation, and yet there would be no actual contract between him and the carrier. But it may be said that the law raises an implied contract. Even if we accept that form of expression, it simply means that the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression and say that those duties and liabilities are imposed by law upon common carriers upon considerations of public policy independent of contract, and arise from the nature of their public employment. Contracts may be made with the carrier, but into all such contracts certain conditions are written by the hand of the law. One such condition is the inherent liability of the carrier for all injuries proximately resulting from its own negligence or that of its servants. But as we have already said, in the case at bar there was no legally existing contract, which is equivalent to saying there was no contract at all. Viewing the plaintiff as a gratuitous

passenger, and it appearing from the verdict that he was injured through the negligence of the defendant, we think that he is entitled to recover.

We have given this case most careful consideration, and have examined a very large number of authorities, but will cite those only which directly bear upon the case in the view we take of it, omitting needless repetitions from the same state. Neither time nor space will permit the discussion of cases having no essential relation to that at bar.

It is significant that the greater weight of authority is to the effect that a passenger may recover for injuries received from the negligence of a common carrier or its servants, even when unlawfully traveling on Sunday, or on a lawful pass with conditions indorsed thereon releasing the carrier from all liability. In both cases the cause of action is attributed to injuries resulting from the breach of a public duty. A fortiori the plaintiff can recover for such negligence when the defendant alone is in the commission of an unlawful act, and when there is no release of liability.

We will begin our citations from the Supreme Court of Pennsylvania, a court which is not addicted to emotional jurisprudence, and has never shown any disposition to burden railroad management with unnecessary conditions or restrictions. In *Railroad v. Butler*, 57 Pa. 335, the intestate was killed while riding on a free pass on which a release was indorsed. Sharswood, J., speaking for the court, says on page 337: "The first error assigned has been properly abandoned, as it is too well settled to be now controverted that a stipulation by a common carrier that he shall not be liable for damages does not relieve him from responsibility for actual negligence by himself or servants." This case is cited with approval upon the same point in *Burnett v. Railroad*, 176 Pa. 45, 84 Atl. 972, the latest case upon the subject.

In *Carroll v. Railroad*, 58 N. Y. 126, 17 Am. Rep. 221, where the plaintiff was traveling on Sunday, contrary to the statute, it was held that: "The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury to a passenger an action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and, whether the action is brought upon contract or for failure to perform the duty, the liability is the same. One violating the statute prohibiting travel upon Sunday (1 Rev. St. [Edmond's Ed.] p. 628, pt. 1, c. 20, tit. 8, § 70) is not without the protection of the law. The carrier owes to him the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the same in the one case as in the other." The court says, on pages 133, 134: "But we deem it unnecessary to decide the question, which was argued with great ability by counsel,

touching the liability of the defendant in the action, treating it as founded upon the contract between the parties. The gravamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract. This case, therefore, is not within the principle of many of the cases cited, which forbid a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it."

In *Railroad v. Trautwein*, 52 N. J. Law, 166, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442, it was held that the plaintiff could recover although unlawfully traveling on Sunday, the court saying, on pages 171, 172, 52 N. J. Law, page 179, 19 Atl., 7 L. R. A. 435, 19 Am. St. Rep. 442: "A contract to carry, made on Sunday, or to be performed on Sunday, is, by force of the statute, illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrongdoing did not contribute to the injury in such a sense as to deprive her of her right of action; it was merely a condition, and not a contributory cause of the injury."

In *State, Use of Abell, v. Railroad*, 68 Md. 433, it was held that "when a carrier undertakes, without any special contract, to carry a passenger gratuitously, the passenger is entitled to the same degree of care as if he had

paid his fare." The court says, on page 443: "The principle announced in this decision, that the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law, has been recognized by this court on the motion to reargue the case of *Baltimore City Pass. Railway Co. v. Kemp and Wife*, 61 Md. 619, 48 Am. Rep. 134, where the court says that a common carrier who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract, and this court illustrates the principle by the example of a child for whom no fare is charged, but who could recover in case of injury, the result of negligence."

In *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799, a gratuitous passenger injured by the breaking down of a hack was allowed to recover. The court says, on page 357: "This, we think, was sufficient to authorize the instruction. The principle announced in it, that, although plaintiff might have been a gratuitous passenger, such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger the carrier may only be liable for gross negligence, it has not been held in any of them that such fact would exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

In *Jacobus v. Railway*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360, it was held that the plaintiff could recover although riding on a pass, as the same degree of care was required of the common carrier as if the plaintiff had been a passenger carried for hire. The court says, on page 129, 20 Minn. (Gil. 112), 78 Am. Rep. 360: "In the case at bar, however, the plaintiff was not merely a gratuitous passenger, i. e., a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? * * * There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patrie*, has in protecting the lives and limbs of its subjects. * * * So far as the consideration of public policy is

concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned."

In *Tibby v. Railway Co.*, 82 Mo. 292, the intestate was killed while riding on a free pass on top of a cattle car. The plaintiff was allowed to recover, the court saying, on page 300: "The contract of exemption from damages was properly excluded. A common carrier is not permitted to stipulate against its own negligence. (Citing cases.) This rule in its application to the carriage of passengers has never been relaxed."

In *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575, the plaintiff, unlawfully traveling on Sunday, was permitted to recover. The court says, on page 128, 30 Minn., page 576, 14 N. W.: "It is further contended that the deceased was, by accepting passage upon the steamboat, engaged in an unlawful act, and was particeps criminis with the defendants and their agents in violating the Sunday law. It is a sufficient answer to this objection that the defendants on that day occupied the relation of common carriers of passengers, and their general obligation to use such care and diligence as the law enjoins is not limited by the contract with the passengers, nor with the person who engaged the use of the boat and the services of the crew for that day, but is governed by considerations of public policy. That the undertaking was unlawful does not touch the question. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 134; *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360. As remarked by the court in that case, 'any relaxation in the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier.'"

In *Rose v. Railroad*, 39 Iowa, 246, it was held, quoting the headnote, that: "The payment of fare is not necessary to create the relation of common carrier and passenger. A railroad company was held to be liable for causing the death of a passenger by the neg-

ligence of its employes, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation, signed by himself, releasing the company from all liability for injury to his person or property while using the same." In its opinion the court adopts the language used in *Railway Co. v. Derby*, 14 How. 468, 14 L. Ed. 502.

In *Russell v. Railroad*, 157 Ind. 805, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214, the release from liability given by a Pullman porter was held valid on the ground that he was not a passenger, but the court uses the following language on page 309, 157 Ind., page 679, 61 N. E., 55 L. R. A. 253, 87 Am. St. Rep. 214: "The decisions of this state firmly establish that a common carrier of goods or passengers cannot contract with a customer for a release of the carrier from liability resulting from the latter's negligence. (Citing cases.) The grounds upon which this prohibition rests are variously stated by the court. It has been said that such exemptions are against public policy, that the public is interested in the exercise of care and diligence on the part of the carrier, that it is unreasonable for any person or corporation to contract for the privilege of being negligent, and that the public is concerned with the life and security of every citizen. The fundamental reason, however, for holding common carriers, such as the appellee, liable for the results of their negligence, notwithstanding contracts exempting them therefrom, is that the state has granted them privileges which they exercise for the benefit of the public; in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract rid itself of the burden of responsibility, which is one of the conditions of its creation. Were it permitted to escape liability by entering into exonerating agreements, its position of advantage over its patrons would in almost every instance enable it to force from them such stipulations as it desired, and the object of the state in creating the carrier would be virtually defeated, the carrier thus being able to abandon the duty imposed upon it by the state. As said in the case of *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869, at page 180, 126 Ind., page 869, 25 N. E.: 'A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which

amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void.' In *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 382, at page 12, 19 Ohio St., 2 Am. St. Rep. 362, the court says: 'Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed to a very great extent to the care of public carriers. It cannot be denied that pecuniary liability for negligence promotes care, and, if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence.'" In *Davis v. Railway Co.*, 93 Wis. 470, 67 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 985, it was held: "A stipulation in a contract for the carriage of a passenger, exempting the carrier from liability for injuries caused by its negligence or the negligence of its agents or employes, is void as against public policy;" the court saying, on page 479, 93 Wis., page 18, 67 N. W., 33 L. R. A. 654, 57 Am. St. Rep. 985: "It is very well established in this state that a contract for such an exemption from liability of a common carrier is void as against public policy. The defendant could not by any agreement, however plain and explicit, wholly relieve itself from liability for injuries caused by its negligence or the negligence of its agents or employes."

In *Railway Co. v. McGown*, 65 Tex. 640, it was held, quoting the headnotes, that: "A common carrier of passengers cannot by contract relieve itself from responsibility, or even limit its liability, for injuries to a passenger resulting from the negligence of itself or its employes or agents in the scope of their employment; and this is so with reference as well to passengers traveling free of charge as to those paying full fare. The liability of the carrier of passengers does not depend on the fact that compensation for the passenger has been paid to it, but the same degree of care is incumbent on the carrier in the case of a passenger traveling on a free pass as in the case of one paying full fare." The court says, on page 648: "The relation of passenger and carrier is created by contract, express or implied, but it does not fol-

low from this that the extent of liability or responsibility of the carrier is in any respect dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please, but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the course thereof; and this is so for the public good. Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern. None could be of greater public concern at the present day than these employments by which men, women, and children are transported by millions, by agencies of a most dangerous character, and with a speed heretofore unknown."

In *Railroad v. Crudup*, 63 Miss. 291, it was held that a mail agent traveling on a "free ticket" could recover, the court saying, on page 302: "The court properly excluded the evidence proposed by the defendant to show that the deceased had accepted a 'free ticket,' by which he relieved the company from liability for the negligence of its servants. By their contract with the government the company received compensation for transporting both the mail and its custodians, and there would have been no consideration for the obligation entered into by the deceased to waive damages; and in addition to this it may be added that such a contract is against public policy. The duty which common carriers owe to all persons carried by it, viz., not to be guilty of negligent injury, is one against the breach of which they may not protect themselves by private contract."

In *Railroad v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607, the court says: "We do hold, however, that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon; for ever since the decision of the leading case of *Coggs v. Bernard*, 2 Smith's Lead. Cas. 82, it has been regarded as sound law that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' And we hold, further, that, in undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damage occasioned by the negligence, or willful default, or tort

of himself or his servants, than he can when he receives a reward for the service to be performed; both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee, not bound by the considerations of public duty attached to the office of a common carrier, from stipulating that he may be fraudulently negligent or safely dishonest. Railroad companies are incorporated in part, at least, from public considerations, and for the public good. As carriers of persons and property, it has been held they may be considered as acting in a public capacity, and as a kind of public officers. The exercise of honesty, care, and diligence by them or their agents and employés is a public duty resulting from their position, the obligation to perform which cannot be thrown off by contract. If thus thrown off, the effect would be to relax or modify the performance of the duty, and to promote a relaxation of proper care in the selection of agents and servants for its performance."

In *Waterbury v. Railroad* (C. C.) 17 Fed. 671, it was held that: "The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him." Wallace, C. J., says, on page 672: "A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption, in any aspect of it, that the plaintiff was entitled to be carried as a passenger, as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or a matter of favor, as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously, and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed. *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468 [14 L. Ed. 502]; *Steamboat New World v. King*, 16 How. 469 [14 L. Ed. 1019]. The carrier does not, by consenting to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare *Todd v. Old Colony, etc., R. Co.*, 3 Allen, 18 [80 Am. Dec. 49]. As is tersely stated by *Blackburn, J.*, in *Austin v. Great Western Ry. Co.*, 15 Wkly. Rep. 863: 'The right which

a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely."

In *Railroad v. Derby*, 14 How. 468, 14 L. Ed. 502, it was held that a gratuitous passenger could recover, the court saying, on page 484, 14 How., 14 L. Ed. 502: "The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler by stage-coach or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of 'respondeat superior,' which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer, to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life, may in some cases successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances or accidents of his situation could affect his right to recover."

* * * This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." See *Coggs v. Bernard*, and cases cited in 1 Smith's Lead. Cas. 95. It is true, a distinction has been taken in some cases between simple negligence and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transporta-

tion be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.' The citations of this celebrated case will be found in 5 Rose's Notes (U. S.) 275-284.

In *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, Curtis, J., speaking for the court, says, on page 474, 16 How., 14 L. Ed. 1019: "In the *Philadelphia & Reading Railroad Company v. Derby*, 14 How. 468 [14 L. Ed. 502], which was a case of gratuitous carriage of a passenger on a railroad, this court said: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross." We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.'

In the celebrated case of *Railroad v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, than which there are few opinions more able or more widely cited and approved, it was held, quoting the language of the court at the conclusion of its opinion on page 384, 17 Wall., 21 L. Ed. 627, that: "First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire. These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire." The plaintiff was traveling on what was called a "drover's pass," which expressly stipulated that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The court held that, while the pass was professedly gratuitous on its face, it was in fact given as part of the original contract for shipping the cattle. The case is treated as a carriage for hire, but the reasoning of the opinion clearly applies to all classes of passengers. Justice Bradley, speaking for the court, says, on page 376, 17 Wall., 21 L. Ed. 627: "It is argued that a

common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest." Again the court says, on page 877, 17 Wall., 21 L. Ed. 627: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms." And again, on page 381, 17 Wall., 21 L. Ed. 627: "Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law." The extent to which this case has been cited and approved will be shown by reference to 8 Rose's Notes U. S. 48.

In *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535, the court says, on page 660, 95 U. S., 24 L. Ed. 535: "Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *Railroad Company v. Lockwood*, supra. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case, and it is often asked, with apparent

confidence, 'May not men make their own contracts, or, in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled."

In *Railroad v. Sullivan*, 120 Fed. 799, 57 O. C. A. 167, 61 L. R. A. 410, it was held that: "Riding in the coach set apart for colored passengers, contrary to the rules of the carrier and provisions of the statute, is not negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach."

In the earlier English reports the doctrine was uniformly held that an action to recover damages for negligent injury by a common carrier arose from a breach of duty imposed by the common law, and needed no contract to support it. In course of time, by some unexplained change of judicial sentiment, the courts began to recognize stipulations for release of liability, until, finally, common carriers were practically allowed to absolve themselves, by stipulation, from liability for all negligence, however gross. This led to the passage of the act of 1854, called the "Railway and Canal Traffic Act," declaring that railway and canal companies should be liable for the negligence of themselves or their servants, notwithstanding any notice or condition, unless the judgment or court trying the cause should adjudge the condition just and reasonable. The practical effect of this statute was to bring the law back to its original status. However, all the cases seem to hold that there is no implied release in the absence of written stipulations or fraudulent concealment of material facts. This is shown by the following cases, which are typical of others: In *Bretherton v. Wood*, 7 E. C. L. 345, the court says, on page 348: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."

In *Marshall v. Railway Co.*, 11 C. B. E. O. L. 78, Jervis, C. J., says, on page 661: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty

implied by law to carry him safely." In the same case Williams, J., says, on page 663: "I am of the same opinion * * *. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, and ending with *Pozzi v. Shipton*, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in *Fitzherbert's Natura Brevium*, Writ de Trespass sur le Case, where it is said (9b): 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well, for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary."

In *Austin v. Railway Co.* (1867) 2 Q. B. 442, it was held that a child over the free age prescribed by statute, and having no ticket, and no fare having been asked or paid, could recover for injuries received. Blackburn, J., concurring, says, on page 444: "I am also of opinion there should be no rule. I think that what was said in the case of *Marshall v. Newcastle & Berwick Railway Company* was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

A large number of authorities could be cited in addition to those above, but it is needless to do so. We have already quoted at greater length than we should, but for the fact that we wished to show, not simply the decision of the cases, but especially the essential principles by which those results were reached. We will now close by citations from the leading text-books.

In 5 A. & E. Enc. 507, it is said: "The carrier is liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. * * * A person riding on a free pass is as much a passenger as if he were paying full fare, and if the pass is given for a valuable consideration he is a passenger for hire. * * * The fact that the carrier is prohibited by law from issuing free passes does not render a person a trespasser who travels upon such a pass unlawfully issued to him. If the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the passenger a trespasser, nor destroy his right as a passenger."

In 6 Oyc. 544, it is said that: "While it is no doubt true, as indicated in the definition, that public carriers of passengers are those who carry passengers for hire, there is not

in the case of carriers of passengers a distinction as to liability between passengers carried for compensation and those carried gratuitously, analogous to that recognized as to carriers of goods between cases where goods are carried for compensation and those where they are carried free. One who is accepted for transportation as a passenger, without any compensation to be rendered, is nevertheless entitled to all the care and protection which the carrier is under obligation to furnish to paying passengers."

In Lawson on Contracts, it is said, in section 335: "A carrier of a passenger who has paid a consideration for his passage cannot exempt himself from liability for damages caused by his own negligence, or that of his servants, by any contract which he may have induced his customer to approve. Such a contract is void as against the policy of the law, even though the passenger is a gratuitous one, riding free and paying no fare."

In 2 Beach, Mod. Law of Contracts, it is said, in section 1502: "The weight of authority in this country favors the rule that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law, and that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

In Fetter on Carriers of Passengers, § 220, it is said: "It is now well settled that a carrier, by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of carriage is illegal, or though there is no express contract of carriage. Hence the fact that a contract of carriage is entered into on Sunday, and that plaintiff, when injured, was traveling on Sunday, in violation of a statute, does not preclude him from maintaining an action against the carrier for the injuries. In the language of the New York Court of Appeals: 'It is certainly a startling proposition that the thousands and tens of thousands of persons who travel on business or for pleasure on Sunday, upon railroads and steam and ferry boats in this state, are at the mercy of incompetent or careless engineers and servants, and that there is no remedy for loss of life or limb resulting from this negligence.'"

In Bishop on Noncontract Law, § 1074, it is said: "Such, therefore, is both the policy of the law and the law itself, in the highest sense fundamental and unyielding. The result of which is that, in just legal reason, it will under no circumstances be competent for a railroad or other common carrier, whether of goods or passengers, to cast off this responsibility by any resort to a by-law, to a usage, or even to an express contract with the party. Particularly in the carriage of passengers, if the road could by contract ex-

empt itself from responsibility for its own negligence, its next step would be to refuse all passengers who would not enter into the contract; thereupon the railroad corporations, freed from the only motive to carefulness which they could appreciate, the danger of being mulcted in damages, would conduct their business with a recklessness rendering travel a horror to every person not permitted to remain at home." See, also, section 1078.

In Cooley on Torts, on page 826 (685) it is said: "Carriers of passengers, it is also held, cannot relieve themselves from the obligation to observe ordinary care by any contract whatsoever, even in the case of 'drovers' passes,' which are given without charge to those who accompany consignments of cattle, or in cases where free passage is given as mere matter of courtesy or favor." The learned author then proceeds to say that, while there are certain exceptions permitted in two states, "the weight of authority is most distinctly the other way, both in this country and in England"; that is, in favor of the rule as stated above.

In Hutchinson on Carriers it is said, in section 566: "It is enough that the person is being lawfully carried as a passenger, to entitle him to all the care which the law requires of the passenger carrier; and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously, as upon what is known as a free pass, or by the carrier's invitation, as when he pays the usual fare." See, also, sections 565 and 567.

In Wharton's Law of Negligence it is said, in section 355: "Is a free passenger to be placed in a different position, so far as concerns his rights to protection from neglect, from a pay passenger? This question, also, was at one time answered in the affirmative, the courts being led astray by the mistaken view of mandates which will be hereafter pointed out. But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—the diligencia of the bonus et diligens paterfamilias—in the performance of the service, even though there is no consideration for such undertaking. Or, as the question is elsewhere put, the confidence accepted is an adequate consideration to support the duty. Eminently is this the case with what are called 'free' passengers on the great lines of common carriage. As has been already observed, there is, in such cases, not merely confidence tendered and accepted, but some sort of business consideration, though this be a mere courteous interchange of accommodations. For these and other reasons noticed under the last head, the carrier is bound to exhibit the same diligence and skill towards passengers of this class as he is to passengers who pay money for their tickets." Again, the same author says, in section 354: "But if a trespasser take his seat openly in a carriage, in the

place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser, supposing him to continue such, is not withdrawn from the protection of that law which requires that no man shall negligently injure another, the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the carriage. If the carrier omits to do this, and if the person in question remains voluntarily with the carrier's assent, then the trespass passes into a quantum meruit contract of carriage. On the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage. On the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence, and skill which the carrier is bound to exercise towards all other passengers."

In Watson on Dam. for Personal Injuries, it is said, in section 280, p. 279: "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong of liability in damages therefor. 'The question how far a person can defend an otherwise indefensible act,' it has been said, 'by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result, generally reached, is that no man can set up a public or private wrong committed by another as an excuse for a willful, or unnecessary, or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases.'" The same author further says, in section 238: "The liability of the owners of a steamboat for injuries to a passenger is not affected by the fact that the person injured was, at the time the injuries were received, engaged in an excursion with other passengers upon defendants' steamboat in violation of the Sunday law. One traveling on Sunday in violation of a statute prohibiting is not, by reason thereof, without the protection of the law. The carrier owes him the same duty as if he were lawfully traveling, and is liable in damages for personal injuries resulting from a failure to perform it." In section 231 the author adopts the language of an able and elaborate opinion by Dixon, C. J., in *Sutton v. Wauwatosa*, 29 Wis. 27, 9 Am. Rep. 534, as follows: "Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect,

the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the state, and thus to impose upon him a penalty many times greater than what those laws prescribed. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail. It would extend the maxim, 'Ex turpi causa non oritur actio,' beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and overrigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it."

In 3 Thompson's Law of Neg. § 3326, it is said: "It is thoroughly settled in the American law that a common carrier of passengers cannot, by a contract with one who is a passenger for hire, relieve himself from liability for damages caused by the negligence of himself or his servants." The same author says, in section 3328: "The principle is well settled that a carrier owes the same duty of protection to a simply gratuitous passenger as to a passenger for hire."

In Buswell on Law of Pers. Injuries, the author, in laying down the rule that a breach of public duty is the foundation of the action for personal injuries, says, in section 3: "The custom of the realm of England, long made a part of the common law, imposes upon common carriers of passengers certain public duties in respect of such passengers, for a breach of which a passenger injured may have his remedy by an action of tort." Again, the author says, in section 116: "In the United States the weight of authority is in favor of the rule that, as to passengers for hire, the stipulation by a common carrier that he will not be liable for damages in case of injury to the passenger will not relieve him from responsibility for the results of the negligence of himself and his servants." Again, the same author says, in section 117: "If a common carrier accepts a person as passenger, there being no contract to relieve the carrier from the legal consequences of his negligence in the case of accident, it is held generally, in the United States, that the carrier remains liable for such negligence, although the plaintiff was to be transported gratuitously. For, having admitted the plaintiff to the rights of a passenger, the defendant is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to all his passengers."

In 2 Parsons on Contracts, the author, after referring to various authorities, says, on page 222: "Whether a common carrier is liable to a passenger to whom he has given passage, and from whom he has therefore no right to demand fare, is not so certain; but he would certainly be liable for gross negligence, and probably liable for any negligence.

He is certainly not excused by mere nonpayment, unless payment has been demanded and refused." In note "x" it is said: "It is now quite generally held that for negligence there is the same liability to persons riding on free passes as to those who pay full fare."

In 2 Wood on Railroads it is said, on page 1207: "In all cases where the company is required by law to carry a person free, or where he is riding free by the consent of the company fairly obtained, he is a passenger, and entitled to all rights and privileges as such. In the case of a free pass the carrier is under the same obligations as to care and vigilance as he is to a passenger for hire, and as to passengers to whom passes are given which are predicated upon any consideration he cannot absolve himself from liability for injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against the policy of the law. It has been held, however, that, when tickets or passes are purely gratuitous, the person receiving may by special agreement assume all risks of the journey incident to the mere negligence of the company."

In Whitaker's Smith on Negligence, while the text does not seem to treat the subject, there are full notes on page 306 showing that the rule is that a common carrier "must exercise the same care and attention in the transportation of gratuitous passengers as of those who have paid their fares, and is liable to the same extent for negligence."

These authorities tend to show that this rule is generally held even in the face of express stipulations of exemption, and universally so in the absence of such stipulations.

In 4 Elliott on Railroads it is said, in section 1497: "The rule, supported by the weight of authority, is that a common carrier cannot by any kind of a contract exempt itself from liability as such for loss or injury occasioned by its own negligence or that of its servants. This rule rests upon considerations of public policy, and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking." The employment of a common carrier is a public one, and the fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. For this reason they are held to the extraordinary liability of insurers. To permit them to contract against liability for their own negligence or that of their servants would be contrary to the whole spirit and policy of the law governing common carriers, and would, in effect, authorize them to abandon the most essential duties of their employment. When we also consider that the parties do not stand upon an equal footing, and that railroad companies are given many special privileges as corporations for the very reason that they have such duties to perform for the public, there can be no

doubt of the justice of this rule, especially as applied to such corporations." The same author says, in section 1578: "We think it is safe to say that the general rule is that every one on the passenger trains of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger. * * * Persons who pay a consideration for passage, no matter in what form, are generally regarded as passengers." And again, in section 1004, he says: "The general rule is that a person riding on a railway train on a free pass, the possession of which was lawfully and rightfully obtained, is a passenger. The possession of the pass must be lawful, for, if it was obtained by fraud or the wrong of the person attempting to use it, he is not a passenger, and the carrier owes him no duty as such." And again, in section 1606, he says: "But where the person riding on a pass is regarded as a passenger, the carrier usually owes to him the same degree of care that it owes to a passenger paying full fare." Again he says, in section 1608: "Passes usually contain a stipulation which in terms exempts the carrier from liability for negligence. As to the validity of such stipulations the authorities are not agreed, some holding that they are valid and binding upon the persons using the pass, others that they are not. In the majority of the states the courts hold that such a stipulation is void and not binding upon the person using the pass, and that the carrier is liable for injuries negligently inflicted upon a person using a pass containing such a stipulation." Again he says, in section 1609: "The relation which the person using the pass bears to the railroad company is also an important element in determining the liability. If he is regarded as a passenger, then the company is bound to use the highest practical degree of care, and for a failure to use such care it will be liable for all injuries approximately caused thereby. But where the person using the pass is an employé, then the carrier will only be liable for such injuries as result from negligence in failing to perform the duties owing to such employés. * * * The general rule is that, where the holder of the pass is to be regarded as a passenger, any act of negligence may give a right of action."

We cannot better close these citations than by the following clear and terse statement of the principles from 2 Shearman & Redfield on Negligence, which is fully sustained by the authorities we have examined. The eminent authors say, in section 491: "It is well settled that, in the absence of a special contract, a passenger traveling gratuitously has a perfect right of action for injuries suffered by him through the carrier's negligence. The fact that a traveler who ought to pay has not paid and does not intend to pay his fare does not, in the absence of actual fraud, deprive him of redress for injuries. There is no practical difference between the de-

gree of care which a free passenger has the right to claim, and that to which a paying passenger is entitled."

To our minds these authorities, taken in connection with the cases cited in them, are conclusive of the questions before us. The greater weight of authority is decidedly in favor of the doctrine that a common carrier cannot in any event stipulate against its own negligence, including that of its servants, while it is overwhelming to the effect that, in the absence of such stipulations, it owes to a gratuitous passenger the same degree of care that it does to those that pay. In the case at bar the plaintiff appears to have been a bona fide passenger, and was so recognized by the conductor in charge of the train. Both are conclusively presumed to have known that the contract for a pass was illegal and void, but there is no evidence that either acted in fraud or bad faith. There is evidence that the plaintiff gave some consideration, although legally inadequate; but in any event the worst position in which he can be placed is that of simply a gratuitous passenger. There were no existing stipulations of exemption between him and the defendant. None had ever existed, except the conditions on the back of the pass. These conditions can have no effect, because, in the first place, the pass had expired, and, secondly, had no legal existence before its expiration. A condition, like the leaf on a tree, must be attached to something from which it can draw its life and strength. By practically all the authorities, in the absence of such express conditions, the plaintiff is held entitled to recover. What would have been the legal effect of such conditions if they existed is not strictly before us. We have shown that the decided weight of authority is against their validity, but we did so to show that, if the liability of a common carrier to a gratuitous passenger could not be waived by an express stipulation, it certainly existed in the absence of any such stipulation. Even those courts that hold it may be waived, necessarily admit its existence in the absence of waiver. If it exists in the absence of contract, and cannot be waived by contract, it must necessarily owe its existence to the policy of the law.

It is contended in behalf of the defendant that there was error in the court below refusing to charge "that there is no evidence to support the plaintiff's allegation [in the complaint] that he was traveling on the defendant's road, on the occasion complained of, as a passenger for hire or compensation." We see no error in its refusal, as, in our view of the case, it was immaterial.

The defendant also contends that its exception to the following charge of the court should be sustained, to wit: "If, when the plaintiff was called on for his fare, he produced to the conductor the pass which had been exhibited in evidence, and the conductor accepted it, the plaintiff was a passenger on the train." We think that whatever error

may be found in this instruction is harmless. The pass was in legal effect a blank piece of paper. It had expired by its own limitation, if that can be said to have expired which has never legally existed. Its only effect could have been to convince the conductor of the truthfulness of the plaintiff's statement that he had a contract with the company under which he was entitled to ride free. The result seems to have been his acceptance as a passenger by the conductor, who, being in control of the train, is in the very nature of things the only officer or servant of the company who can accept a passenger. He is charged with that duty by the defendant, who must therefore abide the consequences of his act, especially as there is no evidence of fraud or deception on the part of the plaintiff. The evidence tends to prove that the plaintiff was on the train as a bona fide passenger under an agreement for so-called "free transportation," but ready to pay his fare if demanded. The fact that the previous contract was illegal, and no fare was either demanded or paid, can have no further effect than to reduce the plaintiff to the condition of a merely gratuitous passenger, having no binding contract, and therefore subject to no limitations of liability. As such we now think he was entitled to recover. The petition to rehear is allowed, and the judgment below affirmed.

Petition allowed.

CLARK, O. J. (dissenting). This is a petition to rehear this cause and reverse our opinion filed therein. 132 N. C. 510, 44 S. E. 34, 95 Am. St. Rep. 641. That opinion is itself a precedent, and to be set aside, like any other precedent, only upon good cause shown. We have had the benefit of full and able argument upon both hearings, and find, after diligent re-examination of the argument and the authorities, that our former decision is in accord with our own precedents and those to be found elsewhere.

The complaint alleges that on 6th April, 1900, "the plaintiff being a passenger on said defendant road," he was injured by the derailment of the car in which he was riding, caused by the negligent construction of the roadbed and the negligent failure of the defendant to provide sufficient crew for said train, and its negligent failure to use such air brakes and other machinery as were necessary to the safe and proper operation of said road. There is no allegation of willful and wanton injury, nor proof of such. The complaint alleges that "the plaintiff was a passenger on said railroad for compensation, * * * the defendant having contracted and agreed to carry the plaintiff between said stations for a valuable consideration," and for a negligent breach of such contract of safe carriage this action is brought.

The plaintiff testified that he was editor of a newspaper; that when called on by the conductor for his fare he told him he had a pass for 1899, and showed it to him; that in 1899

he had made a contract with the defendant to publish its time-table in his paper as consideration for the pass, and the defendant had agreed to continue the contract and renew the contract; that he told the conductor he would pay the regular fare if he wanted it, but the conductor accepted his statement and took him as a passenger without payment of fare or ticket, on the strength of the alleged renewal by the company of the contract of 1899. Such contract was illegal, and is forbidden, under the authority of the lawmaking power in this state, under a penalty of "not less than one thousand dollars nor more than five thousand dollars" against the company, and, this not being a valid but an illegal transaction, the plaintiff cannot be accessory to and participate in such act and then ask a court of justice to give him damages for the defendant's negligence in executing such illicit arrangement.

The General Assembly has declared that public policy forbids discrimination in the exercise of their quasi public duties by common carriers, and, as was said by us in this case, 132 N. C., at page 512, 44 S. E. 35, 95 Am. St. Rep. 641, "nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year current. It does not appear what was the value of the advertising done, charging for the space at the rates as would be charged others, but, let it be what it may, it could not amount exactly, 'neither more nor less,' to the value of a free pass to travel ad libitum an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit and not payable in money." We need not repeat the discussion and construction of this statute as laid down in the able and exhaustive opinion of Mr. Justice Montgomery in *State v. Railway*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246, and in the very able opinion of Mr. Justice Douglas in that case, in which he referred to evidence of \$250,000 of free transportation being given away annually in this state, the cost of which was necessarily considered in fixing the rates charged the unprivileged many. That opinion and subsequent ones have been long published, and the Legislature has not seen fit to change the statute by making editors "a privileged class," who can ride free or on credit, with rates unknown, and thus have the cost of their transportation added to the price of transportation charged the public at large. One ground for this legislation is that discrimination in rates gives these corporations improper weight and influence, and this applies with as much force at least to discriminations and favors to editors as to others. The court at last term, in *Greenleaf*

v. Bank, 133 N. C. 292, 45 S. E. 638, held that lawyers and judges were not a privileged class, and we cannot hold that editors are, unless the General Assembly shall give them special privileges as to free or reduced transportation which is forbidden to the public generally.

Either (1) the plaintiff, having produced no ticket nor paying cash for his transportation, was on the train without authority of any contract, in which case, by all the authorities, he was entitled to what is known as "ordinary care," and hence can recover no damages unless there was willful and wanton injury (which in this case is neither alleged nor shown)—*Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 899, 44 L. R. A. 816; *Cook v. Railroad*, 128 N. C. 333, 38 S. E. 925; *Lewis v. Railroad*, 182 N. C. 382, 43 S. E. 919; *Higley v. Gilmer* (Mont.) 35 Am. Rep. 450; *Hendryx v. Railroad*, 45 Kan., at page 379, 25 Pac. 893, and cases there cited; *Railroad v. Burnsed* (Miss.) 12 South. 958, 35 Am. St. Rep. 656; *Railroad v. Mehlsack* (Ill.) 22 N. E. 812, 19 Am. St. Rep. 17; *Reary v. Railroad* (La.) 3 South. 390, 8 Am. St. Rep. 497; *Railroad v. Mecham*, 91 Tenn. 428, 19 S. W. 232; *Whitehead v. Railroad*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409—for neither the conductor nor the company could give legal assent to his riding contrary to law, without payment of fare, and his condition was that of a trespasser, not being a passenger.

Or (2) the plaintiff, as he alleges in his complaint, sues for injuries sustained by breach of the contract of safe carriage caused by negligence of the defendant, and one of his prayers for instruction is based upon the theory that the plaintiff was a passenger for hire and compensation. In such case the rule is thus stated (1 *Sutherland, Damages*, § 5 [3d Ed.]): "It may be assumed as an undisputed principle that no action will lie to recover a demand or a supposed claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing and depending in any degree upon an illegal agreement to which he was a party"—citing numerous cases. Judge Sutherland further says that: "A bank is not liable for failure to perform its contract to lend or advance money to be used in speculating in futures. *Moss v. Bank*, 102 Ga. 808 [30 S. E. 267]. The sender of a telegram relating to a gambling contract in stocks cannot invoke such contract, or the loss or gain resulting from it, to measure the damages sustained in consequence of its nondelivery. *Morris v. Tel. Co.*, 94 Me. 423 [47 Atl. 926]." In *Griswold v. Waddington*, 16 Johns. 489, Chancellor Walworth says, at page 486: "The plaintiff must recover upon his own merit, and if he has none, or if he discloses a case founded upon illegal dealing and founded on an intercourse prohibited by law, he ought not to be heard, whatever the demerits of the defendant may be. There is, to my mind, something monstrous in the proposition that a court of law ought to carry

into effect a contract-founded on a breach of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books." In *Bowman v. Phillips* (Kan.) 21 Pac. 230, 3 L. R. A. 631, 13 Am. St. Rep. 292, it is held: "The courts will not enforce illegal contracts, nor any supposed rights founded thereon, but will leave the parties and those in pari delicto where they find them." In *Oscanyan v. Arms Company*, 103 U. S. 261, 26 L. Ed. 539, an action for damages for breach of contract, the court held that when such contract is void, because against public policy or in violation of law, the court will nonsuit the plaintiff. In *Phalen v. Clark* (Conn.) 1 Am. Rep. 253, the court held: "Where the plaintiff requires any aid from an illegal transaction to establish his demand, he must fail."

In *Welch v. Wesson*, 6 Gray, 505, it is said: "It may be assumed as an undisputed doctrine that no action will lie to recover a claim for damages if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon the illegal act to which he is a party." In *Pullman v. Transportation Co.*, 171 U. S., at page 150, 18 Sup. Ct. 813, 43 L. Ed. 103, Mr. Justice Peckham quotes with approval from Lord Mansfield in *Holman v. Johnson* (decided in 1775) 1 Cowper, 341: "The objection that a contract is immoral or illegal * * * sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of public policy. * * * The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." It can make no difference whether the action is to recover upon such contract, to enforce specific performance; or (as here) to recover damages for breach thereof. The precise point here presented has been three times passed upon in this court, not only in the case here sought to be reversed, 182 N. C. 510, 44 S. E. 34, 95 Am. St. Rep. 641, but in two other cases. In *Turner v. R. Co.*, 63 N. C. 522, it was held that where a soldier contracted with a railroad for transportation to Johnston's army, and was injured en route by negligence of the company, he could not recover damages (though there the contract was legal when made), Reade, J., saying that, the contract being illegal (in the purview of the court trying the action), the parties were in pari delicto, and the court "would consult its dignity and not interfere in their dispute." Exactly the same decision was made in *Wallace v. Cannon*, 88 Ga. 199, 95 Am. Dec. 385; *Martin v. Wallace*, 40 Ga. 52; *Redd v. Railroad*, 48 Ga. 102; *Railroad v. Redd*, 54 Ga. 33—in all which the court held, as in 40 Ga. 55: "While so engaged, the parties were in pari delicto, and the courts * * * cannot lend

their aid to assist either in the case of injury sustained by the negligence or misconduct of the other." Another case in this state is *Waters v. Railroad*, 110 N. C. 333, 14 S. E. 802, 16 L. R. A. 834, where the court hold (at page 342, 110 N. C., 14 S. E. 802, 16 L. R. A. 834) that, where the illegal purpose of the shipper or passenger enters into the consideration of the contract of transportation, the railroad is exempt from liability for negligence, meaning, evidently, that the court will not take jurisdiction of such controversies. Here both parties participated in the illegal purpose of transporting the plaintiff, contrary to law, without payment of fare, and, as in the above cases, "while so engaged the parties were in *pari delicto*, and the courts cannot lend their aid to assist either in the case of injury sustained by the negligence or misconduct of the other." It is immaterial whether the plaintiff had in his pocket a free pass from the president of the railroad company, or was allowed by the conductor to ride illegally, without payment of fare, in consideration of the plaintiff's statement that the company had promised to renew the pass. The conductor, no more than the president, could give the plaintiff the legal right to ride free, unless the plaintiff came within one of the excepted classes entitled to that privilege, as railroad employes and officials, charity cases, and the like. It was an illegal contract equally whether made by the conductor or the president. Whether the conductor had the legal right to bind the company by his action, so as to subject it to the penalty denounced by the statute, is not before us. But if he had not, then the plaintiff had no claim to a contract of passage on that ground, and comes under the first head above, not being a passenger, and could only recover for willful and wanton injury.

The point here presented is well settled in the text-books, and, by decisions in other states, that the plaintiff cannot recover when he is negligently injured while on the train without any valid contract of carriage, i. e., when he is a licensee or trespasser. In such cases he can only recover if wantonly and willfully injured, or, as it is sometimes styled, for "gross negligence," which is the synonym for "willful and wanton injury," in those cases. *Bouvier, Law Dict. (Rawle's Rev.)*, "Passenger," says that a passenger is "one who has taken his place in a public conveyance by virtue of a contract for the purpose of being transported from one place to another on the payment of fare or its equivalent [*Bricker v. Philadelphia & R. R. Co.*] 182 Pa. 1 [18 Atl. 983, 19 Am. St. Rep. 585]. * * * A carrier is not liable to one who rides by stealth [*Railroad v. Michie*] 83 Ill. 427, or who is a trespasser [*Muehlhausen v. St. Louis R. Co.*] 91 Mo. 332 [2 S. W. 315], although invited to ride by an employe of the carrier [*Railroad v. Campbell*] 76 Tex. 174 [13 S. W. 19], or a voluntary assistant to an express messenger or mail clerk [*Union Pac. Ry. Co. v. Nichols (Kan.)*] 12 Am. Rep.

475, or a newsboy permitted to ride free [*Flower v. Pennsylvania R. Co.*] 69 Pa. 210, 8 Am. Rep. 251; [*Snyder v. Hannibal & St. J. R. Co.*] 60 Mo. 413." Certainly the plaintiff, who was on this train by an arrangement denounced by the statute, under a penalty of "not less than \$1,000 nor more than \$5,000 fine," is not in so good a situation as those above named as debarred of recovery.

Hutchinson on Carriers, § 555, says: "To be entitled to the right of a passenger, the plaintiff who sues for an injury occasioned by the negligence of the company must have been lawfully upon its train;" and that if sued for the injury it can defend upon the ground that the plaintiff had induced the servants of the company to carry him upon a ticket on which he had no right to ride. 2 *Minor's Wood, Railways* (2d Ed.) 1213, instances, among persons not entitled to recover for negligent injuries, one "who, contrary to the rules, gets on a freight train, even with the assent of the conductor, and pays no fare, or a trespasser upon a regular passenger train." If the assent of the conductor does not make him a passenger when riding contrary to the rules of the company, such assent cannot set aside a statute forbidding the plaintiff to ride without paying fare. 3 *Elliott, Railroads*, § 1255, says: "A railroad company owes trespassers no contract duty. Indeed, it owes them no duty except not to willfully injure them." 1 *Fetter, Passengers*, § 240, uses almost the same language: "The only duty due by a railroad company to one who is an intruder or trespasser on its trains is to refrain from wantonly, willfully, or intentionally injuring him. It is not liable for an injury caused by the mistake, inadvertence, or negligence of its employees." 2 *Shear. & Red. Neg.* § 489, holds that "one who, by collusion with a servant of the carrier, rides without intending to pay fare, * * * does not bring him into contract relation with the company so as to make it liable to him as a passenger." To same purport, *Thomp. Carriers*, 43. *Booth, Street Railways*, § 326, says: "The duty of a common carrier does not extend to the personal safety of one who is not actually a passenger;" and the same work, at section 335: "Newsboys who enter street cars for the purpose of selling papers are not passengers, but mere licensees, who assume all the risks of ordinary negligence on the part of the company's servants." Certainly the newsboys who are legally on the car with the assent of the company cannot have greater rights than this plaintiff, who was riding without payment of fare, in violation of law. *Bishop, Noncontract Law*, § 60, says: "If the negligent running of a railroad train injures one who is on it without right, he can recover nothing." 2 *Jagard, Torts*, 1081, says, "When no consideration is paid, though the plaintiff was aboard the train by the invitation or request of defendant's employes, he cannot recover for negligence," citing numerous cases.

All the above are based upon the idea that no one can recover for negligent injuries unless a passenger, and that no one is a passenger unless there is a legal contract, express or implied—a legal obligation to convey him. The above citations from text-books are amply sustained by authorities, among which: "A railroad company owes no duty to a trespasser on its trains, except to abstain from wantonly or maliciously injuring him." *Railroad v. Harris*, 71 Miss. 74, 14 South. 263. "One who is allowed by the conductor to ride as an assistant express messenger without paying fare, under a misapprehension of the conductor that he need not pay, cannot recover damages for injuries sustained by negligence of the carrier." *Union Pac. Ry. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475. In the very interesting opinion by Judge Valentine, he says: "The conductor did not attempt to confer upon the plaintiff any right to ride upon that train, but simply left the plaintiff with the right which he supposed the plaintiff already had, independent of any authority from himself"—the same facts as in this case, though under our statute the conductor could confer no right to ride free when the company itself was prohibited by statute from doing so. In *Railroad v. Meachem*, 91 Tenn. 423, 19 S. W. 233, it is held that the company is not liable for injuries sustained by a trespasser or intruder upon its trains, "except to refrain from willfully, wantonly, or intentionally injuring him," and defines a trespasser as one who rides without payment of fare or authorized invitation. In *Railroad v. Beggs*, 85 Ill. 84, 28 Am. Rep. 613, the same ruling as to nonliability was made as to one riding illegally upon a free pass which had been issued to another person, and this has been cited and affirmed in *Railroad v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17. The pass there used was not more illegal than the pass which the plaintiff in this case presented. *Eaton v. Railroad*, 57 N. Y. 382, 15 Am. Rep. 513, held that one not lawfully upon the train, as one riding upon a freight train, could not recover for negligent injuries, though upon the train by the invitation of the conductor. In *Railroad v. Campbell*, 76 Tex. 174, 13 S. W. 19, it was held that one injured negligently while riding on a freight train could not recover because unlawfully there; and the same ruling was made, and on the same ground, as to one injured while riding upon the engine by permission of the engineer. *Railroad v. Michie*, 83 Ill. 427. The plaintiff in the present case was not lawfully upon the train, it being forbidden by law to carry him without prepayment of fare, and neither the conductor nor the company had authority to receive him on the train without it. In *Condran v. Railroad*, 67 Fed. 522, 14 C. C. A. 506, 23 L. R. A. 749, it is held that one who wrongfully evades payment of fare cannot recover for injuries unless wantonly and willfully inflicted.

In *Railroad v. Berry*, 53 Kan. 112, 36 Pac.

53, 42 Am. St. Rep. 278, it is held that one riding upon a railroad train merely by permission of the conductor and without payment of fare cannot recover for personal injuries like a passenger, affirming *Railroad v. Wheeler*, 35 Kan. 185, 10 Pac. 461. In *McVeety v. Railroad* (Minn.) 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728, it is held that one "who knowingly induces the conductor of a railway company to carry him without charge" cannot recover as a passenger. In *Williams v. Railroad* (Miss. 1895) 19 South. 90, it was held that one illegally riding free by consent of the conductor could not recover, and the same was held in *Railroad v. McAfee* (1893) 71 Miss. 70, 14 South. 260, as to one riding free by collusion with the railroad crew and beaten by them. The latter case is put on the ground of *in pari delicto*—that he had "participated in the violation of duty."

One riding on a train illegally, for instance, contrary to a rule of the company known to him, though with permission of the conductor, cannot recover for injuries sustained by negligence. *Purple v. Railroad*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; *Railroad v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Greenfield v. Railroad* (Mich. March, 1903) 95 N. W. 546. "The only duty a common carrier owes to one not a passenger is not to injure him wantonly." *Hendryx v. Railroad* (Kan.) 25 Pac. 893. "One riding on a railway train free of charge, by invitation and permission of the conductor, is not a passenger so as to entitle him to recover for injuries received." *Stalcup v. Railroad* (1897) 16 Ind. App. 584, 45 N. E. 802. And there are numerous other decisions to the same effect.

The bed-rock principle deduced from all the decisions and text-writers is that an action for injuries for negligence of a common carrier is an action of tort arising on contract, and can never be sustained except when there is a breach of a legal and valid contract of safe carriage; that, as to torts not arising out of contract, recovery can only be had when the injury was inflicted wantonly and willfully. This is sound in principle, and well settled, if any principle can be settled by precedent.

Taking it in the most favorable light for the plaintiff, he was riding on an extension of an illegal pass. That being so, upon the authorities in our state and those from other states and text-writers above cited, the plaintiff cannot recover damages sustained by the negligent breach of such illegal contract of carriage. There are other authorities to the same purport. In Massachusetts, where traveling on the Lord's Day, except from necessity or for purposes of charity, was made illegal, it was held in an opinion by that eminent lawyer, Shaw, C. J., in *Bosworth v. Swansey*, 10 Metc. 363, 43 Am. Dec. 441, that one so traveling illegally could not recover damages caused by a defect in the highway; and to the same purport is *Conolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396, and *Davis v.*

Somerville (1880) 128 Mass. 594, 35 Am. Rep. 399. The same was held as to recovery of damages sustained by negligence of a street car company by one traveling thereon on Sunday (*Stanton v. Railroad*, 14 Allen, 485), and as to one negligently injured at a railroad crossing while illegally traveling along the public road on Sunday (*Smith v. Railroad*, 120 Mass. 492, 21 Am. Rep. 538). In *Gregg v. Wyman*, 4 Cush. 322, it was held that the owner of a horse, who let him for driving on Sunday, against the statute, could not recover damages for the death of the horse by immoderate driving, because the parties were in *pari delicto*, the court saying its conclusion "is fully sustained by numerous decisions both in England and the various states of the Union," many of which it cites, and the same is held in *Way v. Foster*, 1 Allen, 408, and *Parker v. Latner*, 60 Me. 529, 11 Am. Rep. 210. In *Lyons v. Desotelle*, 124 Mass. 387, it was held that one traveling on the Lord's Day in violation of the statute, and who had fastened his horse at the side of the road, could not invoke the aid of the courts to recover damages for injuries to his horse, caused by the negligent act of another in driving against it. In *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119, it was held that one injured by the negligence of the defendant while clearing out a wheel pit, though gratuitously and as an act of kindness, on the Lord's Day, could not recover damages, because participating at the time the injury was sustained in an act in violation of law. In *Wallace v. Navigation Co.* (1883) 134 Mass. 95, 45 Am. Rep. 301, it was held that one sailing his yacht on Sunday, in violation of the statute, could not recover damages for being negligently run into by a steamboat, because he was there in violation of law, as the plaintiff was in this case. These decisions are uniform in that state till changed by statute as to injuries from common carriers (*St. 1877, p. 629, c. 232*), which provides that the general statute (chapter 84, § 2) "prohibiting travel on the Lord's Day shall not constitute a defense to an action against a common carrier of passengers for any tort suffered by a person so travelling." There is no statute in North Carolina taking away from common carriers the defense of *in pari delicto* in case of one traveling on a free pass. The defendant relied on *Carroll v. Railroad*, 58 N. Y. 126, 17 Am. Rep. 221, where it was held that the plaintiff, injured on a ferryboat while traveling on Sunday, contrary to the statute, could recover; but the court put its decision on the ground (page 182, 58 N. Y., 17 Am. Rep. 221) that if the plaintiff was going in a case of necessity or charity he was not traveling illegally, and, as the defendant had the right to carry him and to enforce payment of the fare, if the illegal purpose of the plaintiff was unknown to the defendant, the latter made a valid contract of carriage, and was liable for negligence in executing it. Here the plaintiff solicited the illegal carriage by say-

ing his pass had been renewed, and the conductor acted upon it. Both parties knew of the illegality.

In *Smith v. Rollins*, 11 R. I. 464, 23 Am. Rep. 509, where a livery stable keeper let his horse for driving on Sunday, contrary to the statute, and the other party drove to a different place and brought the horse back damaged, it was held that the plaintiff could not recover, the court saying (page 472, 11 R. I., 23 Am. Rep. 509): "If the tort cannot be made to appear without proof of the contract, certainly the contract can hardly be considered immaterial, or as not affecting the liability of the defendant, even though it may not be a part of the cause of action." In *Holcomb v. Damby*, 51 Vt. 428, the court says (page 435), affirming previous cases: "It has been repeatedly held in this state that, if a party sustain injury by reason of the insufficiency in the highway while such party is traveling in violation of the statute, he cannot recover of the town for such injury." In *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290, it was held that the plaintiff could not recover damages for the alleged seizure of his whisky if he was keeping it for sale in violation of law.

Among many cases holding that a party participating in an illegal act cannot obtain from the court relief for an illegal act or neglect of the other party, if such conduct of the defendant cannot be shown without showing the precedent conduct of the plaintiff in violation of law, is *Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 384, 44 N. E. 353, which held that a county treasurer loaning out county funds contrary to law cannot maintain an action to recover them back. *Haggerty v. Ice Co. (Mo.)* 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647, holds that, where it is contrary to law to have game in possession during the "close season," one who has deposited game, in violation of the statute, with a cold-storage company, "cannot recover damages for violation of the contract or for negligence in its performance," the court saying the complaint shows "that the plaintiff contracted with the defendant corporation for the commission of a misdemeanor. * * * The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to the suit where it finds them, unsanctioned by its favor and unaided by its process." That case is identical in principle with this, the plaintiff having committed no misdemeanor, but having procured the defendant to contract to do an indictable act, as in this case.

Upon similar grounds, in *Kitchem v. Greenbaum*, 61 Mo. 110, it was held that the plaintiff could not recover a prize drawn on a lottery ticket, upholding the maxim, "*In pari delicto potior est conditio defendentis et possidentis*"; not that the defendant has right on his side, but because the court will help neither party to an illegal transaction. In *Youngblood v. Trust Co. (Ala.)* 12 South. 579,

20 L. R. A. 58, 36 Am. St. Rep. 245, it was held: "No rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred, and all contracts which are made in violation of a penal statute are absolutely void." In *Brewing Co. v. Wall*, 98 Mich. 158, 57 N. W. 99, it was held that a liquor dealer doing business in violation of the statute could not recover damages for violation of a contract by a company to make him its exclusive agent in that locality. The plea that he could legally buy, though he could not legally sell, was overruled on the ground that he was buying to illegally sell. In *Kelly v. Courter*, 1 Okl. 277, 30 Pac. 372, it was held that a tenant selling liquor in violation of law could not recover damages to such liquor caused by the failure of the landlord to supply ice as agreed, the court resting its decision upon a citation from *Ewell v. Daggs*, 108 U. S. 146, 2 Sup. Ct. 412, 27 L. Ed. 682, that the law will not lend its aid where the contract "appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land (Broom's Leg. Max. 108)"—which was the case in this transaction now before the court. The Oklahoma court neatly sums up thus: "The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Many cases to like purport could be added, but it is useless to multiply authorities upon a principle so well settled in the law and in reason.

The same general principle that no action can be sustained if based in any wise upon an illegal contract which must be put in evidence—*ex turpi causa actio non oritur*—is supported by all the precedents in this court in which a contract was necessarily alleged, as in this case. *Basket v. Moss*, 115 N. C. 448, 20 S. E. 738, 48 L. R. A. 842, 44 Am. St. Rep. 463; *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; *Griffin v. Hasty*, 94 N. C. 438; *Covington v. Threadgill*, 88 N. C. 186; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Whitaker v. Bond*, 63 N. C. 290; *Carter v. Greenwood*, 58 N. C. 410; *McRae v. Railroad*, Id. 395; *Ingram v. Ingram*, 49 N. C. 188; *Ramsay v. Woodard*, 48 N. C. 508; *Allison v. Norwood*, 44 N. C. 414; *Sharp v. Farmer*, 20 N. C. 255; and "there are others." The plaintiff cannot recover for negligence without showing he was on the train under a valid contract of carriage, and the contract he shows is one against public policy, and makes at least one of the parties indictable. Whether the other party is not also indictable as an accessory in procuring such violation of law is an interesting question, but not now before us.

The plaintiff's allegation is that he was on the train by virtue of his contract for a free pass. Such transaction being a discrim-

ination, as above shown, the penalty denounced by the statute upon the common carrier for such violation of law is a fine "not less than one thousand dollars nor more than five thousand dollars," and the penalty of the law upon the other party is that, if negligently injured during such illegal transportation, he cannot recover in the courts, since he must put forward such illegal transaction as the basis of his action. If his own act was not indictable, he procured an act by the defendant which was a misdemeanor, and obtained transportation thereby. A court of equity will not interfere with a contract, if it be illegal and against state policy, where the contractors are in *pari delicto*. *Taylor v. McMillan*, 123 N. C. 398, 31 S. E. 730, citing *Grimes v. Hoyt*, 55 N. C. 271. If there was no contract of carriage, the plaintiff had no rights as a passenger, but only the right to be protected against wilful and wanton injury, which is not alleged here. If he had any contract, it was one void under our decisions, being forbidden by statute and against public policy, and he is in no better condition.

The former judgment of this court ordering a new trial should be affirmed, and the petition to rehear dismissed, upon at least three other grounds, not heretofore discussed, because not deemed necessary. It was error to refuse the defendant's prayer that, if the free pass were legal, the plaintiff was estopped from recovery because of the stipulation upon the back of the pass releasing the company from liability for negligent injuries sustained while riding thereon. While there has been some conflict in authorities upon this point (4 *Elliott on Railroads*, § 1808; 2 *Jaggard on Torts*, 1082), the Supreme Court of the United States, in a recent and well-considered opinion, filed February 23, 1904 (*Railroad v. Adams*, 24 Sup. Ct. 408, 48 L. Ed. —), holds that such stipulation is valid, and cites an array of precedent showing that it is sustained by the overwhelming weight of authority. That opinion says: "But one answer can be made to the question. The railroad company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. If he had desired to hold it to its common-law obligations as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and, having accepted that privilege, cannot repudiate the conditions." The reason—the waiver of the common-law right to recover for negligence—applies equally here, where there was no valid contract of carriage at all, the plaintiff choosing by an illegal arrangement to become a mere licensee or trespasser. It would be strange if one claiming passage upon an illegal contract, which

embraced as a part of it a release from liability for negligence, could recover when the bearer of a legal free pass with the same stipulation cannot recover.

In a still more recent case in the United States Supreme Court, *Boering v. Railroad*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. —, it is said that a stipulation in a free railway pass requiring the user to assume the risk of injury due to carrier's negligence is binding on the person accepting the privilege, although notice of such stipulation may not have been brought home to such person. For a stronger reason it applies to the plaintiff, who testified that he knew of such stipulation. For a stronger reason still, whatever different ruling to above may have been in some courts as to persons injured while riding on legal free passes, the plaintiff cannot invoke them as authority when asking for transportation and accepting it on an illegal free pass which had expired. The conductor had no right to receive him as a passenger, and plaintiff was fixed with knowledge of such illegality, and is in no condition to ask the court for damages not inflicted wantonly and willfully. Irrespective of the validity or illegality of the free pass upon the alleged extension of which the plaintiff obtained transportation without payment of fare, the contract of the plaintiff himself on the back of the free pass, that in consideration of obtaining passage upon it he released the company from liability for injuries to his person, is an independent contract, valid and binding upon him, and of itself puts an end to this action. The pass was put in evidence, and the language on the back (adopted by the plaintiff by using the pass) is as follows: "The person accepting this pass assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, for an injury to the person or loss or damage to baggage of the person using it." Why is he not bound by it when he seeks to hold the defendant bound by the illicit contract of carriage, for it is only when there is a contract of carriage that plaintiff can recover for damages caused by carrier's negligence, and not willfully and wantonly?

Jones, a witness for the defendant, testified that he sent the plaintiff the pass as a gratuity, upon his application; that he paid nothing for it; that there was no contract to publish the time-table; and that he made no agreement to renew the pass when it expired. The defendant asked the court to charge "that there is no evidence to support the plaintiff's allegation [in the complaint] that he was traveling on the defendant's road, on the occasion complained of, as a passenger for hire or compensation." It was error to refuse this, for, whether the plaintiff's or the defendant's testimony was correct, whether the pass had been renewed or not, the plaintiff was not a "passenger for hire or compensation." *State v. Railway Co.*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246.

The defendant also excepted properly to this charge of the court: "If, when the plaintiff was called on for his fare, he produced to the conductor the pass which has been exhibited in evidence, and the conductor accepted it, the plaintiff was a passenger on the train." The pass on its face had expired, and there was no testimony that it had been renewed. The judge does not add the proviso "if it had been renewed," and, if it had not been, certainly it could not make him a passenger. On the contrary, if the plaintiff's own evidence was true that a pass was issued in consideration of publishing the time-table, and, further, that the defendant had agreed to renew it, this being an agreement to make a contract forbidden by our statute against discrimination, the plaintiff was equally not a passenger. In any aspect this instruction was erroneous.

The point here presented has been admirably discussed by Sanborn, United States Circuit Judge, in the recent case, above cited, of *Purple v. R. R.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, which holds: "One who, knowing that a conductor has no authority to grant free transportation, rides upon a train under an agreement, or tacit understanding, with the conductor that he shall ride free, is not a passenger, but a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury. A contract of carriage is indispensable to a recovery, and the implied contract from plaintiff's being on the train was conclusively negatived upon showing the illegal agreement to transport without payment of fare." Here the plaintiff was fixed with notice in law that neither the company nor the conductor could transport him without payment of fare. A still stronger case is *McGraw v. R. R.* (at this term) 47 S. E. 758, which holds that, though one has a ticket, he cannot recover for willful expulsion if the conductor erroneously, but reasonably, supposed he had no ticket. A fortiori, the plaintiff cannot recover when he had no ticket, which the conductor knew, and there was no force used, but merely negligence is averred.

MONTGOMERY, J. I concur in the dissenting opinion of the CHIEF JUSTICE.

(135 N. C. 651)

VANN v. EDWARDS.

(Supreme Court of North Carolina. June 1, 1904.)

MARRIED WOMEN—SEPARATE PROPERTY—DISPOSITION—CONSTITUTIONAL PROVISIONS—CONSTRUCTION—BILLS AND NOTES—PRESUMPTION FROM POSSESSION—GIFTS—QUESTIONS FOR JURY—APPEAL—LAW OF THE CASE.

1. Where by the Constitution a married woman is vested with the power of disposing of her personal property, that power cannot be divested or taken from her by any act of the Legislature.

2. In the construction of constitutions and statutes, technical words must be construed according to their legal definition, in the absence

if anything to clearly indicate that the words were not intended to be so used.

3. Const. art. 10, § 6, providing that the real and personal property of a married woman shall remain her sole and separate estate, and shall not be liable for any debts or engagements of her husband, "and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried," permits a married woman to dispose of her property by gift without the assent of her husband, except in those cases where a written instrument or conveyance is required by law for that purpose.

4. Const. art. 10, § 6, providing that the property of a married woman shall remain her sole and separate estate, and shall not be liable for any debts of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried, does not remove the incapacity which prevents a married woman from contracting debts or pecuniary obligations, but so far as the power to contract is concerned, the disability of coverture remains as at common law, except where changes have been made by statute.

5. Where on a first appeal the only question presented was whether defendant's possession of a note raised the presumption of payment, the Supreme Court was not precluded, under the doctrine of the law of the case, on a subsequent appeal, from passing on the validity of the indorsement of the note by defendant's mother to him.

6. Where defendant's mother, by indorsement and delivery of a note executed by defendant to her, made a gift of it to him, the fact that defendant's father at the time of his death had possession of the note would not of itself defeat defendant's title acquired by the gift.

7. Whether defendant's mother, by indorsement and delivery of a note executed by defendant to her, made a gift thereof to defendant, or whether the note belonged to defendant's father, who had possession of it at the time of his death, was a question for the jury.

Montgomery, J., dissenting.

Appeal from Superior Court, Hertford County; Justice, Judge.

Action by T. E. Vann, administrator of Darius Edwards, against D. K. Edwards. From the judgment for plaintiff, defendant appeals. Reversed.

See 39 S. E. 66; 40 S. E. 858.

L. L. Smith, for appellant. Winborne & Lawrence and Geo. Cowper, for appellee.

WALKER, J. This action was brought to recover the amount of two notes, one for the sum of \$450, and the other for the sum of \$500. We are concerned only with the latter note, as the other is not in controversy. The note for \$500 was executed by the defendant to his mother, Sarah F. Edwards, on the 8th day of June, 1888, and was payable eight years after its date, with 6 per cent. interest. The defendant, having admitted the execution of the note, avers that it was transferred, indorsed, and given to him by his mother, and he also avers that, if the transfer from his mother was void, he acquired title to the note by gift from his father. At the time the note was executed, and also at the time it was alleged to have been transferred to the defendant by his mother, Darius Edwards, the husband of Sarah F. Edwards, was living, and

did not assent to the transfer, and the same was made, if at all, without his knowledge, and with the belief, on the part of Mrs. Edwards and the defendant, that he would not assent to the transfer. There was evidence in the case tending to prove that after Mrs. Edwards' death the note passed into the possession of her husband, who survived her, and remained in his possession until his death. There was evidence, on the contrary, which tended to prove that, while the note was in the possession of Darius Edwards after the death of his wife, it was delivered by him to the defendant, who kept it until the death of his father, and had possession of it until this suit was brought, when it was handed by the defendant's wife to one of the defendant's attorneys. When the case was here before, it was held that the defendant's possession of the note after the death of his father, in whose possession it had been subsequent to the death of his wife, who was the original owner and holder of the note, would, if established, raise a presumption that such possession was lawful, and that he is the owner of the note, and a new trial was granted to the defendant because of an erroneous ruling in the court below upon this point. At the second trial an issue was submitted to the jury as to the ownership of the note, the plaintiff asserting title to it as the administrator of Darius Edwards. The jury found against the defendant, and, judgment having been rendered upon the verdict for the plaintiff, the defendant excepted and appealed. The only exceptions which we need notice were taken to the charge of the court, and to an instruction of the court given to the jury at the plaintiff's request, which is as follows: "If you find from the evidence that the defendant acquired possession of the \$500 note by delivery from his mother, without the knowledge or consent of his father, Darius Edwards, then no title to the note would pass to the defendant thereby; and if that were his only claim to the note, you should answer the first issue 'Yes.'" The court also charged the jury, among other instructions, to which no exception was taken, as follows: "If the note was executed by the defendant to his mother, and by her indorsed and transferred to the defendant without her husband's knowledge or consent, and that was his only claim, that would avail the defendant nothing, and the note would have passed to the husband as his property upon the death of his wife, subject to the payment of her debts." Defendant excepted. These two exceptions are in substance the same, and may be considered together, and they involve the question whether a married woman can make a valid transfer to another of a note belonging to her, without the written consent of her husband.

The Constitution (article 10, § 6) provides as follows: "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal.

to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried." It is provided by the Code (section 1826) that "no woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed." Our answer to the question we have stated must be in the affirmative. The decision of the case turns upon the construction of section 6 of article 10 of the Constitution, for if, by that section, a married woman is vested with the power of disposing of her personal property, such as the note upon which the suit was brought, this power cannot be divested or taken from her by any act of the Legislature, and section 1826 of the Code can have no operation in such a case, assuming it to be fully sufficient in its scope to embrace her executed contracts of sale or her gifts. It is provided by the Constitution, which is the higher, and indeed the supreme, law, to which all conflicting legislation must yield, that the property of every female, whether acquired before or after her marriage, shall be and remain her sole and separate estate, and shall not be liable for any of the debts, obligations, or engagements of her husband. If this were all of the section, we would have to conclude that, as a married woman is thus vested with full and complete ownership of things real and personal acquired by her before or after her marriage, having both the legal and equitable title, she must necessarily have also acquired every right which inheres in or is incidental to such ownership, and the most important and most valuable among them is the right of alienation, or what is commonly known in the law as the *jus disponendi*. While this may not accord with the view taken of that section in one or two of the cases, it will be found upon examination that they did not involve a decision of the question of a married woman's right to dispose of her personal property, but of her power to contract so as to bind her property generally, and it was held that, notwithstanding the provision of section 6, art. 10, of the Constitution, the disability of coverture remains as it was at common law, and prevents her from making a valid executory contract.

It will be observed that it is ordained by the Constitution that all that a married woman has or acquires in things real and personal shall be her sole and separate estate and property. The word "property" is of very broad signification. It is defined as;

"Rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy. A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the right of disposition. * * * The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution, save only by the laws of the land." *Black's Law Dict.* pp. 953, 954. The word "estate," which is also used in the Constitution, denotes the interest which any one has in lands, or in any other subject of property. An estate in lands, tenements, and hereditaments, says Blackstone, signifies such interest as the tenant has therein. 2 Bl. Com. 103. It also signifies the condition or circumstance in which the owner stands with regard to his property.. Both words are also used to describe the thing, real or personal, in which one has an estate or the subject-matter of ownership, or over which the right of property is exercised, and in this sense, perhaps, they were intended to be used in the Constitution. But the very word "property" implies the exclusive right of possessing, enjoying, and disposing of a thing, and, when used subjectively, it means that with respect to which this right exists, or that which is one's own. So it must be admitted that, if there were no words in section 6 of article 10 of the Constitution to limit the scope of that part of the section which we have just quoted, a married woman would have the same dominion over her separate estate and property as if she were a feme sole. But there are such words of limitation, and how and to what extent they restrict the right of alienation is the difficult and delicate question presented for solution. After exempting her property from any debt, liability, or obligation of her husband, it is provided that she may devise and bequeath the same. This power is absolute. She may will her property with the same freedom as if she were unmarried or *sui juris*. And by the last provision of the act she may, with the written assent of her husband, "convey" her property as if she were a feme sole. A correct analysis of this section brings us to this conclusion: that a married woman may dispose of her property in any way she may see fit to do so, except that, when she conveys it, the written assent of her husband is essential to the validity of her conveyance.

But what is meant by the word "convey"? The act by which she passes to another the title to her property must in law be a conveyance. Discussing a kindred subject in *Kelly v. Fleming*, 118 N. C., at page 188, 18 S. E. 81, this court, by Mr. Justice Macitae, says: "The word 'convey,' in its broadest significance, might embrace any transmission of possession; but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by the means of a written instrument and other formalities. *Rapalje & Lawrence Law Dict.*: 'Convey; Conveyance.' According to Webster, a conveyance is 'an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another.' The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smithdeal v. Wilkerson*, 100 N. C. 52 [6 S. E. 71]." A conveyance is "an instrument in writing under seal (anciently termed an 'assurance'), by which some estate or interest in lands is transferred from one person to another; such as a deed, mortgage, etc." *Black's Law Dict.* p. 273, citing 2 Blackstone. In *Pickett v. Buckner*, 45 Miss. 245, the court, in construing the dower act of that state, says: "In employing the term in the dower act 'conveyance,' or 'conveyed,' we suppose that the Legislature meant the sense in which the word is ordinarily used in our jurisprudence. It is a technical or quasi technical word, of precise and definite import. As defined by Bouvier (1 *Law Dict.* 348), 'Conveyance' 'is the transfer of the title to land by one person to another.' The instrument itself is called a conveyance." In *Nickell v. Tomlinson*, 27 W. Va. 720, the word "convey" is thus defined: "But the language now used is probably just as open to criticism as the language used one hundred years ago. The language now used is: 'shall operate to convey from the wife her right of dower in the real estate embraced in the deed.' Now 'convey' means transfer the title of land from one person or class of persons to another. See Bouvier's *Law Dict.* vol. 1, p. 399. Clearly, an inchoate dower interest is no title to land. It is no estate, present or future, vested or contingent, and the term 'convey' can be properly used only when the transfer of some 'estate in land' is spoken of." Again, the court says: "Conveyance is a transfer of an estate in land from one person to another." In *Thompson v. Hart*, 58 App. Div., at page 449, 69 N. Y. Supp. 229, the court, in construing the word "convey" with reference to its sufficiency as a legal term to pass personal property, said: "Manifestly the word 'convey' is inappropriate to the transfer of personal estate."

In *Klein v. McNamara*, 54 Miss. 105, the word "conveyance" is said to be a general word, and "comprehends the several modes of passing title to real estate. It is defined

to be the transfer of the title of land from one person, or class of persons, to another." *Lambert v. Smith*, 9 Or. 193; *Edelman v. Yeakel*, 27 Pa. 27. Defining the word in *Jenckes v. Court of Probate*, 2 R. I. 255, the court says: "The term 'convey' is a technical term, long known or used in deeds conveying real estate." We believe all the lexicographers generally adopt, as the definition of the word "convey," the transfer of the title to realty, and of the word "conveyance" the instrument by which this is done. *Anderson's Law Dict.* p. 254; 1 *Bouvier's Law Dict.* (1897) p. 434; 1 *Rapalje & L. Law Dict.* 289; *Abbott's Law Dict.* 284. Blackstone emphasizes the distinction between instruments used in the alienation of "real estate" and those by which personal property and effects are transferred. "The former," he says, "being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances; which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses." 2 *Blk.* 309. And, speaking again of conveyances, he says: "The legal evidences of this transmutation of property are called common assurances of the Kingdom, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed." 2 *Blk.* 294, 295. Referring to this definition of Blackstone, the court, in *McCabe v. Hunter's Heirs*, 7 Mo. 357, says: "It has been argued that there is nothing in our statute concerning conveyances which requires an instrument conveying lands to be sealed. The statute uses the word 'conveyance' to designate all the instruments conveying lands from one to another. Blackstone says deeds which serve to convey the property of lands and tenements from man to man are commonly denominated 'conveyances.' 2 *Blk.* 309. We have seen that in England the word 'conveyance' carries with it the idea of a sealed instrument. This word is used by our Legislature in the sense in which it is understood in England." But if the framers of the Constitution used the word "convey" in its widest sense, as meaning transfer of property or the title to property from one person to another by means of a written instrument and other formalities, and its substantive "conveyance" as signifying the instrument itself by which the transfer is effected (*Prouty v. Clark*, 73 Iowa, 55, 34 N. W. 614), we do not think it can affect the result in this case. The word "convey" must still be restricted in its operation to such property as is by law required to be transferred by a written instrument. The words "convey and devise" are technical terms relating to the disposition of interests in real property. It would not be technically or legally correct to speak of conveying personal property by a verbal sale of it, or even by a writing, any more than it would be to speak of devising it by last

will and testament; not that a draftsman may not use a technical word to express his meaning without intending that it shall be construed in its strictly technical sense, but, in the absence of anything to clearly indicate that the word was not intended to have its commonly accepted meaning in the law, but was used in some other and different sense, we must adopt the legal definition of the word, because, in the first place, it must be presumed to have been used in that sense, and, in the second, because it would be unsafe to reject that well-understood meaning for another, unless the latter had been most clearly indicated; and this principle should especially apply to constitutions and statutes, which are generally written by those learned in the law, and are intended to declare what the law shall be. It must be assumed in such a case that the state of the law and the meaning of its technical terms at the time of the enactment were known, for we are required, in construing written laws, especially those changing the common law, to consider the old law, and, in comparing it with the new so as to gather the intent, words of well-known legal signification must have the meaning thus attached to them by the law, and especially must they be understood in the sense which they have acquired by actual judicial interpretation, unless, by such construction, we defeat the intention which clearly and distinctly appears from some other part of the enactment or from its context. It may be added that the framer of section 6, art. 10, of the Constitution, must have been familiar with the meaning of technical or legal terms, for he made the proper distinction between the disposition of realty and the disposition of personality by will, when he used the words "devise" and "bequeath." It may fairly be assumed that he knew also that a writing was not essential to the transfer of personality, and that when he used the word "convey" he intended it should have its technical meaning.

There is another reason why the restriction upon the wife's right of alienation should be confined to that kind of property which can be transferred only by a written instrument. Section 6 of article 10 of the Constitution provides that a married woman's separate estate and property may be conveyed by her, with the written assent of her husband, as if she were unmarried. Property in things personal, generally speaking, may pass from one person to another by mere delivery or by word of mouth. An unwritten sale or gift is quite sufficient for that purpose. This being so, can it be supposed to have been intended by that section to require that, in every case where the wife makes a sale or gift of her personal property by delivery or by word of mouth, however small or however inconsiderable in value the article of property may be, the husband must give his written assent thereto? Or, to put the case more strongly, is it intended by that section that,

if the wife wishes to sell or give to another her personal estate or any part of it, however small that part, she cannot do so by delivery or by word of mouth—a usual and immemorial method of transferring such property—but she must, in every instance, reduce the transfer to writing, in order that her husband may assent in writing to it, and that without this kind of written assent a valid transfer cannot be made? Either one or the other of the two alternatives must be adopted, unless the restriction upon her right to convey her separate estate and property is held to apply only to her realty, or to property the title to which can pass only by a written instrument. It further appears from an examination of section 6, art. 10, of the Constitution, that it was not intended to vest in the wife merely the naked title, or power to hold in her own name this "sole and separate estate and property," without any of the usual incidents of ownership, and without the right of direct control or dominion over it; but it was manifestly the purpose that, as it was vested in her own right, it should become her sole and separate property as if she were a single female, subject only to the limitations of that section. It is an enabling provision of the law, and should be construed in the spirit which prompted its enactment, and, as it authorized the wife to take and hold property to her sole and separate use, without the interposition of a trustee, and has thus made her capable of holding it by herself and for herself, independently of her husband, she should be adjudged to have the capacity of disposing of it, except in so far as she may be expressly or impliedly restrained. That this was the spirit and purpose of the lawmakers is evidenced by the fact that she is given the absolute right to dispose of her estate by will, which is certainly something more than the naked right to own and possess it, and then she may also convey it. It is therefore perfectly clear that it was intended she should have the right of disposition, in one form absolutely, and in another under certain restrictions. As she is vested with her property, including the incidental right of disposing of it inter vivos, subject only to one condition, it must follow that in all other respects her right of alienation is left free and unfettered. The expression of the one limitation upon this right is the exclusion of all others. When the law says that in one case she shall be under the restraint of her husband, it means, necessarily, that in all other cases she shall be free. We may well ask why should a wife be permitted to devise and bequeath her property, real and personal, and be allowed to convey only her real estate. If the use of the word "convey" restricts the right of alienation to the real estate, as we have shown that it does, then as to the personal property she is left without the right of disposition, unless it was the intention to confer upon her a general power to dispose

of her property, with the proviso that real estate should not be conveyed without the assent of her husband. There is no valid or sufficient reason for making any distinction between the right to dispose of real estate, and the right to dispose of personal property, which would deprive her of the latter right. We think the true meaning of section 6, art. 10, is that a married woman may dispose of her property without the assent of her husband, except in those cases where a written instrument or conveyance is required for that purpose. This construction of the Constitution seems to be strongly favored by the court in *Withers v. Sparrow*, 66 N. C. 138. Referring to *Knox v. Jordan*, 58 N. C. 175, *Boyden, J.*, for the court, says: "But the court in that case seems unwilling to sanction the doctrine that, as to the separate estate of the wife, she was to be regarded as a feme sole in all respects, as held in England and also in the state of New York. But however proper this unwillingness of the court to recognize that doctrine might have been at the time of that decision, there can be no reason, since the adoption of our present Constitution, why the English and New York doctrine should not now be followed in our state." We understand the court to mean that a married woman has under the Constitution the right to dispose of her separate estate in any manner, save in so far as she may be restricted to any particular method of alienation pointed out in that instrument, and not that she may contract generally, so as to subject her separate estate at law to the payment of her debts, as would be the case if she were *sui juris*. We are not at all disposed to change or impair the doctrine so frequently announced by this court with reference to the capacity of a married woman to contract. That question is not now directly before us. Nor do we think it necessary to disturb the principles established in *Frazier v. Brownlow*, 38 N. C. 237, 42 Am. Dec. 165, *Harris v. Harris*, 42 N. C. 111, 53 Am. Dec. 393, *Knox v. Jordan*, 58 N. C. 175, and more recently in *Pippen v. Wesson*, 74 N. C. 438, *Dougherty v. Sprinkle*, 88 N. C. 300, *Flaum v. Wallace*, 106 N. C. 296, 9 S. E. 567, and *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998, and still more recently in *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644.

Our decision of the question involved in this case does not conflict with what this court has so often said, and which is thus clearly stated by *Ruffin, J.*: "At law a feme covert is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But even in that case, and in that court, her contract has no force whatever as a personal obligation or undertaking on her part. Nor was there any change wrought in this partic-

ular by the alterations made in our court system under the Constitution of 1868, or by the adoption of the statute known as the 'Married Woman's Act.' It was in reference to those very alterations, and the effect of the statute, that the court declared in *Pippen v. Wesson*, 74 N. C. 437, and *Huntley v. Whitner*, 77 N. C. 392, that no deviation from the common law had been produced thereby as respects either the power of a feme covert to contract, the nature of her contract, or the remedy to enforce it; that as a contract her promise is still as void as it ever was, with no power in any court to proceed to judgment against her in personam." *Dougherty v. Sprinkle*, 88 N. C. 304; *Flaum v. Wallace*, 106 N. C. 296, 9 S. E. 567. The Constitution does not remove the incapacity which prevents a married woman from contracting debts or pecuniary obligations. So far as her power to thus contract is concerned, the disability of coverture remains as it was at common law, except where changes have been made by statute. In this connection the language of the court in *Pippen v. Wesson*, 74 N. C., at page 445, is appropriate: "We conceive that while it would be beyond the power of the Legislature to destroy or alter the essential qualities of the separate estate given by the Constitution, as by giving the personal property to the husband, by making the property liable for his debts, or by destroying the wife's power of disposition, yet it is within its power to regulate the manner in which the separate estate shall be held, to prescribe what contracts and what dispositions of their estates, other than those specifically authorized by the Constitution, married women may make, and by what forms and ceremonies all their contracts shall be made and authenticated, and their free consent thereto ascertained. The Legislature may abolish all the incapacities of married women, and give them full power to contract as *femes sole*. The question is, has it done so?"

In what respect the method of charging in equity a married woman's separate estate with liability for her agreements may be affected, if at all, by this decision, is not now presented for our consideration. We simply hold that, without the assent of her husband, she may dispose of any of her property, unless the law requires the disposition to be evidenced by a conveyance or a writing.

It is argued that the case of *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544, is at variance with the conclusion we have reached, but we do not think so. The conflict, if there is any, is more apparent than real. The note in that case, which belonged to the wife, was indorsed by her alone, and deposited by her with the Piedmont Bank as collateral security for her husband's indebtedness to that bank. His indebtedness having increased to the amount of \$3,000, an arrangement was made by which the husband borrowed to the amount of his indebtedness

from the Wilmington Bank, and gave his note to that bank for the loan, and, with the proceeds realized on his note to the Wilmington Bank, he paid the debt due the Piedmont Bank, which bank had indorsed his note to the Wilmington Bank, for his accommodation, upon an agreement with him that the note for \$1,250 should be deposited with it as collateral security or indemnity for its indorsement, and the husband so notified the Wilmington Bank, by letter, both before and after that bank loaned him the \$3,000. The wife did not assent to, and, so far as appears in the case, had no knowledge of, this new arrangement. Upon these facts it is clear, we think, that, as the wife could only be liable as surety for her husband by reason of the indorsement and deposit of her note at the bank (*Purvis v. Carstaphan*, 73 N. C. 575; *Trust Co. v. Benbow* [at this term] 47 S. E. 435), the change in the arrangement fully discharged her, whether it be regarded as an extension of the time of payment to her husband (*Fleming v. Barden*, 126 N. C. 450, 36 S. E. 17, 78 Am. St. Rep. 671; *Id.*, 127 N. C. 214, 37 S. E. 219, 53 L. R. A. 316), as a novation of the debt, or as a payment of the debt and an extinction of her liability, the last being the correct view, as we think. If the wife did not assent to the agreement by which her note was to be retained by the Piedmont Bank as indemnity against any loss resulting from its indorsement of her husband's note to the Wilmington Bank, and could not, in any view of the matter, be bound thereby, why inquire whether her indorsement of the note was valid and binding upon her? The indorsement had been virtually canceled and nullified by the payment of the note due the Piedmont Bank, whether it was originally valid or not, and the court so treated it, for it says "the wife never assented to the new arrangement," and was therefore not bound. The question as to the validity of her indorsement was not in the case, but, if it was, we would not be inclined to follow the decision, in so far as it conflicts with the conclusion which we have reached in this case. The point was not presented in *Rawls v. White*, 127 N. C. 20, 37 S. E. 38, which is also cited for the plaintiff.

But the plaintiff's counsel, in his well-prepared brief, insists that the point was decided in this case when it was here on a former appeal (128 N. C. 425, 39 S. E. 66), and also on the rehearing of that appeal (130 N. C. 70, 40 S. E. 853), and that it is *res judicata*, and has become the law of the case, whether the decision was right or wrong. We may admit the general proposition that the decision of a court of final resort upon a given state of facts becomes the law of the case upon a second trial and another appeal in regard to those facts, if they are substantially the same as those upon which the former decision was made, and yet, with that principle conceded, we do not think the question we are now considering has been finally

adjudicated, as between the parties to this suit, so as to foreclose any further discussion of it and make any expression in either of the former opinions upon that question, whether correct or not, the law of the case. An examination of the record in the first appeal will show that the only question presented, and upon which the decision therein could have been made, was whether the defendant's possession of the note raised a presumption that he was the lawful holder of it, or, to speak more accurately, raised a presumption that the note had been paid. In passing upon this question, it could make no difference whether the note had been legally indorsed to defendant by his mother or not, for, if it had not been, he would still be entitled to the benefit of the presumption raised by the law from the fact of his possession of the note. When this court decided with him in regard to the presumption, it was not necessary to consider the other question as to the legal effect of the indorsement of his mother, even if it had been presented in a way to call for an adjudication of this court upon it. We have therefore concluded that the question as to the validity of the indorsement of the note by the defendant's mother to him is now open for our consideration.

The question as to the right of a married woman to dispose of her personal property without the written assent of her husband is directly and squarely presented in this case by the defendant's request for instructions and the charge of the court to which exception was taken, and it is the first time, as we think, that it has been so presented. Having held that the transfer of the note by his mother to the defendant was valid, it follows that the court erred in refusing to give the instruction requested by the defendant, and in giving the instruction to which he excepted, because, if the indorsement and delivery of the note to the defendant constituted a valid gift of it to him, the fact that the jury have found that he did not have possession of the note at the time of his father's death should not defeat his title to it acquired by the gift, as the defendant may be able to show that, even if his father had possession of the note at the time of his death, and there is therefore a presumption in favor of plaintiff, he is himself the real owner of it by virtue of the gift from his mother. This is a question for the jury to decide upon all the facts of the case and under proper instructions from the court, and, by holding that defendant acquired no title to the note by his mother's indorsement, the court deprived him of the use of that important fact in developing his defense. The error thus committed entitles the defendant to another trial.

New trial.

MONTGOMERY, J. (dissenting). I still am of the opinion that the law on the subject of the right of a married woman to dispose of

her separate estate, whether it consists of real or personal property, was properly decided in the case of *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544. The opinion in this case overrules that case. In *Walton v. Bristol*, supra, the court said: "The Constitution, as we have seen, so far as the wife's power to convey her separate estate is concerned, makes no difference between real property and personal property. If she undertakes to convey either species of property, the written assent of her husband must be had." Article 10, § 6, of the Constitution, is in these words: "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate, and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried." It will be seen from reading that section of the Constitution that the words "real and personal property" are always associated, and that the copulative conjunction "and," leading the last clause, connects both real and personal property with the mode of conveying them. If inconveniences arise practically in the disposition of small articles of personal property by the wife, the written assent of the husband being required, the difficulties are created by the section of the Constitution above quoted, and this court cannot dispense with them. I can add nothing to what I said for the court in *Walton v. Bristol*, supra.

(125 N. C. 654)

BRINKLEY v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 31, 1904.)

RAILROADS — CHANGES IN ROADBED — REMOVAL OF PUBLIC HIGHWAY — LIABILITY TO LANDOWNER — STATUTES.

1. A railroad company acquired a right of way through plaintiff's land under Laws 1854-55, p. 264, c. 228, § 29, providing that, in the absence of contract in relation to lands through which the road may pass, it shall be presumed that the land over which the road may be constructed, together with 100 feet on each side thereof, has been granted by the owner to the company, and that the company shall hold it so long as used for the purposes of the road, unless the owner shall apply for an assessment of the value within two years after the road has been located. The track was originally laid in the center of the right of way, and so remained for over 30 years, when defendant changed the track by removing it about 5 feet on and along the right of way, and also changed the grade by substituting in one place a cut for a fill. Held, that the owner of the servient estate was not entitled to compensation for the change as for a new taking of the land.

2. Under Code, § 1957, subsecs. 3, 5, providing that a railroad company may use any portion of a public highway in constructing its road, and that when this is done the company shall construct another highway in place thereof, a railroad, in making a change in its track, has a

right to change a county road within the limits of its right of way without rendering itself liable to the owner of the servient estate as for a new taking of the land.

Douglas, J., dissenting.

Appeal from Superior Court, Burke County; Shaw, Judge.

Action by Henry Brinkley against the Southern Railway Company for compensation for change in defendant's roadbed, in which it was agreed, *inter alia*, that defendant's predecessor in ownership located and constructed the line of railroad in question in 1868 or 1869, that by the change in location of the roadbed it became necessary to change the public road or highway running along the railroad, and that all of the changes were within 100 feet of the roadbed as originally constructed. From a judgment for defendant, plaintiff appeals. Affirmed.

Avery & Avery and Avery & Ervin, for appellant. S. J. Ervin, for appellee.

MONTGOMERY, J. The question for consideration is whether or not a railroad company can use, for any and all purposes connected with the conduct of railroad business, the entire strip of land which it may have acquired by process of condemnation, or as a result of law growing out of the provisions of its charter. The defendant claims the right of way over the land in dispute, under a purchase of the interest in the same of the Western North Carolina Railroad Company, chartered by the General Assembly of this state. Laws 1854-55, p. 257, c. 228. There was no condemnation of the land, but it is agreed that the Western North Carolina Railroad Company acquired the right of way over it by virtue of section 29 (page 264) of the act of incorporation, which is in these words: "And in the absence of any contract or contracts in relation to the lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with 100 feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners shall apply for an assessment of the value of said land as hereinbefore directed, within two years after that part of the said road has been located." When that part of the road located on the land in dispute was finished, the track was laid in the center of the right of way, and remained there until March, 1902, when the defendant changed the location by removing it about five feet to the southward from its original position for a part of the way on and along the right of way. The defendant also at the same time changed the grade of the original railroad track by substituting in one place a cut about 6 feet deep for a fill of about 2½ feet in height. The plain

tiff contends that that action of the defendant company was a new taking of his land, and for the trespass and taking he is entitled to compensation in damages. His contention, in his own words (in the brief), is "that, while the company could build side tracks on the same grade and inside of its right of way, if necessary for corporate purposes, it had no right, first, to inflict additional damage upon the owner of the servient tenement by changing a cut into a fill or a fill into a cut on his premises; second, that a change of location of the main line necessarily involved a change in the center of the right of way, and, when the defendant moved its right of way five feet south of the original location and changed the center of that track, it involved an additional taking of the land of the plaintiff on the south of the track, and a corresponding abandonment of a strip of equal width on the land of the abutting owner just north of Brinkley and on the opposite side of the track. This must be a new taking, being such a change as would change the location of the entire right of way along the plaintiff's front."

The right of the defendant to the free use of its right of way for railroad purposes is involved in the case. The question is not whether the Western North Carolina Railroad Company acquired the fee-simple interest or an easement in the right of way (that question has been determined in favor of the latter view in *Blue v. Railroad*, 117 N. C. 644, 23 S. E. 275; *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779; *Shields v. Railroad*, 129 N. C. 1, 30 S. E. 582), but rather whether under the easement the defendant has the right to use the whole of the right of way for railroad purposes, including the right to change the grade of the roadbed, or to remove the location of its main track at any time to any point on the right of way. In the cases last above cited it was decided that railroad companies, if they should need the whole of the right of way for railroad purposes, had the right to use the whole. Some of those uses were mentioned in the decisions, viz., roadbed and drains, side tracks, and houses for their employés, warehouses and station houses, with convenient ingress and egress. Under those decisions, railroad companies could build as many side tracks over any part of the right of way as might be necessary to a proper conduct of their business, with a view to the safety of the traveling public, as well as for its own and the public interests. Why, then, have they not the right to change the grade of the main track, or alter the location of the main track, whenever the safety of their service is improved or the public interests require it? We can see no reason to the contrary.

If the plaintiff's house was situated on the right of way at the time the railroad was

finished, and he acquiesced in the appropriation, he would have rights if the railroad company should have afterwards built high embankments or made deep excavations so near his residence as to materially interfere with the free use and enjoyment of his home. But no such matter is now before us. There is no such claim or demand in the complaint. The naked question before us is this: Whether or not a railroad company has a right to change the grade of its roadbed, or to remove it to any point on its right of way? We think it has that right. In *Mills on Eminent Domain*, at section 211, the author says: "There is a vast difference between the location of a right of way and the location of a track on a right of way. The company has the right to locate its track at its will and pleasure upon any part of its right of way. One location of its track does not deprive it of the right to make another location." *Dougherty v. Wabash Ry. Co.*, 19 Mo. App. 419; *State v. Sioux City R. Co.*, 43 Iowa, 501; *Munkers v. Railroad*, 60 Mo. 334; *Com. v. Haverhill*, 7 Allen, 523. In *Pierce on Railroads* the writer says: "It [the railroad company] may lay its tracks, side tracks as well as main tracks, at any place within the location, and shift them from place to place within it." The defendant had the right to make the change in the county road under subsections 3 and 5 of section 1957 of the Code.

No error.

WALKER, J. (concurring). This case, in my judgment, is correctly decided, and for the reasons given in the opinion of the court as written by Mr. Justice MONTGOMERY. So far as the questions incidentally referred to in the opinion, and which relate to the control of a railway company over its right of way, are concerned, it is best that I should withhold even any intimation of opinion in regard to them, until they are directly presented for decision, when my judgment can be formed after mature consideration and reflection. As I view those questions, they involve important interests, not only of private individuals and of the railway companies, but of the public as well.

DOUGLAS, J. (dissenting). I do not think the real question at issue is correctly stated in the opinion of the court, which assumes as a fact the ownership by the defendant of a right of way of 200 feet in width. If the defendant railway company had actually condemned or bought or had given to it 100 feet on each side of its track through the plaintiff's land, the case would be different. I do not understand that there is any pretense that the defendant paid anything whatever for its right of way, or was actually given any more land than it actually occupied. Its only claim for 200 feet of land seems to rest upon a naked presumption founded upon a

legal fiction in an unpleaded private statute. If a neighbor asks me to give him a few roasting ears, and I tell him to help himself, am I to be held to have given away my entire corn crop? Suppose the agents of a railroad company come to a generous citizen and say to him, "We want to go through your land; we will locate our track over 100 feet from your house, and so nearly on grade as to permit you to cross at any point without putting you to any discomfort or inconvenience," and he should say, "Go ahead, I will not charge you for merely going through my land;" by what process of reasoning can such permission be construed into a grant under which the company, by altering its location and changing its grade, can take his land, injure his remaining property, and destroy his home? Oh, but it is said, he should have brought suit within two years. Brought suit for what? He had neither the right nor the inclination to bring suit for the land he had given to the railroad, and I am ignorant of any authority by which he could have brought suit for land which was claimed by no one else, and of which he alone was in actual and undisturbed possession adverse to all the world. I cannot bring myself to hold that the Legislature had either the power or the intention of taking the land of an individual and giving it to a corporation without compensation or the opportunity of obtaining it. Why should the corporation, the creature of the law, have any greater privileges than the citizen, the creator of the law?

I have no desire whatever to unnecessarily interfere in the slightest degree with the construction or operation of railroads, and I am aware that their public character and the proper performance of their public duties justify and require the exercise of certain powers and privileges not possessed by the individual. An instance is the exercise of the power of eminent domain inherent in the state as the concrete representative of the sovereign people. But all such privileges, given alone for the public benefit, are subordinate to the public welfare, and must be exercised with due regard to the inherent and inalienable rights of the individual. If they need his land, let them take it; but let them pay for it. Let them take it openly and fairly, so that he may know what they claim; and let them pay for it, not in legal fictions or irrebuttable presumptions, but in money or money's worth. In the words of the Court of Appeals of New York, "Take, but pay." The plaintiff is not seeking to prevent the defendant from changing the location and grade of its track, but simply to obtain compensation for the additional injury done to him by such change. My views upon these questions are fully expressed in my dissenting opinions in *Jones v. Commissioners*, 130 N. C. 457, 42 S. E. 144, and *Dargan v. Railroad*, 131 N. C. 626, 42 S. E. 979, wherein I have attempted to discuss principles which to me seem to underlie the foundations of our government.

(124 N. C. 363)

PAUL v. CITY OF WASHINGTON.

(Supreme Court of North Carolina. March 8, 1904.)

INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS—REASONABLENESS—EQUITABLE RELIEF—INJUNCTION—SCOPE.

1. An injunction will not lie to restrain a city from enforcing ordinances regulating the liquor traffic within its corporate limits, and from revoking and canceling complainant's license for violation thereof, and to declare such ordinances void on the ground that they impose unreasonable, vexatious, and oppressive restrictions on the business of selling liquors by those licensed to do so by the city authorities.

2. Under Priv. Laws 1903, c. 170, p. 362, § 18, incorporating the city of W., and providing that the board of aldermen of such city shall have power to regulate, control, license, or prevent the sale of spirituous, vinous, and malt liquors, and preserve the peace, order, and tranquillity of the city, such board had power to pass reasonable ordinances to restrict and regulate the liquor traffic in such city, and to prohibit the same, at their election.

3. City ordinances regulating the liquor traffic prohibited the use of any contrivance obstructing the view of the interior of the saloon from the outside; required all liquors to be served and drunk at the counter; prohibited the use of tables, lounges, etc.; declared that the saloon keepers, their servants or employees, should not use any side or rear doors, trap doors, elevators, or stairways for the purpose of selling or delivering liquor; established business hours between 6 o'clock in the morning and 8 o'clock in the evening; prohibited the saloon keeper or his employees from being in the saloon during closing hours; prohibited the use of billiard tables, pool tables, gaming devices, tenpin alleys, or other devices in saloons; and also prohibited the maintaining of any restaurant or committee rooms connected with the barroom of the saloon, or in the same building where liquors were sold, unless the places were separated by one or more solid perpendicular walls, with no openings of any kind therein; and authorized the board of aldermen to revoke the license of a saloon keeper, in addition to the imposition of a fine, for breach of such regulations. Held, that such regulations were not objectionable as unreasonable.

Douglas, J., dissenting in part.

Appeal from Superior Court, Beaufort County; Hoke, Judge.

Bill by Smith Paul against the city of Washington to restrain defendant from enforcing certain liquor ordinances. From an order dissolving a restraining order, plaintiff appeals. Affirmed.

This is an appeal of the plaintiff from an order made by Judge Hoke in which he dissolved a restraining order theretofore made in the case. The plaintiff was, before the 1st day of January, 1904, and at the time this action was commenced (January 18, 1904), engaged in retailing liquor in the city of Washington, N. C., in a large two-story brick building situated at the corner of Main street and Whitecar alley. There is a front door upon Main street and a side door upon Whitecar alley, and also a door from the rear of the building opening into the lot upon which the building stands; and there has been, and still is, a cellar beneath the building, with a trapdoor leading to the cellar

and the cellar has been used and could be used for storage purposes. Prior to the 1st day of January, 1904, the plaintiff rented out the second story of the building as a general restaurant, and a part of the time conducted the same on his own account. On the 4th of November, 1903, the board of aldermen of the city of Washington enacted and adopted (to go into effect on the 1st day of January, 1904) the following ordinances:

"(1) That it shall be unlawful for any person, firm or corporation, carrying on the business of selling spirituous, vinous or malt liquors in Washington, or for any agent, servant or employee of such person, firm or corporation, to have, use, permit or allow in their saloons, sales room or place of business, any storm doors, partitions, screens, blinds, stained glass, or any contrivance which shall in any manner obstruct the view of the interior of his or their saloon, sales room or place of business or any part thereof, or which shall in any manner conceal or cut off any view of any person or persons in such saloon, sales room or place of business from and through the front door and windows thereof. All front doors shall be glass paneled, one glass to the shutter; the bottom of said panel shall not be more than four feet in height from the level of the sidewalk; the bottom of glass in all front windows shall not be more than four feet in height from the level of the sidewalk; all glass in front windows and front doors shall be kept clean of dirt, specks or anything that will dim or obstruct the view of the interior of such saloon, sales room or place of business. No counters shall extend more than fifty feet from the front door or doors of said saloon or saloons. All liquor shall be served at the counter, and all liquors drunk in said saloon or saloons shall be drunk at the said counter or counters; and any person violating this ordinance shall, upon conviction thereof be fined fifty dollars. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense.

"(2) That it shall be unlawful for any person, firm or corporation, carrying on the business of selling spirituous, vinous or malt liquors in Washington, or for any agent, servant or employee of such person, firm or corporation to use, permit or allow any side door or rear door, trap doors, elevators or stairways for entrance to or exit from his or their saloon, sales room or place of business by side or rear door or place of entrance or exit; nor shall any spirituous, vinous or malt liquors be sold or delivered through any window or other opening, and any person violating this ordinance shall upon conviction thereof be fined fifty dollars. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense; provided nothing herein contained shall prevent the use of such back or side doors by the person or persons carry-

ing on said business, his or their agents, servants or employees for purposes other than the sale or delivery of liquors.

"(3) That it shall be unlawful for any person, firm or corporation to whom shall be granted a license to sell spirituous, vinous or malt liquors by the board of aldermen of Washington, or for any agent, servant or employee of such person, firm or corporation to sell, give away or in any manner part with directly or indirectly any liquor or drinks in his or their saloon, sales room or place of business between the hours of eight o'clock in the evening and six o'clock in the morning, or permit or allow the doors of his or their saloon, sales room or place of business to be opened or remain open between said hours; and every person violating this ordinance shall upon conviction thereof be fined fifty dollars. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense.

"(4) That in every saloon or room where the business of selling spirituous, vinous or malt liquors shall be carried on under a license from the board of aldermen of Washington, the person, firm or corporation, holding such license shall keep burning throughout the period of darkness, each and every night, a gas or electric light of such brightness that objects in the rear of said room may be plainly seen; and no such room shall be entered, opened, kept open or occupied by any person whomsoever between the hours of closing on Saturday night at eight o'clock and the hours for opening on the next Monday morning at six o'clock. Any person, firm or corporation, or his or their servant, agent or employee who shall violate this ordinance, shall upon conviction thereof be fined fifty dollars.

"(5) That it shall be unlawful for any person, firm or corporation carrying on the business of selling spirituous, vinous or malt liquors in Washington, or for any agent, servant or employee of such person, firm or corporation to have, use, permit or allow in his or their saloons sales room or place of business, or in any room connected therewith, any billiard table or pool table, tenpin alleys, gaming tables or any games or gaming devices whatsoever, whether the same be played or used or played for amusement and exercise or for anything of value, and shall also be unlawful to have, use, permit or allow in his or their saloon, sales room or place of business or in any room connected therewith, any restaurant, eating house, room or table or any means or contrivance whatever for providing, supplying or furnishing food, whether the same is to be provided, supplied or furnished for giving away or for selling to customers, and it shall be unlawful to permit or allow in his or their saloon, sales room or place of business, obscene pictures, the printing to be exposed to view on the walls thereof or elsewhere in the room.

Any person, firm or corporation, his or their agents, servants or employees who shall violate this section shall upon conviction be fined fifty dollars.

"(6) No saloon shall be conducted, or shall any spirituous, vinous or malt liquors be sold or disposed of in any building in which there is a restaurant, eating house, room, table, or any means or contrivance whatever for providing, supplying or furnishing food, whether the same be provided, supplied or furnished free or for pay: provided this shall not apply where the saloon or place wherein liquor is disposed of and the room or place where food is furnished or supplied shall be separated by one or more solid, upright, perpendicular walls, with no doors, nor openings of any kind therein. Any person, firm or corporation, his or their agents, servants or employees who shall violate this section, shall upon conviction be fined fifty dollars.

"(7) That any and all licenses hereafter granted by the board of aldermen of Washington for the sale of liquors shall be issued by the said board and be accepted by the applicant therefor upon the express condition that a violation of any of the foregoing ordinances, of any statute or ordinance regulating the sale of liquors in or at the saloon, sales room or place of business for which the license has been granted, shall work a forfeiture of said license, and that the board of aldermen upon satisfactory evidence of such violation shall have the power of declaring such license revoked, and such condition shall be incorporated in the license when granted. Upon complaint made to the mayor that any person, company or firm has violated any of the said ordinances or statutes, he shall forthwith summon such person, company or firm to appear before the board of aldermen at a given time, not less than three days notice being given, to show cause why such license should not be revoked."

On January 2, 1904, the ordinances being in full force, a license to retail liquor was granted to the plaintiff by the board of aldermen upon a condition inserted in the license that a violation of any of the ordinances should work a forfeiture of the license.

Chas. F. Warren, for appellant. Bragaw & Ward, for appellee.

MONTGOMERY, J. (after stating the facts). The plaintiff commenced this action for relief by injunction, his object being to avail himself of the benefits of his license and at the same time to restrain and enjoin the defendant from enforcing the ordinances on the ground that they were oppressive, vexatious, and unreasonable. He is met in limine by the contention on the part of the defendant that he cannot try the validity of an ordinance of a municipal corporation by injunction, and that he can have no relief in equity because he can have full relief in a court of law if the ordinance be unlaw-

ful. The cases of *Cohen v. Commissioners*, 77 N. C. 2, *Wardens v. Washington*, 109 N. C. 21, 13 S. E. 700, *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64, were cited in the argument of the defendant's counsel here in support of the contention.

In answer to that position, the counsel of the appellant, while questioning the correctness of the law of those cases, yet insists that the facts there can be distinguished from those in the present case; that the reason assigned in those cases by the court for denying redress in equity is that the plaintiff could have complete redress in an action at law for damages; that the court certainly could not have meant that damages could be recovered against the municipal corporations, for the reason that municipal corporations are not liable for torts in the nature of trespass committed by their officers—policemen—when they undertake to enforce unconstitutional and void ordinances enacted in the attempted exercise of police powers or public or governmental functions; nor could it have intended to say that damages could be recovered against the members of the board of aldermen of cities and towns individually or personally, for municipal officers who enact ordinances under a claim of power from the legislative branch of the government are vested with the immunities and privileges of government, and consequently are exempt from liability if they have made a mistaken use of their powers; and that the court must have meant, therefore, that the policemen who actually made the arrests under an unconstitutional municipal ordinance are liable in damages to the person aggrieved. And the counsel of the appellant further insisted that, as in the present case the policemen are and were insolvent, and on that account a recovery against them would be worthless, and afford no redress to the appellant for injuries he may have sustained if the ordinances are void, the case was easily to be distinguished from *Cohen v. Commissioners*, supra, and the other similar cases mentioned, where it did not appear that the officers making the arrests were insolvent. The counsel further contended that the suggestion made in *Wardens v. Washington*, supra, that one who doubts the validity of a municipal ordinance might raise the question by a defense of himself when he might be arraigned upon a criminal charge for an alleged violation of a town ordinance, places the complainant at a disadvantage; that it would be a hard law to compel a citizen who has no redress in the way of damages against the municipal corporation or its aldermen personally, or from the constable or policeman (on account of his insolvency) who makes the arrest under an unlawful ordinance, to compel him to violate the law—the ordinance—at his peril in order to test its validity.

The writer of this opinion is in sympathy with the argument of the counsel of the ap-

pellant, but the majority of the court are of the opinion that the law as laid down in the cases above cited is correct in principle, and applies to the facts of this case, and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction. That view of the case by the court would relieve us of the consideration of the question of the alleged unlawfulness of the ordinance, but, as a decision upon that branch of the case will be of so much importance to the public, we will now take up that question for discussion and decision.

No question can be raised in this case as to the power of the board of aldermen to pass reasonable ordinances to restrict and regulate the liquor traffic in Washington, and even to prohibit it if they see fit to do so. In section 18 of chapter 170, p. 362, Priv. Laws 1903, entitled "An act to incorporate the city of Washington," it is enacted "that among the powers conferred on the board of aldermen are these: They may * * * regulate, control, tax, license or prevent the establishment of junk and pawn shops, their keepers or brokers, and the sale of spirituous, vinous or malt liquors; * * * provide for the proper observance of the Sabbath, and the preservation of the peace, order and tranquillity of the city." It was argued in this court for the defendant that, as the board of aldermen were given the power to prevent the sale of intoxicating liquors within the city limits, therefore, under the maxim that "the greater includes the less," ordinances regulating and restricting the traffic, if the aldermen should see fit not to prevent, but to license, whether reasonable or unreasonable, were matters in their discretion, and not reviewable by the courts. We think that that is not a proper view of the powers of the aldermen, or of the rights of those who may be licensed to sell liquor by the board. They, as we have said, had the right to prevent or prohibit entirely the sale of liquor. They had also the power to license the traffic, and to regulate it, and, having adopted as a choice the plan of licensing and then regulating, it must follow that the regulations and restrictions must be such as are reasonable, and their reasonableness must be, in case of contest, finally decided by the courts. *State v. Taft*, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. Rep. 768; *State v. Yopp*, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305.

In the consideration of the reasonableness of these ordinances, it must be understood that they are to be discussed from the point of view of our state legislation on the subject of the liquor traffic, and the decisions of our court upon that legislation. The restrictions and limitations with which the legislative branch of our government for many years past, at the demand of a strong and aggressive sentiment, individual and public, against the evils of intemperance, have environed this traffic, and the firm support of this legis-

lation by the courts, afford unmistakable evidence that the traffic is dangerous to society in its moral effects, and injurious to the material welfare of the commonwealth. The police power, directly through the Legislature and indirectly through municipal corporations, is being more and more exercised in the regulation and suppression of the sale of liquor, on the theory that it is evil in its nature, until such legislation has grown into a system of temperance legislation. Each encroachment, however, has been stubbornly resisted by those engaged in the trade. This court has in no uncertain language approved of the legislation on this subject. In *Bailey v. Raleigh*, 130 N. C. 209, 41 S. E. 281, 58 L. R. A. 178, the court said, referring to the restrictions in the prohibition act for Raleigh, "This is done under the exercise of the police power, owing to the evil tendency of the business;" and in *State v. Ray*, 131 N. C. 817, 42 S. E. 960, "Liquor itself is regarded as an evil, an enemy of civilization and good government." From the standpoint of the statute law on the subject and the decisions of the court, the rule with reference to what the law would regard as undue restrictions upon a useful business cannot be the same as that applicable to the liquor traffic. What would be a deprivation of the use of property without due process of law, or an infringement of personal liberty against one engaged in a useful trade, would not be such when considered in connection with the property or person with one engaged in the sale of intoxicating liquors, as is pointed out in *State v. Ray*, supra, where the court said: "It must be understood that they [saloons] stand on a very different footing to the sale of dry goods and family groceries. Liquor itself is regarded as an evil, an enemy of civilization and good government. Its sale without a license is condemned and prohibited by law, and the regulations closing at certain hours such shops might well be put upon the implied power as being for the public good." In looking at the ordinances as a whole, it is readily seen that the aldermen in enacting them had in view the purpose to cause the licensee to give publicness to whatever might go on inside of the place in which liquors might be sold, instead of allowing secrecy about the matter; to break up, as far as possible, loafing and loitering in saloons; to prohibit the young, or those who might not be permitted to enter the front doors, to come in by means of side and rear doors in a clandestine manner, or to get liquor from rear and side doors, or to do indirectly the same thing by means of having eating houses connected with the drinking places; to take from the saloons enticements and allurements which have a tendency to attract the senses, and to develop and foster the susceptibility of vice and immorality; to close the saloon at hours when general work is over for the day, to the end that the inexperienced, the young and impressionable, and the unfortunate

of those who have been at work in useful occupations may not be induced to spend their evenings and their money in the bar-room; and to have lights kept burning and doors closed during prohibited hours that the officials may more easily preserve the public peace and order, and that the public may know that the laws in respect to the retailing of intoxicating liquors are being obeyed.

In respect to the first ordinance it is insisted for the plaintiff that that part forbidding the use of partitions was not only enacted without authority, and is unreasonable, but that it is positively mischievous, in that it prevents the separation of the white and negro races while they are drinking in the saloon. The law has no requirement for race separation in barrooms, and, if their keepers think it necessary to make the separation, there is really nothing in the ordinance that prevents them from so doing. The partition can be run from the front toward the counter, and one side can be allotted to one race and the other to the other, and the ordinance will not be violated; for it only provides that the partitions or screens shall not "conceal or cut off any view of any person or persons in such saloon, sales room, or place of business from and through the front doors and windows thereof." We have no decisions of this court on the subject of the power of municipal corporations, or even of the General Assembly, to prohibit the use in saloons of stormdoors, screens, stained glass, or any contrivances which obstruct the view of the interior of saloons, or as to what kind of doors and windows, whether of glass or of other material, shall be used; but the decisions from other states fully sustain the requirements of the first ordinance in all these respects, and we are of the opinion that the ordinance is a reasonable one.

We think further that that part of that ordinance which requires that all liquors shall be served at the counter, and shall be drank at the counter, is also a reasonable requirement, being calculated to prevent loafing and loitering, and also to diminish the quantity that might be drank. Drinking to excess would certainly be more apt to take place where guests could be seated around tables or lounges with other attractions that might be offered.

In regard to the second ordinance the contention of the plaintiff is that it is "arbitrary, oppressive, vexatious, unreasonable, and void" in that it deprives the plaintiff of the use and convenience of his property without due process of law. By that ordinance saloon keepers and their servants and employes are not permitted to use any side or rear doors, or trapdoors, elevators, or stairways, for the purpose of selling or delivering liquor through such communications; but the ordinance does not prohibit the use of such entrances and exits for any other purposes than the sale and delivery of liquors. That certainly is a

restriction upon the plaintiff's property, but, in our opinion, it is not an unreasonable restriction; certainly not one so unreasonable as to warrant us to declare it void. As was said in the case of *State v. Yopp*, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305: "Such statutes [police regulations] are valid, unless the purpose or necessary effect is not to regulate the use of property, but to destroy it. As we have said, it is the province of the Legislature to decide upon the wisdom and expediency of such regulations and restraints, and the courts cannot declare them void, or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence are not within the proper exercise of the police power of the government. Courts cannot regulate the exercise of this power; they can only declare the invalidity of statutes that transcend its limits. The exercise of this power does not extend to the destruction of property under the form of regulating the use of it, unless in cases where the property or the use of it constitutes a nuisance." The plaintiff's property is not destroyed by this ordinance. It is true the regulations concerning its use by the aldermen are stringent, but we cannot say they are too much so, when the purposes for which the building is being used are taken into consideration. The board of aldermen have said that that part of the plaintiff's building which he uses for the sale of liquor is a suitable place, and sufficient for that purpose, and that the use of the forbidden parts of that building in connection with the sale of liquor are not necessary, and would prevent, if so used, the proper regulation of the sale of spirituous liquors. We have no doubt that the defendant, under the power given in the charter, had a right to confine the sale of liquor to a particular room in that building, and to prohibit the use of side and rear doors, trapdoors, elevators, and stairways leading to or out of that room for the purposes of selling or delivering liquors.

It is contended that the third ordinance is unlawful for the reason that it prohibits the selling or giving away liquors between the hours of 8 o'clock in the evening and 6 o'clock in the morning, and also for that it prohibits the saloon keeper or his employes to open the doors, or allow them to remain open between said hours. In *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, the hours prescribed by the ordinance were 10 o'clock p. m. and 4 o'clock a. m., and there was no question made in that case on the reasonableness of such hours. It seems to us that the hours of closing and opening in the case before us are not unreasonable. For a few months in the year there might be, in the mornings, a couple of hours of daylight in which the retailing of liquor might not be carried on, but it does seem that those hours—hours in which the greater number in each community is engaged in preparing for the day's duties and living—might be spent in

some useful way without injury to saloon keeper. He would then have nearly 14 hours in which to supply the demand for his wares. That ought to be ample time for all legitimate needs and necessities.

So far as the requirement in the fourth ordinance that places for the retailing of liquor shall be kept reasonably lighted, it seems to us there can be no just objection, for on its face it seems a very fair and proper police regulation. But in respect to that requirement which makes it unlawful for the owners of saloons to enter their buildings between the hours of closing on Saturday night at 8 o'clock p. m. and the hour for opening next Monday morning at 6 o'clock we have some doubt. In the case of *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, the charge was that the defendant remained in his barroom after the hour prescribed for closing. In that case the ordinance made "it unlawful for any barkeeper, clerk or agent or any person whatsoever to keep open, or be or remain in, a bar room or other place where spirituous or intoxicating liquors are sold between 10 o'clock p. m. and 4 o'clock a. m." The court there held that the charter of Marion did not empower the town to pass the ordinance, and that under the general law (Code, § 3800) the power did not exist to pass the ordinance. Under the charter of the city of Washington the board of aldermen, as we have seen, had the power either to prohibit the sale of liquor or to regulate and control its sale, and the only question is whether this part of the fourth ordinance, preventing the owners of saloons from entering their saloons during Sundays, is reasonable. As we have said, we have our doubts about this matter, but as that part of the ordinance is not clearly unreasonable, and remembering that the board of aldermen have full opportunity to judge of such a necessity, we do not feel called upon to set aside their judgment by declaring the ordinance invalid on the ground that it is unreasonable. We cannot see that the objections to the fifth ordinance are reasonable objections. Billiard tables, pool tables, gambling tables, tenpin alleys, and other gaming devices, whether played for amusement and exercise or for anything of value, are such attractions as ought not to be used in saloons where liquor is sold. They entice and allure men into the temptation to drink, and encourage loafing and lounging. It is true that in the Revenue Laws of 1903 a tax is levied on billiard and pool tables and bowling alleys connected with any place where liquor is sold or allowed to be drunk, whether kept under the same roof or not; but it does not follow from this that it is not in the power of a municipal government that is authorized by its charter to prohibit the sale of liquor, or to license its sale, and then regulate it, and declare that billiard and pool tables shall not be used in connection with barrooms. It is only where they are not prohibited from being used by the lawful authority that they can

be taxed. Under the fifth ordinance there is no prohibition against the use of restaurants or eating houses, rooms or tables for providing or furnishing food, being kept in the same building in which liquor is sold, but the prohibition is against having such restaurants or eating rooms connected with the barroom. We cannot say that that prohibition is unreasonable.

The sixth ordinance enacts that no place where spirituous, malt, or vinous liquors are sold or disposed of shall be in any building in which there is a restaurant, eating house, room, or any means or contrivance for providing or furnishing food, unless the two places shall be separated by one or more solid upright perpendicular walls, with no doors nor openings of any kind therein. That seems to us a very proper regulation. Such a condition of affairs, we can see, would be most conclusive to the bringing together of elements of society whose conduct in many instances would tend to produce disorder. We may take judicial notice of a fact so well known that these joint eating houses and drinking saloons afford opportunities for carousals and lawlessness, and are sore spots in many communities.

It is provided in the seventh ordinance that in case of a violation of any of the ordinances of the town regulating the sale of liquor by one licensed to sell liquor the board of aldermen may have the power to investigate the matter, and to revoke the license in case it should be found that the ordinance had been violated. We see no objection to the ordinance as applicable to this case, especially as the plaintiff in this case had agreed to that method of trial. But, if that ordinance was invalid, yet the others would not be affected, and the plaintiff or any licensee of the board of aldermen of Washington might be made to pay the fines mentioned in the ordinances by the proper tribunal, upon its being made to appear that the ordinance had been violated.

Chapter 233, p. 233, of the Acts of 1903, has no application to the city of Washington, for, as we have seen, the charter of that city confers on the aldermen the power to regulate or to prevent the sale of intoxicating liquors, and section 19 of chapter 233, p. 233, of the Laws of 1903, particularly declares the purpose of the act to be not to interfere with such municipalities or territories as are given the power to regulate or to prohibit the sale of intoxicating liquors.

No error.

WALKER, J. (concurring). This action was brought to enjoin the defendant from enforcing certain ordinances regulating the liquor traffic within its corporate limits, and from revoking and canceling the plaintiff's license to sell liquor, and to declare the said ordinances null and void upon the ground that they impose unreasonable, vexatious, and oppressive restrictions upon the business

of selling liquors by those who are licensed to do so by the town authorities. The motion for the injunction was denied, and the plaintiff appealed. It is sufficient, I think, for the purpose of deciding the case in the view I take of it, to state that it is provided by the several ordinances in question that the business of retailing liquors shall be conducted under certain rules and regulations specified in the ordinances, and that a failure to comply with the said rules and regulations or the violation of any of the ordinances subjects the offender, upon conviction, to a fine of \$50 for each day on which a violation occurs. It is not necessary to set forth the terms of the several ordinances more particularly than I have done, as the court, in my opinion, is not at liberty to consider the general question of their validity, because of an objection of the defendant in limine, which is fatal to the plaintiff's action, namely, that if we concede, for the sake of the argument, the ordinances are invalid, the plaintiff is not, upon the facts stated in his affidavit, entitled to any relief by injunction. The plaintiff, upon affidavit, obtained a restraining order and an order to show cause why an injunction to the hearing should not be issued, and on the return day of the order the motion for a continuance of the injunction was heard upon the affidavits, as is stated in the order, no complaint having been filed, though it is recited in the original restraining order that it was granted upon the complaint and affidavits. Regularly, the motion to continue the injunction should not have been heard until the complaint was filed, and it may be that the law contemplates in a case like this one that the complaint shall be filed in the beginning, so that the court may see clearly and distinctly that the plaintiff is entitled to the relief demanded, "where it consists in restraining the commission or continuance of an act" (Code, § 338); but, however this may be, it would seem to be good practice to require the complaint to be filed when the motion to continue is heard, for it is the allegations of the complaint, and not of affidavits merely, that ascertain and determine what is the cause of action out of which arises the right or equity that requires protection pending the litigation. But I will consider the case without reference to the question of pleading and practice, as I desire to state my views upon the legal merits involved.

There are two objections to the plaintiff's right to maintain this action: First, the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances imposing fines or penalties; and, second, the defendant, under its charter, had the power "to prevent, control, tax, license, or regulate the sale of spirituous, vinous, or malt liquors," and the plaintiff, having applied for and accepted his license with full knowledge of the terms of the ordinances, is not in a position to question their validity, but must

exercise the right and privilege of selling conferred by that license in strict compliance with the conditions and restrictions imposed.

In regard to the first objection, we must bear in mind that, if the court should issue an injunction against the institution of a criminal prosecution, it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the state, in whose sovereign name and capacity all criminal cases are commenced and prosecuted; and the state is not even a party to this action, and her rights cannot be prejudiced without notice and a hearing, even if we could entertain for a moment with any seriousness the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by statute a misdemeanor. Code, § 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the right of the complaining party, or, in this particular case, the validity of the ordinance, has been first determined in an action at law. The true principle governing such a case is well stated in *Wallack v. Society*, 67 N. Y. 28: "The general rule is that the court will not restrain a prosecution at law when the question is the same at law and in equity. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the chancellor in *West v. Mayor*, 10 Paige, 539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a corporation ordinance claimed to be invalid. The unconstitutionality of the act of 1872 would be a perfect defense to a prosecution for the penalties given by it, and the question as to the constitutionality of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not a ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage, rather than restrain, litigation." Further, the court thus states the law: "The question as to the validity of a corporation ordinance does not properly belong to this court for decision, where the complainants, as in this case, have a perfect defense at law if the ordinances are

invalid, or if they do not render the complainants, or those in their employ, liable for the penalty. And it would be a usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. * * * This court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits." In 16 Enc. of Law, p. 370, we find the following succinct statement of the principle: "It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violation of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to the prosecutions which are merely threatened or anticipated as well as those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court, and to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void, or that the party seeking the injunction has not committed a violation of the ordinance, or that the complaint in the prosecution under the ordinance states no cause of action." In *Burnett v. Craig*, 30 Ala. 138, 68 Am. Dec. 115, the plaintiff sought to enjoin the enforcement of an ordinance against the sale of liquor, and the court said: "We have found no case, however, where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only trespasses to realty, where the remedial agency is shown to be necessary to prevent multiplicity of suits, or to avert irreparable mischief. * * * The judgments and sentences of the town council, of which the appellant complains, were quasi criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. * * * We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or quasi criminal, or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance or of the fines imposed on the appellant. They will be considered when properly presented." In *Moses v. Mayor*, 52 Ala. 198, it is said: "Courts of equity will not interfere

to stay proceedings in criminal matters, or in any cases not strictly of a civil nature. They will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least a court of equity cannot entertain a bill on this ground alone. * * * A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression, and there is neither principle nor authority to support it. * * * Municipal authorities would be paralyzed in discharging the public duties intrusted to them if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the interference of a court of equity. * * * The counsel for the appellant have sought to withdraw the case presented by the bill from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer, the litigation and multiplicity of suits apprehended are criminal in their character, and without the jurisdiction of the court." And to the same effect are the following authorities: *Devron v. First Municipality*, 4 La. Ann. 11; *Beach on Injunctions*, § 520; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929; 1 *Spelling, Inj. & Extr. Rem.* § 694. In *Burch v. Cavanaugh*, 12 Abb. Prac. 410, it was held that an injunction will not lie to restrain an illegal arrest, and that several persons who were threatened with arrest could not unite in the same action to prevent it; and, further, that the insolvency of a person who threatens to make the arrest cannot be ground for an injunction to restrain him. The case of *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 South. 575, in its essential facts, is very much like the case at bar. The plaintiff alleged that the defendant, by the attempted enforcement of an illegal and void municipal ordinance, was interfering with her dairy business, and by its unauthorized acts was injuring her property and impairing the value thereof. The court, after stating that as a court of equity it had no power by injunction to prevent a municipal corporation from enforcing penal ordinances in the interest of public order and health, said: "The ordinance was enacted in pursuance of the police power vested in the city—whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation, in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the or-

dinance cannot, therefore, be considered in determining the question of jurisdiction. The enforcement of the ordinance vested by the Constitution and law of the state upon the recorder's court of the city of New Orleans. If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury, as she has her remedy, and can urge her defense in the recorder's court. Failing there, she has her remedy by appeal to this court." In *Cohen v. Commissioners*, 77 N. C. 3, this court said: "If the defendants have an unlawful ordinance, and have arrested and fined the plaintiffs, as they allege, the plaintiffs have complete redress in an action for damages. And as often as the arrest may be repeated they have the like redress. But we are aware of no principle or precedent for the interposition of a court of equity in such cases." The principle has been expressly affirmed in *Wardens v. Washington*, 109 N. C. 21, 13 S. E. 700, *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64, and recognized and applied in *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685; *Busbee v. Lewis*, 85 N. C. 332; *Busbee v. Macy*, Id. 329; and *Pearson v. Boyden*, 86 N. C. 585. While, as we have said, the fact that the police officers of the town are insolvent does not take this case out of the general rule, it may be added that process can be issued by the mayor, who is made by statute a magistrate and custodian of the peace with the jurisdiction of a justice of the peace, to any lawful officer, such as a sheriff, town constable, etc. (Code, §§ 2079, 3808, 3811, 3818; *State v. Cainan*, 94 N. C. 890); and the execution of such process is not confined to the policemen of the town. But, if an injunction is the proper remedy, the plaintiff must fail in this suit, as his case presents no equity to be protected by the restraining process of the court. The ordinances in question were adopted by the defendant before the plaintiff applied for and obtained his license to retail liquor, and he knew of their existence and accepted the license subject to the conditions and the regulations imposed by them. Under these circumstances, what moral or legal right has he to question their validity? The Legislature may prohibit or restrict the sale of liquor in any manner its wisdom and discretion may dictate, and no one has any natural or absolute right to sell liquor. If he sells at all, it must be on such terms as the law may impose. The law in this respect is thus stated in *Crowley v. Christensen*, 137 U. S. 91, 11 Sup. Ct. 13, 34 L. Ed. 620: "The police power of the state is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquor by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the ut-

most its evils. The manner and extent of regulation rest in the discretion of the governing authorities." The same doctrine is stated by this court in *Bailey v. Raleigh*, 130 N. C. 214, 41 S. E. 281, 58 L. R. A. 178, as follows: "It [the Legislature] had the right to have absolutely prohibited the interstate or any one else from selling liquor within one mile of the corporate limits of the city. This it did unless the party selling obtained a license or permission to do so from the city authorities. Instead of this right to do so with the permission of the city authorities being a restriction, its effect was to relax the prohibitory rule, and to grant him a right he did not otherwise have. The law allowing him to get a license from the city took nothing from him, and imposed no duty upon him. It only gave him an option—a right to take the license and pay the tax, or not. How he was damaged by having this privilege, this option, which he chose to accept, we are unable to see." When, therefore, the law conferred upon the defendant the power to "prevent, regulate, control, tax, or license the sale of spirituous, vinous, and malt liquors," as they had the power to prevent, or, what is the same thing, to prohibit, the sale, this necessarily implied that they could grant license upon any terms or conditions they saw fit, in the exercise of their judgment or discretion, to impose or to annex to the grant. "A grant of entire control, or of power to suppress and restrain, would enable the corporation to adopt any mode of regulation within the limit of those powers, license included." *Horr and Bemis*, Mun. Pol. Ord. p. 250. "Regulating a thing is the prohibition of it, except in accordance with certain rules. This act prohibits the sale and manufacture of intoxicating liquor except under certain regulations therein provided." *Cantini v. Tillman* (C. C.) 54 Fed. 975. I confess my inability to understand how a person, who, upon his own application, has received a license in which is stated that it was issued "subject to all ordinances of the city of Washington now in force and hereafter enacted, and upon the condition that a violation of any ordinance of the city shall work a forfeiture of said license," can continue to enjoy the right and privilege conferred by the license and repudiate the conditions upon which it was granted. He must take the burden with the benefit or privilege he has sought and accepted. If the plaintiff is about to suffer any injury to his property, it is one which he has voluntarily and deliberately brought upon himself by accepting a license so worded, and he has no good reason to complain. He is the author of his own misfortunes, if any are about to overtake him; and I am not aware of any principle of law or morals upon which he can justly appeal to a court of equity for relief.

Having concluded that the court has no jurisdiction to grant the relief demanded, it is unnecessary to consider the question ar-

gued by counsel as to the reasonableness and validity of the ordinances. That matter is not before the court, and anything I might say would be the expression of my individual opinion upon an abstract and hypothetical question. I agree with the majority of the court that the ruling below, by which the injunction was dissolved, was right.

CLARK, C. J., and CONNOR, J., concur with WALKER, J., that an injunction does not lie against the enforcement of a municipal ordinance, the violation of which is a misdemeanor, for the reason that the state cannot be enjoined from the execution of its criminal laws, and concur with MONTGOMERY, J., that the ordinances are not void.

DOUGLAS, J. (dissenting in part). With the utmost respect I am constrained to express the difficulty I have had in arriving at the real opinion of the court. Having held that the action would not lie, it seems to me that there the opinion of the court ended, and that all that is said in the numerous opinions as to what might have been the law if there were any question of law before us is obiter dicta. Still, as it is in the opinion of the court, and as the judgment of the court is that there is "no error," I must take things as I find them, regardless of their legal relation. I am inclined to think that the weight of authority is against the right of the plaintiff to injunctive relief. This, in my opinion, ends the case, and my only excuse for proceeding further is that I am following the court. We are now in the last hours of the term, and it is impossible to write this opinion, which has been delayed for various reasons, with the fullness and care that I would desire. Many of the ordinances are reasonable, while others are utterly indefensible. No ordinances should go beyond a reasonable regulation of the traffic, remembering always its dangerous character. But we must also remember that it is not an unlawful business as long as the state sees fit to license it, and that when the people vote for license they are entitled to have their will carried out in good faith by their public servants. When a man accepts a public office, he should give to all classes of men the equal protection of the law, no matter what may be his personal convictions, or resign the office. Under the pretense of regulating a business he should not seek to destroy it. Time will permit me to cite but one of the several ordinances I deem unreasonable. It is made unlawful for the owner of a saloon to enter his own building between 8 o'clock on Saturday night and 6 o'clock on Monday morning, a period of two nights and a day, and yet he is required to have a bright light burning in his saloon during the entire night. Should the light go out during that 34 hours, he is liable to heavy penalties if he fails to relight it, and also liable to a heavy penalty if he goes into his building for the purpose of

lighting it. Is this reasonable? It certainly is not law. *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535.

Much is said in the opinion of the court as to the moral features of the case that may justify a personal allusion on my part. All my life I have voted consistently and persistently for temperance in whatever form it was presented, and in the sunset of life I see no reason to change my course; but others are entitled to the same freedom of suffrage and opinion. I am constrained to say that I have sometimes had occasion to doubt the wisdom of my vote, and I am sure that the cause has frequently been injured by the intemperate language of some of the most zealous and brilliant of temperance advocates. My experience convinces me that extremists on either side are the evangelists of opposition.

(135 N. C. 356)

McCALL v. WEBB et al.

(Supreme Court of North Carolina. May 11, 1904.)

OFFICERS—TITLE TO OFFICE—RIGHT TO FEES—
RES ADJUDICATA—STATUTES—CONSTITUTIONAL LAW.

1. Code, § 616, as amended by Acts 1895, p. 105, c. 105, § 1, as amended by Acts 1899, p. 144, c. 49, relating to the hearing of cases to try title to office, requires the defendant to give a bond conditioned on defendant paying to the plaintiff all costs and damages, including the loss of fees and emoluments which plaintiff may recover in the action, and provides that, if the bond be not given, the judge shall render judgment in favor of plaintiff and against defendant for the office and costs, and judgment by default and inquiry, to be executed at term, for damages, including fees and salary, and that, in case the bond is given and judgment is rendered for plaintiff, the court shall render judgment against defendant and his sureties for costs and damages, including loss of fees and salary. Code, § 618, provides that in actions to recover the possession of an office, if judgment be rendered in favor of the person alleged to be entitled to the office, he may recover by action the damages which he shall have sustained. *Held*, that section 618 is inconsistent with, and therefore repealed by, section 616 as amended.

2. There is no constitutional objection to Acts 1895, p. 105, c. 105, § 1, as amended by Acts 1899, p. 144, c. 49, amending Code, § 616, relating to the hearing of cases to try title to office, on the ground that the action is prosecuted in the name of the state to assert the right of one of its citizens to a public office.

3. Under Code, § 616, as amended by Acts 1895, p. 105, c. 105, § 1, as amended by Acts 1899, p. 144, c. 49, relating to the hearing of cases to try title to office, the failure of plaintiff to recover fees and salary in the action adjudging his right to the office is a bar to a new and independent action for fees and salary.

Montgomery and Douglas, JJ., dissenting.

Appeal from Superior Court, Buncombe County; Hoke, Judge.

Action by R. S. McCall against Ohas. A. Webb and others. From a judgment for plaintiff, Webb appeals. Reversed.

The General Assembly, by an act passed at its session of 1895, established the "crim-

inal circuit court of the counties of Buncombe, Madison, Haywood, and Henderson," and the plaintiff was duly elected and qualified as solicitor of the circuit for the term of four years. In 1897 the act was amended by adding the county of McDowell to the circuit. The Legislature, at its session of 1899, repealed both of the said acts, and subsequently, at the same session, established the "Western District criminal court," with jurisdiction in the said counties and others named in the act, and provided for the appointment of a solicitor for each of the counties composing the district. The defendant was appointed and qualified as solicitor for the county of Buncombe, and was installed in office. The plaintiff thereupon brought an action in the nature of quo warranto against the defendant to test the validity of the act of 1899, which he alleged to be void, and in his complaint he states that the defendant has usurped and intruded into the office of solicitor of the Western District criminal court for Buncombe county, and is unlawfully receiving the fees and emoluments thereof. He demands judgment that the defendant is not entitled to the office, that the plaintiff is so entitled, and for costs, and for such other and further relief, etc. In his answer the defendant denies the plaintiff's right to the office, and, among other things not necessary to mention, avers that he is "in possession of said office lawfully, and is lawfully entitled to receive and retain to his own use the fees and emoluments thereof." The plaintiff, on filing his verified complaint, applied to the court, by motion in writing, for an order requiring the defendant to file a bond in the sum of \$200, to be void upon condition that the defendant "shall pay to the plaintiff all such costs and damages, including the damages for loss of such fees and emoluments as may or ought to have come into his hands, as the plaintiff may recover in this action"; and he notified the defendant that "in default of the execution and filing of such undertaking the plaintiff will move for judgment for the recovery of said office and costs, and for judgment by default and inquiry for damages according to law." He afterwards moved that the defendant be required to increase the penalty of the bond to an amount not less than \$400. Both motions were granted by the court, and the defendant was required to give undertakings conditioned as above set forth in the plaintiff's written motion—one of them, in the sum of \$200, being executed by the defendant with his codefendants, Rankin and Featherstone, as sureties; and the other in the sum of \$300 by the defendant with his codefendant Rankin as surety. These undertakings were given in strict accordance with the acts of 1895 and 1899 hereinafter mentioned. Upon the coming in of the answer each of the parties moved for judgment upon the pleadings. The court gave judgment for the plaintiff, and therein declared him "to be entitled to the office, and to perform the duties and

to receive the emoluments thereof," and for costs of action. There is no reference in the judgment to the plaintiff's right to recover of the defendant any of the fees or emoluments of the office received by him, nor did the plaintiff ask for any reference or any inquiry to ascertain or assess his damages. The judgment was simply that he was entitled to the office, and that he recover the possession of the same, and his costs. To the judgment thus rendered the defendant excepted, and appealed to this court, which, on November 21, 1899, affirmed the said judgment. 125 N. C. 243, 34 S. E. 490. At November term, 1899, of the superior court, the plaintiff moved that the judgment of the last term in the quo warranto case be reformed so as to include an order for an inquiry as to his damages, and that a referee be appointed to take and state an account of the salaries, fees, and emoluments received by the defendant. These motions were continued. Afterwards, at February term, 1900; the plaintiff moved that the judgment entered at November term, 1899, be amended by inserting the words: "This cause retained for the purpose of an inquiry as to the damages which the relator may be entitled to recover of the defendant herein;" and, second, that the plaintiff's complaint in that action be amended by inserting in it an allegation as to the unlawful and wrongful receipt of the fees and emoluments of the office by the defendant to the amount of \$700, and his refusal to account for and pay over the same to the plaintiff, together with a prayer for judgment for \$700, the amount of said fees and emoluments and costs. The motions of the plaintiff were denied at February term, 1900, and final judgment then entered according to the certificate of this court. The plaintiff excepted, and appealed, and the judgment was affirmed by this court. 126 N. C. 760, 36 S. E. 174. The plaintiff thereafter, on November 29, 1899, brought this action against the defendant and his surety on the undertakings given in the former action to recover the fees alleged to have been collected by the defendant as solicitor, amounting to \$657.50, and the defendant pleaded the judgment in the former suit as res judicata and a bar to this action. The matter was heard in the court below upon a case agreed, the facts of which we have already substantially set forth. The court adjudged upon the facts that the plaintiff recover of the defendants the sum of \$657.50, the full amount of the fees collected by the defendant Webb during his incumbency of the office, with interest and cost, the said judgment to be discharged as to the defendant Featherstone by the payment of \$200 and interest to the day of the payment, and as to the defendant Rankin so soon as the payments amounted to \$500 and costs then accrued. The defendant excepted to this judgment and appealed.

Julius C. Martin, F. A. Sondley, and T. H. Cobb, for appellant. Frank Carter and V. S. Lusk, for appellee.

WALKER, J. (after stating the case). The question in this case is whether the plaintiff should have recovered his damages for the loss of the fees and emoluments of the office in the action in the nature of *quo warranto* in which his right to the office of solicitor was established, or whether he can maintain a separate action, such as this one is, and recover his damages therein. If he could only have his damages assessed by reference or inquiry in the first suit, it would seem perfectly clear that the judgment in that suit operates as *res judicata*, and is a complete bar to his right of recovery in this case, as he permitted a final judgment to be entered in that action without having his damages assessed. Whether the remedy to have the damages assessed in the first action was exclusive of all other remedies, and prevented the bringing of a separate action, as this is, for their recovery, depends upon the construction of our statutes upon the subject, because it cannot be contended with any hope of success that the Legislature did not have the power to provide that the plaintiff's damages should be assessed and recovered in the action brought to try the title to the office. The right to a particular remedy is not a vested one, and, while the Legislature cannot deprive a party of all remedy, the state has complete control over the remedies which it offers to suitors in its courts, and may limit the resort to remedies. It may abolish old remedies and substitute new, or even without substituting any, if a reasonable remedy still remains. *Cooley*, Const. Lim. (7th Ed.) p. 515 et seq. It was so held in *Parker v. Shannonhouse*, 61 N. C. 209, in regard to the repeal of the statute giving the remedy by *scire facias* (13 Edw. I, c. 15; Rev. Code, c. 81, § 100) to revive a dormant judgment, because the plaintiff still had the common-law remedy by action upon the judgment. It has been held that laws changing remedies for the enforcement of legal contracts or abolishing one remedy when two or more existed may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy. *Cooley*, supra, 406. So that the power resided in the Legislature to repeal the remedy by separate action for the recovery of damages from him who has been adjudged to have wrongfully intruded into an office and to have received the fees and emoluments thereof. The functions of a court in respect to statutes are, first, to decide upon their constitutionality or validity, and, second, to ascertain and declare their meaning.

Having decided as to the extent of the power and authority of the Legislature with respect to remedies, we will next consider what remedy it has given for the recovery of damages such as those claimed in this case. It was provided by the Code, § 613, that in actions to recover the possession of an office, "if judgment be rendered upon the right of the person so alleged to be entitled,

in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation of the defendant of the office from which such defendant has been excluded." It was held under this section that compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder, who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. *Swain v. McRae*, 80 N. C. 111; *Jones v. Jones*, Id. 127; *Howerton v. Tate*, 70 N. C. 161. Section 616 of the Code, providing for expediting the hearing of cases brought to try the title to offices, was amended by Acts 1895, p. 105, c. 106, § 1, by inserting the following: "The defendant before he is permitted to answer or demur to the complaint shall execute and file in the superior court clerk's office of the county wherein the suit is pending an undertaking with good and sufficient surety in the sum of \$200 which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant shall pay to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments, as may or ought to come in the hands of the defendant, as the plaintiff may recover in the action." And section 1 of chapter 105, p. 105, of the Acts of 1895 was itself amended by Acts 1899, p. 144, c. 49, by adding thereto the following: "At any time after a duly verified complaint is filed alleging facts sufficient to entitle the plaintiff to the office, whether such complaint is filed at the beginning of the action or later, the plaintiff may upon ten days notice to the defendant or his attorney of record move before the resident judge or the judge riding the district at chambers to require the defendant to give such undertaking; and it shall be the duty of the judge to require the defendant to give such undertaking within ten days; and if the undertaking shall not be so given the judge shall render judgment in favor of the plaintiff and against the defendant for the recovery of the office and the costs, and judgment by default and inquiry to be executed at term for damages including loss of fees and salary. Upon the filing of said judgment for the recovery of such office with the clerk, it shall be the duty of the clerk to issue and the sheriff to serve the necessary process to put the plaintiff into possession of the office. In case the defendant shall give the undertaking, the court, if judgment is rendered for the plaintiff, shall render judgment against the defendant and his sureties for costs and damages including loss of fees and salary." It will be observed that by the act of 1895 the defendant is required to give an undertaking to secure to the plaintiff all costs and damages, including such fees and emoluments as may or ought to come into his hands, and which the plaintiff may recover in the action. This language is

perfectly clear and explicit, and leaves no room for doubt as to what is meant. If it is not expressed in so many words, it is plainly implied, that the plaintiff must recover his damages in the pending action for the recovery of his office, for the essential condition of the undertaking is "that the defendant shall pay all such costs and damages as the plaintiff may recover in the action," and these damages are secured by the undertaking, and, if they are not paid by the defendant, the sureties become liable for them. How can a plaintiff recover damages in an action unless they are assessed in that action. The expression, "such costs and damages as the plaintiff may recover in the action," means necessarily and *ex vi termini* that there must be a recovery of them in that action, or not at all. The damages are to be recovered just as the costs, for they are associated together, and put in the same category. But if there were any uncertainty as to the meaning of that statute, all doubt would be removed by the act of 1899, for it provides that: "If the undertaking shall not be so given the judge shall render judgment in favor of the plaintiff and against the defendant for the recovery of the office and the costs and judgment by default and inquiry, to be executed at term for damages including loss of fees and salary." And again: "In case the defendant shall give the undertaking, the court, if judgment is rendered for the plaintiff, shall render judgment against the defendant and his sureties for costs and damages including loss of fees and salary." (*Italics ours.*) A judgment by default and inquiry is taken always against the defendant, and not against his sureties. They cannot be said to have defaulted, nor are the damages assessed against them, but against the defendant, and they become liable for the amount so assessed to the extent of the penalty of their bond. But the second branch of the act of 1899 is still more to the point, and excludes any and all doubt as to what was meant. It is therein expressly provided that, if the undertaking is given, and the plaintiff recover, judgment shall be rendered against the defendant (and, of course, his sureties) for costs and damages. This is a positive and unequivocal direction that judgment for any damages sustained by the plaintiff shall be rendered, if at all, in the action brought to try the title to the office.

These amendments in regard to the method of recovering damages in such cases do not provide for a cumulative remedy, but it was intended by them to substitute the remedy by inquiry in the action brought to recover the office for the former remedy by separate action on the undertaking, which was given by section 613 of the Code; and, besides, the amendments are inconsistent with the provisions of section 613, and the latter is therefore repealed by them. The amendments provide not only a sufficient and adequate remedy for the assessment of the plaintiff's

damages, but one that is more expeditious and less expensive than a civil action. We do not think there is anything in the peculiar nature of the suit, nor in the fact that it is brought in the name of the state, that renders the mode of procedure prescribed by the amendments incompatible with the object or purpose of the suit. It is now an ordinary civil action, prosecuted, it is true, in the name of the state, but in fact for the use and benefit of the relator, who is the real party in interest, or at least one of the real parties in interest; and he can assert all of his rights in the action. So far as the action affects his rights, it is private in its nature. There is no constitutional objection to the amendments of 1895 and 1899 upon the ground that the action is prosecuted in the name of the state to assert the right of one of its citizens to a public office.

Having sustained the validity of the acts of 1895 and 1899, and having shown from the wording of the acts that they require the damages to be assessed in the original action, we will now refer to some of the authorities upon the latter question. In *Gold Co. v. Ore Co.*, 79 N. C. 48, the court, construing section 192 of the Code of Civil Procedure (now section 341 of the Code), which required the damages to be ascertained by reference or otherwise, as the judge shall direct, held that it was not contemplated that a separate action should be brought on the injunction bond, but that the damages should be assessed in the action in which the bond was given. To the same effect is *Crawford v. Pearson*, 116 N. C. 718, 21 S. E. 561, in which it is said the fact "that the defendant was sued alone in this action, and not his sureties on the injunction bond with him, makes no difference. The undertaking does not impose any new liability on the defendant, but simply provides an additional security. Therefore the damage which the plaintiff suffered, if any, should have been assessed in the same manner as if the sureties on the undertaking had been moved against; i. e., in the same action in which the injunction was issued." In *Railroad v. Mining Co.*, 117 N. C. 191, 23 S. E. 181, it is held, approving the cases just cited, that when there is a final judgment against the plaintiff in the action the defendant must "then and there lodge a motion for the assessment of their damages, or else lose their remedy." But when there is an appeal the motion must be entered not at or before the time of the appeal, but, when, after the judgment of the appellate court is certified to the lower court, the latter is about to enter the final judgment, and before it is entered; otherwise the right to damages will be lost, as in the other case, where there was no appeal. It is contended that the cases of *McCall v. Webb*, 126 N. C. 760, 36 S. E. 174, and *McCall v. Zachary*, 131 N. C. 466, 42 S. E. 903, settle the principle that a separate action for the damages in cases like this may be brought, and that it is

the only proper remedy. We have read and carefully considered those cases, and, so far as they do so decide, we do not think that they can be sustained. It is manifest that the court overlooked the acts of 1895 and 1899, which perhaps were not called to its attention. No reference to them is made by the court, and in the discussion of the cases the argument of the court proceeded altogether upon the idea that the action in the nature of quo warranto is of a public nature, which, we think, is erroneous. If such an action is instituted by the state alone, or by the state on the relation of a citizen to inquire into the right of another to hold a public office, the action might be said to be of a public nature; but not so where one citizen sues another for the recovery of an office, although he uses the name of the state for the purpose. The distinction is clearly drawn in High on Ext. Leg. Rem. §§ 629a, 631, and 682, and is also recognized in the Code, §§ 607-610 and 618. But the suggestion is sufficiently answered by the fact that the acts of 1895 and 1899 have distinctly provided that the damages shall be assessed in the original action, and it was clearly within the power of the Legislature so to provide.

In *McCall v. Webb*, 128 N. C. 760, 36 S. E. 174, it was held that the plaintiff's motions to amend the judgment and to amend the complaint were properly refused, because, as they were made after the certificate of this court had been sent to the court below, that court could not change or modify the judgment of this court; and *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 916, and several other cases, were cited in support of the ruling. The principle stated is undoubtedly a correct one, but we do not think it had any application to that case. Those cases apply only when the action of the court below would introduce a new cause of action or new facts, and thereby unsettle the decision and final judgment of the court, and not to cases in which an order is made for the purpose only of carrying the judgment into effect. If Judge McNeill had granted the motions, he would not have changed or modified in the least the former decision of the superior court or the decision of this court. The judgment declaring *McCall* to be entitled to the office of solicitor would have remained unimpaired. Perhaps the proper course to pursue is to move for an inquiry at the time the judgment is first entered, and then, if there is an appeal, and the judgment is affirmed, the inquiry can be executed when the case goes back to the superior court; but, if it is reversed, the order for an inquiry, being a part of the judgment, will be set aside with it. We do not mean by this to say that the motion for an inquiry cannot be made after the judgment of this court is certified to the superior court. It may be that either course is open to the plaintiff. The ruling in *McCall v. Webb*, 128 N. C. 760, 36 S. E. 174, seems to be inconsistent with the decision in

Railroad v. Mining Co., 117 N. C. 191, 23 S. E. 181, which we have already cited and commented upon. In view of the plain and explicit provision of the statute as contained in the acts of 1895 and 1899, we are unable to follow *McCall v. Webb*, 128 N. C. 760, 36 S. E. 174, and *McCall v. Zachary*, 181 N. C. 466, 42 S. E. 903, upon the question involved in this action. If the plaintiff was erroneously denied relief in *McCall v. Webb*, supra, he should have filed a petition to rehear, and, if the decision was right, he loses because he made his motions in the cause too late. In either case the judgment of the superior court in that action, which was affirmed by this court, is a final determination of all matters which the law required to be litigated in it. The judgment is conclusive, not as to all matters which might have been brought into it for litigation, but as to those which the law contemplates as actually involved in the case and presented for decision, and the cases must be thus understood. *Glenn v. Wray*, 128 N. C. 730, 36 S. E. 167; *Williams v. Clouse*, 91 N. C. 827; *Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144. The plaintiff is concluded by the judgment in the original action of *McCall v. Webb*, as to all claim for damages, including the loss of fees and emoluments, upon the presumption of the law that they have either been waived by his not insisting on their recovery, or that his right thereto has been adjudicated against. In no view of the matter can this action be maintained, as a party cannot resort to a new and independent action when relief can be had by proceeding in the original cause. *Clark's Code* (3d Ed.) p. 855, where the numerous cases are collected. This is especially so when the law prescribes what the remedy shall be, and how it shall be enforced.

It must be certified to the superior court that there is error in its judgment, which must be set aside, and judgment entered upon the agreed statement of facts dismissing the action. Reversed.

MONTGOMERY, J. (dissenting). The plaintiff in this action brought a civil action in the nature of quo warranto against this defendant to recover the possession of the office of solicitor in the criminal court of Buncombe county, and at August term, 1899, of the superior court of that county recovered a judgment upon the complaint and answer. The defendant appealed to this court, and the judgment was affirmed. At the term of the superior court when the certificate of the opinion and judgment of this court was received the plaintiff made two motions—the first for a reference to have ascertained the amount of fees and emoluments the defendant had received while he was wrongfully in possession of the office; and, second, for an amendment to his complaint to embrace a claim for such fees and emoluments. The motions were overruled, and upon appeal by

the plaintiff to this court it was decided that there was no error in the ruling. In the meantime, on November 25, 1899, the plaintiff had commenced the present action in the superior court of Buncombe county against the same defendant Webb and the other defendants, J. E. Rankin and A. A. Featherstone, for the recovery of \$857.57, which it is admitted was the amount of fees which the defendant had collected while in possession of the office of solicitor of the criminal court of Buncombe county. The defendants, in their answer, set up as a defense to the action of the plaintiff the plea of *res judicata*. They contend that by law the matters of complaint in the present action should have been heard and decided in the original *quo warranto* proceeding, and the plaintiff, not having claimed the fees and emoluments of the office in that complaint in that suit, nor made a motion to have the fees and emoluments ascertained in that action, is precluded from making such demand against the defendants in a separate action. This question, then, is presented: Is the plaintiff in a *quo warranto* action for the recovery of an office compelled to have the damages in the way of fees received by the intruder assessed and ascertained in the same action? Or may he recover the office in the *quo warranto* proceeding, and bring an action for the fees and emoluments in a separate action, if he sees fit to take that course? The answer to the question depends upon the construction of certain recent statutory law. By the terms of section 616 of the Code, actions to try the right or title to any public office are required to be tried at the return term of the summons if the complaint shall have been filed and a copy served with the summons 10 days before the return day thereof, and the judges are to expedite the trial of such actions, and give them precedence over all other actions, criminal or civil. The act of 1895, p. 105, c. 105, amended section 616 of the Code by adding these words: "The defendant, before he is permitted to answer or demur to the complaint, shall execute and file in the superior court clerk's office of the county wherein the suit is pending an undertaking with good and sufficient surety in the sum of \$200, which may be increased from time to time, in the discretion of the judge, to be void upon condition that the defendant shall pay to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover in the action." (Italics ours.) The General Assembly, at its session of 1899, amended the above-mentioned act by adding to section 1 the following: "At any time after a duly certified complaint is filed alleging facts sufficient to entitle the plaintiff to the office, whether such complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days notice to the de-

fendant or his attorney of record, move before the resident judge or the judge riding the district at chambers to require the defendant to give said undertaking; and it shall be the duty of the judge to require the defendant to give such undertaking within ten days, and if the undertaking shall not be so given the judge shall render judgment in favor of the plaintiff and against the defendant for the recovery of the office and the costs and judgment by default and inquiry to be executed at term for damages, including loss of fees and salary. Upon the filing of said judgment for the recovery of such office with the clerk, it shall be the duty of the clerk to issue and the sheriff to serve the necessary process to put the plaintiff into possession of the office. In case the defendant shall give the undertaking, the court, if judgment is rendered for the plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary." The plaintiff in this action, after he had duly verified his complaint, twice moved before the judge of the district to have bonds according to the statutes executed by the defendant to secure the fees and emoluments of the office. The bonds were ordered, and one of them was executed by J. E. Rankin and A. A. Featherstone, defendants in this action, as sureties in the penalty of \$200, and the other by Rankin as surety for \$300. The condition in each of these bonds is that the bond shall be void if the makers shall pay to the plaintiff all such costs and damages, etc., as the plaintiff may recover of the defendant *in this action*. (Italics ours.) These bonds were drawn in exact conformity to the statutes to which we have referred; and according to the language, its clear intent and meaning, and the meaning of the statutes themselves, no damages can be recovered on the bonds in the present action. The undertaking was that the makers should be liable on the bond only for such damages as might be recovered by the plaintiff in the action in which the bonds were given. The plaintiff did not see fit in that action to claim his damages and have them assessed, but of his own motion recovered a judgment upon the pleadings for the office simply. He must have known that, so far as the bonds were concerned, if he wanted damages, he was required to recover them in that action. I, however, think that the judgment below against the defendant Webb ought to be affirmed. I am satisfied that the extraordinary benefits and remedies furnished by the statutes referred to to the plaintiff to secure to him the benefits of a recovery were intended also to afford the sureties on the bond the advantage of having that part of the action which referred to the damages which the plaintiff was entitled to recover settled speedily, and in the same action. It was for the benefit of the sureties, and not for that of the intruder, that the statute required that damages should

be assessed in the quo warranto proceeding. In quo warranto proceedings, so far as the question of damages is concerned against the intruding defendant, section 613 of the Code still applies. Its language is as follows: "If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall sustain by reason of the usurpation by the defendant of the office from which such defendant has been excluded." That section of the Code does not require that a plaintiff in quo warranto, in his claim for damages, shall be compelled to recover them in that action. *Howerton v. Tate*, 70 N. C. 161. In that case it was decided also that an intruder who may perform the duties of the office and receive the fees arising therefrom cannot retain any part of the fees as a compensation for his labor. This case of course overrules that of *McCall v. Zachary* (a unanimous opinion of the court) 131 N. C. 466, 42 S. E. 903, so far as they are in conflict. The statutes I have referred to in this case were not so critically examined by me in that case, as they have been examined in this; and the argument for the defendant, too, before this court in the present case was more elaborate and thorough than it was in that case.

Modified and affirmed.

DOUGLAS, J., dissents.

(134 N. C. 612)

STATE v. PATTERSON.

(Supreme Court of North Carolina. March 1, 1904.)

INTOXICATING LIQUOR—STATUTES—TITLE OF ACT—CONSTRUCTION—SALES—PLACE OF DELIVERY—CONSTITUTIONALITY OF STATUTE—CONSTITUTIONAL LAW—PLACE OF TRIAL OF AN OFFENSE.

1. Laws 1903, p. 572, c. 349, is entitled "An act to prohibit the manufacture, sale and importation of liquors in C., M. and G. counties." And section 2 declares that the place where delivery of any intoxicating liquor is made in the state shall be held to be the place of sale thereof. Held that, notwithstanding the title, section 2 of the statute applies to a sale and delivery of liquor at any place within the state.

2. Whether an enactment in a statute is general, local, public, or private is a question of law for the court.

3. Whether an enactment in a statute is general or local, public or private, is not determined by the nature of the act in which the enactment is found, nor by its publication in the public or private statutes.

4. Laws 1903, p. 572, c. 349, § 2, providing that the place where delivery of liquor is made in the state shall be construed to be the place of sale thereof, and that any place to which any person shall ship any liquor for the purpose of delivering the same to a purchaser shall be construed and held to be the place of sale, is not unconstitutional as to shipments within the state.

5. The sixth amendment to the federal Constitution, providing that in a criminal prosecution the accused shall be tried by a jury of the state and district where the crime shall have been committed, is a restriction on the federal

government and courts, and not upon the states, and hence Laws 1903, p. 572, c. 349, § 2, providing that any station or place to which any person shall ship or convey any liquor for the purpose of delivery to a purchaser shall be construed to be the place of sale, is not affected by such amendment.

Douglas, J., dissenting.

Appeal from Superior Court, Durham County; Cooke, Judge.

J. G. Patterson was indicted for selling liquor in prohibited territory. Verdict of not guilty entered on a special verdict, and the state appeals. Reversed.

Manning & Foushee, R. B. Boone, and the Attorney General, for the State. Winston & Bryant, for defendant.

CLARK, C. J. The defendant is indicted for selling spirituous liquor to one Guess in the town of Durham, where such sale is prohibited by virtue of an election had under the provisions of chapter 233, p. 288, Laws 1903. The special verdict finds that the defendant was not a druggist, and had no license to sell spirituous liquor within the city of Durham; that he resided in Roxboro, where he had license to sell spirituous liquor; that Guess sent the defendant \$2 by mail, with an order to ship said Guess at Durham one gallon of corn whisky, by express, charges prepaid, which the defendant did, and the whisky was delivered to Guess in Durham; that said Guess was not a druggist, nor was said liquor sold to him upon the prescription of a regularly practicing physician. The point presented, therefore, is whether this was a sale at Roxboro, where the liquor was delivered to the carrier by the defendant for transportation to Guess, or was it a sale at Durham, where it was received by Guess, and where such sale was prohibited by law?

Laws 1903, p. 572, c. 349, § 2, provides: "That the place where delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors is made in the state of North Carolina shall be construed and held to be the place of sale thereof, and any station or other place within said state to which any person, firm, company or corporation shall ship or convey any spirituous, malt, vinous, fermented or other intoxicating liquors for the purpose of delivery or carrying the same to a purchaser, shall be construed to be the place of sale: provided this section shall not be construed to prevent the delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors to druggists in sufficient quantities for medical purposes only." This section is explicit that the place of actual delivery to the buyer, or to which it shall be shipped for delivery to him, "shall be construed to be the place of sale." It is contended that this provision does not have the effect of the plain purport of the words used by the lawmaking power, because:

1. This section 2 is found in a statute entitled "An act to prohibit the manufacture,

sale and importation of liquors in Cleveland, Cabarrus, Mitchell and Gaston counties." Formerly, the caption of an act was not at all considered to any extent whatever in construing it, for reasons given in *State v. Woolard*, 119 N. C. 779, 25 S. E. 719, but the modern doctrine is that, when the language of the statute is ambiguous, the courts can resort to the title as aid in giving such act its true meaning, but that this cannot be done when the language used is clear and unambiguous. *Randall v. Railroad*, 107 N. C. 748, 12 S. E. 605, 11 L. R. A. 460; *Id.*, 104 N. C. 410, 10 S. E. 691; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719; *Freight Discrimination Cases*, 95 N. C. 434, 59 Am. Rep. 250; *Blue v. McDuffie*, 44 N. C. 131. To like purport, in *Hadden v. Collector*, 5 Wall. 107, 18 L. Ed. 518, Mr. Justice Field uses the following language: "At the present date the title constitutes a part of the act, but it is still construed as only a formal part. It cannot be used to extend or to restrain any positive provisions in the body of the act." The language of section 2 is "that the place where delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors is made in the state of North Carolina shall be construed and held to be the place of sale thereof. * * *" This provision is positive in its character, and its operation cannot be restrained by any reference to the title of the chapter. In the sections of chapter 349 other than sections 1 and 2 there is no reference to the place in which the act is to be operative, and hence, by reference to the title, they are to be applied only to the four counties therein named. Section 1 is specifically made operative in the counties therein named, and is to take effect at a different date, and section 2 is made operative as to the sale of any spirituous or intoxicating liquors anywhere in the state, and, as to them the title cannot be used to restrict or extend the meaning of the explicit, clear, and unambiguous language used. "It is well settled," says *Ruffin, O. J.*, in *Humphries v. Baxter*, 28 N. C. 439, "that one part of a statute may be public in its nature, while another is local and private." Part of a statute may be local, and another of general application; part may be a public statute, of which the court will take judicial notice, and another part a private statute, which must be set up in the pleadings; and whether an enactment in a statute is general or local, public or private, is a question of law for the court, and is not determined by the nature of the act in which the enactment is found, nor by its publication in the public or private statutes. The decisions are uniform as to this. *State v. Wallace*, 94 N. C. 827; *Durham v. Railroad*, 108 N. C. 401, 12 S. E. 1040, 13 S. E. 1; *State v. Barringer*, 110 N. C. 529, 14 S. E. 781; *Hancock v. Railroad*, 124 N. C., at page 225, 32 S. E. 679; *Potter's Dwarrit*, 53.

2. It is further objected that, if the statute has this meaning, it is unconstitutional, but

we are not pointed to any section of the Constitution which forbids the lawmaking power to designate the place of sale when the goods are shipped by the vendor to the vendee by a common carrier or other agency. It is true the courts have held that the place of sale is where the goods are delivered to the carrier, the latter being the agent of the vendee; thus making the constructive delivery, instead of the place of actual receipt of the goods by the purchaser, the place of sale. This rule is of comparatively modern origin, and at first was held to apply only when the vendee designated the carrier by whom the goods were to be shipped. *Davies v. Peck*, 8 D. & E. 330. It has not been uniformly held, and is subject to many exceptions (1 *Beach*, Cont. § 568; 2 *Kent*, Com. 499), as the right of stoppage in transitu, and other exceptions. It is merely a rule of judicial construction, which was made in the absence of legislation, and is not protected by any constitutional provision from legislative power to change it. Especially can the Legislature change such rule in the exercise of its police power over the sale of intoxicating liquors, when, as here, it can be readily seen that, with the multiplication of common carriers and the speed and ease with which intoxicating liquors can be shipped, it would be a vain thing to prohibit the sale of liquor in any designated territory, if vendors a short distance off can at will fill orders coming from within the prohibited territory upon the judicial fiction that the sale is complete upon delivery to the carrier, who is construed as the agent of the vendee. Whether it may or may not require an act of Congress to make a similar change as to liquor shipped into prohibited territory from points outside the state in no wise affects the power of the state to so provide when the shipment is from another point in the state. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. In *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450, as construed by same court in *Railroad v. Sims* (Dec., 1903) 24 Sup. Ct. 151, 48 L. Ed. —, it seems to be held that by virtue of the police power shippers of intoxicating liquors into a state from without its borders are subject to the same restrictions as shippers from points within the state, it not being a matter of taxation upon interstate commerce. But that point is not now before us. Where one upon one side of the line of a political division, as a state or county, shoots across the line and kills a person on the other side, the courts have held that the act is committed where the shot is delivered by striking the body of the victim (*State v. Hall*, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822); or if he commit false pretense by a letter delivered in another state, the offense is committed in the state in which the letter is delivered (*In re Sultan*, 115 N. C., at page 60, 20 S. E. 375, 28 L. R. A. 294, 44 Am. St. Rep. 433). A statute modifying the latter rule

was sustained in *State v. Caldwell*, 115 N. C., at page 800, 20 S. E. 523; and in *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89, in which Gray, J., said that the statute rested upon the general power of the Legislature to declare any willful or negligent act which causes an injury to persons or property in its territory to be a crime. The General Assembly has authorized the people of Durham to hold an election by virtue of which it is deemed injurious to sell intoxicating liquors in the limits of Durham, and by virtue of such exercise of the police power, and to make it effective, it is further enacted that the sale shall be deemed made in Durham (or elsewhere in this state) upon the delivery there of the injurious article to the buyer, just as in the case of a shot fired across the line, or a letter or poison so sent by the mail or other agency.

It was suggested on the argument, though the point is not made in the record, that the statute contravenes the sixth amendment to the United States Constitution, which provides that in all criminal prosecutions the accused shall be tried by a jury of the state and district where the crime shall have been committed. But aside from the fact that the law has construed the crime to be committed in Durham, where the forbidden article was actually delivered, instead of at Roxboro, where it was only constructively delivered, it is well known that the first 10 amendments were all passed as restrictions upon the federal government and courts, and as a concession to states which reluctantly and hesitatingly had entered into the Union upon a pledge that such amendments should be submitted. That these amendments are restrictions upon the federal government, and not upon the states, has been uniformly held in the United States Supreme Court. *State v. Caldwell*, 115 N. C., at page 803, 20 S. E. 523, and cases there cited; *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *Cook v. U. S.*, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906; *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Spies v. Ill.*, 123 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80; and there are numerous others. *Twitchell v. Com.*, 7 Wall. 321, 19 L. Ed. 223; 2 Tucker, Cons. § 325, and cases collected in 8 Rose's Notes, 368-372. In *Barron v. Baltimore*, supra, Marshall, C. J., referring to the first 11 amendments, said: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." Upon the special verdict the defendant should be adjudged guilty.

Reversed.

DOUGLAS, J. (dissenting). Regardless of any personal predilections, I am forced to dissent from the decision of the court as a pure matter of law. It is impossible for me by any process of reasoning to bring my mind to the conclusion that the Legislature

had a legal intention of doing something that I am morally certain never entered their minds. It is a matter of common knowledge, borne out by the legislative journals and published laws, that the Legislature, after most careful consideration, enacted a general act intended to reduce the regulation of the whisky traffic throughout the state to a uniform system, as far as possible. In framing this act two bills were earnestly pressed by their respective supporters—the Watts bill, which was substantially adopted, and the London bill, which was ably drawn, and expressed in clear and exact language the purposes of its distinguished author. These bills represented distinct schools of thought, and the adoption of one over the other was an unmistakable expression of legislative preference. At the same term at which the Legislature passed the general act and the act now held by the court to be amendatory to the general act, it also passed 25 or 30 other acts relating to the same general subject. These acts profess to be local, like the act now construed by the court as general in its operation, and, with four exceptions, are likewise printed in the public laws. Can we suppose that the Legislature intended every section in every one of these numerous acts to operate as an amendment to the general act unless specifically restricted in each section? If one of them can have such an effect, why should not the others? If that were so, what would become of the general act, and what hope would there be of extricating the law from the hopeless confusion that would result? Oliver Cromwell denounced the laws of England in his time as "a tortuous and ungodly jumble." If the great protector were brought face to face with our liquor laws, including the general act, with all the amendments constructively adhering thereto, and the infinite variety of municipal ordinances passed thereunder, I fear that words would fail him. But it may be asked, what other construction is open to us? The answer seems simple enough to me: construe those statutes to be general which on their face profess to be general, and those to be special which are avowedly special. Of course, I am now alluding to conflicting statutes passed at the same session of the Legislature, and in *pari materia*. Where there is neither conflict nor ambiguity in the statute, there is no room for interpretation. The act containing the section which the court now says is general in its application is specifically entitled "An act to prohibit the manufacture, sale and importation of liquors in Cleveland, Cabarrus, Mitchell, and Gaston counties." I know that it has been said that the caption or title is no part of the act. This was so originally because in England all acts of Parliament passed at the same session were considered as one act. The separate acts had no captions when passed, and hence the captions were not the words of

Parliament, but of the speaker or some parliamentary clerk, who subsequently added them thereto. But now, since the title has become a part of the act as passed by the Legislature itself, the rule is necessarily different. Indeed, the title has become so essential a part of the act that it is sometimes taken as the act itself. Section 23 of article 2 of the Constitution provides that: "All bills and resolutions of a legislative character shall be read three times in each House, before they pass into laws." It is a well-known fact that bills are rarely ever read in full except on the second reading, if then; and that they are habitually "read by title" on both the other readings. If the Legislature did not consider the title as an essential part of the bill, giving substantial notice of its contents, would not such habitual action be a flagrant violation of the Constitution?

I have said that these acts are in pari materia, being passed by the same Legislature, at the same session, and upon the same general subject-matter. They should therefore be construed together, so as to preserve them both as complete and effective acts, each operating within its own sphere of action. 26 A. & E. Enc. (2d Ed.) 620 et seq., and cases cited therein; Black, Int. Laws, § 86; Sedgwick, Stat. & Const. Law, 247; Endlich on Int. of Stats. §§ 43, 44, 45, 56; State v. Bell, 25 N. C. 506; Simonton v. Lanier, 71 N. C. 498; Rhodes v. Lewis, 80 N. C. 136; Bowles v. Cochran, 93 N. C. 398; Wortham v. Basket, 99 N. C. 70, 5 S. E. 401; Willson v. Jordan, 124 N. C. 683, 33 N. E. 139. I do not feel that any legal principle forces me to impose such a constructive intent upon the Legislature, and I feel sure that no such intent existed in fact. Custom permits the writer of a dissenting opinion to allude to known facts outside the record. In the light of such facts it will hardly be contended that the Legislature actually intended the act in question to apply to any counties other than those mentioned in its title. I understand that the author of the bill disclaims any such general application, and I am informed on the highest authority that when the bill was read in the Senate it was distinctly asked and positively answered that it did not apply to any counties other than those named therein. Upon that assurance it was passed.

It is not for me to discuss the merits of the act, but, in answer to a suggestion in the opinion of the court, I may say that the practical effect of the section is not so much to restrict the traffic as to force it into the hands of nonresidents who can carry it on with impunity. All that the present defendant has to do is to "move a little further from the road," over into the state of Virginia, and continue his business. But this does not influence me in my view of the law. As to the moral effect of a statute not resting upon the will of the people, I may be permitted to express my doubts. After years of faithful devotion to the cause of temperance, I am satisfied that it can never rest upon a legal

fiction, and that no great moral question ever made any permanent advancement along the pathway of indirection.

WALKER, J., concurs in result only.

(185 N. C. 628)

OSBORN v. LEACH et al.

(Supreme Court of North Carolina. May 27, 1904.)

LIBEL—MATTERS LIBELOUS PER SE—BURDEN OF PROOF — STATUTES—RETRACTION—CONSTITUTIONAL LAW—ACTION—FAILURE TO ALLEGE NOTICE—DEMURRER—DISMISSAL.

1. A publication to the effect that plaintiff bought for the State's Prison, of which he was a director, a number of mules, paying an excessive price for them, and that he received for his services a specified sum for each mule bought, as a commission, when by statute he was only entitled to \$4 a day as compensation for director, was libelous per se.

2. In an action for the publication of matter libelous per se, the burden is on defendant to prove the truth in mitigation.

3. Const. art. 1, § 35, declares that all courts shall be open, and that every person shall have, for an injury in his lands, goods, person, or reputation, a remedy by due course of law; and section 20 declares that the freedom of the press ought not to be restricted, but that every individual shall be held responsible for the abuse of the same. The London libel law (Laws 1901, p. 784, c. 557, § 1) provides that, before any proceedings shall be brought for the publication in a periodical or newspaper of a libel, the plaintiff shall serve a written notice on defendant, specifying the article and the statements which he alleges to be false, and that if it appears on trial that the article was published in good faith, that its falsity was due to an honest mistake in fact, and that there were reasonable grounds for believing that the article was true, and that within 10 days after the serving of notice a fair and full retraction was published, the plaintiff shall recover only actual damages. Held, that the statute is not unconstitutional, since "actual damages" include all save punitive damages, which are not property. ||←

4. The question, under the statute, whether defendant in an action for libel exercised good faith, made an honest mistake, and had reasonable ground for believing the publication true, is an affirmative defense.

5. The question, under the statute, whether defendant in an action for libel exercised good faith, made an honest mistake, and had reasonable ground for believing the publication true, is a question for the jury.

6. Inasmuch as the statute applies in its terms equally to all newspapers and periodicals, it does not amount to an unconstitutional discrimination.

7. In an action against a periodical for libel, it is ground for demurrer that it does not appear that the statutory notice was given defendant.

8. Where, in an action against a periodical for libel, defendant demurs on the ground that it does not appear that the statutory notice was given it, and the demurrer is sustained, the court may, in its discretion, permit the complaint to be amended by alleging such notice, if in fact it was given.

9. An action against a periodical for libel will not be dismissed because the statutory notice was not given defendant, since, even if it were not given, the action is still valid for the recovery of actual damages.

10. In an action against a periodical for libel, the fact that plaintiff failed to give the statutory

notice could not affect the defendant prejudicially, where it appeared that defendant actually made a retraction.

Douglas, J., dissenting in part.

Appeal from Superior Court, Guilford County; O. H. Allen, Judge.

Action by W. H. Osborn against M. T. Leach and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

King & Kimball, J. T. Morehead, and T. M. Argo, for appellant. J. A. Barringer, Armistead, Jones & Son, and Brooks & Thompson, for respondent Leach. Busbee & Busbee, for respondent News & Observer Pub. Co.

CLARK, C. J. This is an action for libel against M. T. Leach and the News & Observer Publishing Company. Judgment by default for want of an answer and inquiry had been taken against the defendant Leach. 132 N. C. 1149, 45 S. E. 1037; 133 N. C. 427, 45 S. E. 783. In the trial upon the merits, at the close of the plaintiff's evidence, the defendant Leach moved to dismiss "upon the ground that the newspaper article alleged to be libelous was not libelous, and that the plaintiff had not alleged a cause of action." The court, being of that opinion, instructed the jury, on account of the judgment by default and inquiry, to return a verdict of one penny as to Leach, and thereupon rendered a judgment against him for one penny damages and one penny costs. Code, § 525 (4). In this there was error. The publication inspired by the defendant Leach charges that the plaintiff bought for the State's Prison, of which he was a director, certain mules, giving \$27 per head more than they were worth, and paying for horses double what they were worth, thus defrauding the State's Prison of that sum; and charging further that the plaintiff received for his services \$5 for each mule bought, as commissions, his expenses, and several hundred dollars for his time, when, as director, by law he was entitled to \$4 per day only (Laws 1899, p. 119, c. 24, §§ 4, 9, 10), and that he committed a fraud upon Leach; thus charging a breach of official duty by the plaintiff as director of a state institution, and incompetence, if not worse, in the purchase of the mules and horses, and the receipt of pay in excess of that allowed by law. This language was libelous per se (Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775), and the burden was upon the defendant to prove its truth or matter in mitigation.

As to the other defendant, the News & Observer Publishing Company, the court allowed the motion made to dismiss upon the grounds (1) that the plaintiff had not given it the notice required by chapter 557, p. 784, Laws 1901; (2) that the plaintiff had not made out a case against it; and (3) upon the further ground that the plaintiff's counsel admitted in open court that the plaintiff had

not sustained, and did not claim, any special damage. The second ground is disposed of by what is said above. The article was not copied from any paper which had then been filed in any legal proceeding, but was an oral statement by the defendant Leach to the reporter of the News & Observer of what he intended to file. The burden was upon the defendant publishing company to prove the truth of the publication, or to prove the absence of malice.

The other two points raise the question of the constitutionality of chapter 557, p. 784, Laws 1901, commonly known as the "London Libel Law." That statute has been adopted in several states in almost the identical words of our statute. It has been already presented in the Supreme Court of two of our sister states, and has been held to be unconstitutional in both, but because of the addition of words restricting "actual damages" to mean special damages, which words are omitted in our statute.

The Constitution of North Carolina provides: "All courts shall be open, and every person for an injury in his lands, goods, person, or reputation, shall have remedy by due course of law." Article 1, § 85. "The freedom of the press ought not to be restrained, but every individual shall be held responsible for the abuse of the same." Article 1, § 20. If, therefore, this chapter impairs the right of any one to recover for an injury to his reputation, or abridges the responsibility of the press for an abuse of the freedom of the press, the Legislature is clearly forbidden by the above sections of the Constitution from the enactment of such statute.

Section 1, c. 557, p. 784, Laws 1901, is as follows: "Before any proceedings, either civil or criminal, shall be brought for the publication in a newspaper or periodical in this state of a libel, the plaintiff or prosecutor shall at least five days before instituting such proceedings serve notice in writing on defendant or defendants, specifying the article and the statements which he alleges to be false and defamatory. If it shall appear upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction were published in the same editions of corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if in a criminal proceeding, a verdict of guilty shall be rendered on such a state of facts, the defendant or defendants shall be fined a penny and costs and no more: provided this act shall not apply to existing suits." It must be noted that there is no penalty on the plain-

tiff, nor any exemption to the defendant, if the plaintiff does not choose to give the five-days notice, but there is merely a provision that five days' notice must be given by the plaintiff, in the manner stated, before issuing his summons, and that, when such notice is given, then, if within 10 days the specified retraction is made, and it appears that the article was printed in good faith by honest mistake, and with reasonable ground to believe the statements to be true, the plaintiff can only recover actual damages. It was therefore error in the court to nonsuit the plaintiff, because good faith, honest mistake, and reasonable ground of belief were affirmative defenses, which the court could not adjudge. But independently of that, as the argument raises the constitutionality of the act, it is well to dispose of it.

The plaintiff is entitled to recover actual damages under the act of 1901, and actual are compensatory damages, and include (1) pecuniary loss, direct or indirect, or special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation. Punitive damages are not included in what are termed actual or compensatory damages, and the act, upon the conditions therein specified, relieves and can relieve a defendant only against a claim for that particular kind of damages. They are awarded on grounds of public policy, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. 18 Am. & Eng. Law (2d Ed.) 1091; Wallace v. Railway, 104 N. C. 452, 10 S. E. 552. The right to have punitive damages assessed is therefore not property. The right to recover actual or compensatory damages is property. In our case the law presumes injury to the feelings, mental anguish, and injury to the reputation, the publication being libelous per se. The evidence of the plaintiff, besides, proves both these elements, and also physical suffering. There is no evidence of special damages, and it is not inferred. The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are actual damages, and these are property. "The right to recover damages for an injury is a species of property, and vests in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment, but the commission of the wrong, that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guarantees." Hale on Damages, p. 2, note 5; Cooley, Const. Lim. (5th Ed.) 445. It cannot be extinguished except by act of the parties or by operation of the statute of limitation. Ib. This being an action upon a libel per se, the plaintiff has a right to recover compensatory damages. Newell on S. & L. 43; Hale on Damages, p. 90, note. Compensatory damages include all other damages than punitive, thus

embracing not only special damages, as direct pecuniary loss, but injury to feelings, mental anguish, and damages to character or reputation. 18 Am. & Eng. Enc. (2d Ed.) 1082 et seq.; Hale on Damages, pp. 90, 108. "Actual damages" are synonymous with "compensatory damages" and with "general damages." Newell on S. & L. 839; 18 Am. & Eng. Enc. (2d Ed.) 1081 et seq. Damages for mental suffering are actual or compensatory, not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Enc. (2d Ed.) 802. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character. In similar statutes adopted in other states the following words were added, which are wisely omitted in our statute, i. e., that actual damages shall mean only "such damages as the plaintiff has suffered in respect to his property, business, trade, profession or occupation." And on account of the inclusion of those words, which restrict actual damages to mean special damages, the act has been held unconstitutional in most conclusive opinions by very able courts, both in Kansas and Michigan. In a recent opinion (Hanson v. Krehbiel, 75 Pac. 1041), filed March 12, 1904, the Supreme Court of Kansas, passing upon the constitutionality of chapter 249, p. 439, Laws 1901, of that state, which is verbatim our libel law (chapter 557, p. 784, Laws 1901), save the addition in that statute of the definition of actual damages, as above stated, holds that the statute is unconstitutional because in violation of section 18 of the Kansas Bill of Rights, which gives to all persons injured in person, reputation, or property remedy by due course of law; such constitutional guaranty being almost identical with the above-cited section 85, art. 1, of the Constitution of North Carolina. The Supreme Court of Kansas says: "It will be noted that the questioned statute limits the right of recovery in cases of libel to actual damages, where, after service of notice provided in the first section, the publisher of the newspaper in which the libelous matter has appeared shall make a full and fair retraction of the libelous matter, coupled with a showing upon the trial that the same was published in good faith, under a misapprehension of the facts, and defines that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession, or occupation. So that in such cases the libeled party may not recover all his damage, but he is confined to the narrow class designated and defined in the act as actual damages. The common law recognizes two classes of damages in libel cases—general and special. General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence. They are al-

lowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted, and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. The injury for which this class of damages is allowed is something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, it is a real one, and more often than otherwise more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, it is such an injury to the reputation as was contemplated in the Bill of Rights. The law presumes that this class of injuries resulted necessarily from the publication of the libelous matter, and the damages therefore were recoverable without special assignment. Special damages were also recoverable, when properly pleaded and shown, and were such damages as were computable in money, and may be said to be fairly embraced in the list of actual damages as given in the statute referred to. This was the condition of the law at the time of the adoption of our Constitution, and is now, and all these are the injuries to reputation for which it provided that there should be 'remedy by due course of law.' It requires no argument to demonstrate that the act in question does deny remedy for a portion of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is remediless. For that other large class of persons, and still larger class of injuries, no remedy is found. From the writings of the world's wisest man we have the assurance 'that a good name is rather to be chosen than great riches.' Yet the possessor of this thing of greatest value, being despoiled of it, is left entirely without remedy for its loss, by the statute in question, except in such rare cases as he shall be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that it is less protected from spoliation by the quoted provision of the Bill of Rights. It is suggested, however, that the retraction required by the act to be published is a fair compensation for the injury done, and a re-investment of the libeled one with his good name. This being done, all has been accomplished that would be by a verdict of a jury, and hence that the retraction required by the legislative enactment is, if not 'due course of law,' an ample substitute for it. It is not an easy task to deduce either from reason or the authorities a satisfactory definition of 'law of the land' or 'due course of law.' We feel safe, however, from either standpoint, in saying these terms do not mean any act that the Legislature may have

passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one 'shall have remedy'; that is, proper and adequate remedy, thus to be ascertained. To refuse hearing and remedy for an injury after its infliction is a small remove from infliction of penalty before and without hearing." It further says: "The retraction required by the act in question may or may not be full reparation for the injury suffered. It might the rather aggravate the injury already inflicted, than mollify it. It is sufficient to say, however, that all these are questions for the courts, upon proper notice to all parties, and may not be determined arbitrarily by an act of the Legislature. * * * It is claimed that, admitting the constitutional invalidity of this act, because it denies remedy by due course of law, still the Legislature would have a right to require the service of this notice as a step in the procedure in prosecuting an action for the recovery of damages occasioned by libel; this in order to give the publisher opportunity of retraction for the purpose of mitigating general damages and relieving himself from punitive damages. We do not deny that the Legislature might do this. It seems to us, however, that such was not its purpose and object, but, rather, that the service of this notice was but a step in the procedure to relieve publishers from all general damages. That object being found unconstitutional, these ancillary matters must go with it." We have thus copied at some length the discussion of an almost identical statute by the very able Supreme Court of our sister state because of the clearness and vigor with which it presents our own views upon the subject.

The Supreme Court of Michigan also holds a similar statute unconstitutional (*Park v. Detroit Free Press*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 540), saying: "We do not think the statute controls the action or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in such cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel.

A woman who is slandered in her chastity is, under this law, usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charge is unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief." This case has subsequently been approved by the same court in *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21, where the court holds that "the right to recover in an action of libel for damages to reputation cannot be abridged by statute."

These decisions were by unanimous courts. A contrary view was expressed, but by a divided court, in *Allen v. Pioneer Press*, 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. Rep. 707, based mainly upon the reasoning that the retraction, being required, as it is, to be published as widely and to substantially the same readers, is usually a more complete redress than would be a judgment for damages. But as the Kansas Supreme Court, *ut supra*, well observes, this may or may not be true, and, even if true, it is not "remedy by due course of law," which section 35, art. 1, guarantees that every person shall have, through the courts, "for an injury to his lands, goods, person or reputation." He is entitled, of constitutional right, to have such injury determined, and the amount of just compensation for his wrong settled by a jury of his peers. He cannot be deprived of this by a legislative adjudication beforehand that a retraction by the newspaper is full compensation for the injury he has suffered. And even in that case (*Allen v. Pioneer Press*) a new trial was granted be-

cause the question of good faith should have been submitted to the jury.

It was therefore error in the court below to sustain the third ground of the motion, which construed the statute as restricting the recovery to special damages. Those words are not in our statute, and, if they were, the statute would be unconstitutional, as we have seen. Besides, as above stated, whether the publication was made in good faith, honest mistake, and with reasonable ground of belief—the conditions which, taken with the retraction, would relieve from punitive damages—is an affirmative defense, to be found by the jury upon the evidence. It was error for the court to find it.

The provision for retraction, construed according to its palpable meaning, as affording opportunity to escape punitive damages only, and when there was good faith, honest mistake, and reasonable ground of belief before publication, is an appropriate remedy, in its terms, for newspapers and periodicals, and could not well apply to others. It applies equally to all newspapers and periodicals, and we do not think it a discrimination forbidden by the Constitution.

The only remaining question is whether the court was justified in dismissing the action upon the first ground in the motion of the defendant *The News & Observer Publishing Company* for failure to give the five-days notice required before bringing an action of this nature. Such failure was held to be ground for demurrer in *Williams v. Smith* (at this term) 46 S. E. 502. The giving of such notice is required only for the purpose of furnishing the defendant opportunity to publish a retraction, the effect of which, as we have seen, could extend no further than to relieve from punitive damages, even when good faith, honest mistake, and reasonable ground of relief are shown by the defendant. When such demurrer is sustained, the action should not be dismissed, but the court can still permit, in its discretion, the plaintiff to amend the complaint by averring such notice, if it was in fact given; and, if it was not, the action is still valid for the recovery of actual damages—i. e., of all except punitive damages—and it would be error to dismiss it. In this case, failure to give the five-days notice in no wise could affect the defendant, for the additional reason that it actually did make the retraction, to afford the opportunity of doing which is the only reason for requiring the notice.

For the reasons given there must be, as to both defendants, a new trial.

DOUGLAS, J. (concurring in the result). While concurring in the result, I feel constrained to say that, in my opinion, the so-called libel act is unconstitutional, inasmuch as it discriminates between the editor of a newspaper and the ordinary citizen. If I write a letter libeling an editor, that perhaps, at most, 10 people may see, and he li-

bels me by printing identical charges against me that 10,000 people may see, I am subject to pains and penalties from which he is exempted by operation of the statute. Whatever other merits the act may have, I do not think that such discrimination can be sustained under the explicit provision of our Constitution. It is, however, due to the court to say that its opinion eliminates from the act its most dangerous features.

CONNOR, J., did not sit on hearing of this case.

(135 N. C. 591)

WESTFELDT et al. v. ADAMS et al.

(Supreme Court of North Carolina. May 27, 1904.)

EJECTMENT — EVIDENCE — HEARSAY — DECLARATIONS — INSTRUCTIONS — ERROR — SUPREME COURT RULE — CONSTRUCTION — DEED — ACKNOWLEDGMENT — SEAL — STATUTE.

1. Battle's Revisal, c. 35, § 14, providing that conveyances of land by a married woman must be jointly executed with her husband, and that proof or acknowledgment shall be before the probate judge, and requiring the judge, when the land is in another county than that of his residence, to affix his seal of office to the certificate, has no application to the deed of an unmarried man.

2. In an action to recover possession of land located on a certain ridge defendants introduced one H., who testified that the entries for the defendants' lands had been made by M. in his (H.'s) name, and that he (H.) had no interest in them. Another witness testified that his father, who was dead at the time of the trial, told him, when witness was a boy, the names of ridges in their view, while they were standing in the vicinity of the land in question, and showed the witness what was declared to be the ridge on which the land was located, and on that occasion spoke of the tract of land in dispute as lying on the ridge which was about 2½ miles long. *Held*, that it was proper to reject as hearsay further testimony of the witness to the effect that his father then pointed in the direction of the lands in controversy, and said the reason he did not enter them was that they were covered by older grants, the H. or M. lands, or the H. and M. lands, which, the witness said, he did not remember, and, further, that he did not know which H. his father referred to, nor where the lands were.

3. The compensation received by a surveyor for making a survey of land involved in an action to recover possession thereof is not such a disqualifying interest as to render proof of a declaration by the surveyor as to the boundary incompetent.

4. Where the testimony of a witness in ejectment was admitted to contradict another witness, it was error to refer to the testimony of the impeaching witness in reciting to the jury the evidence for the party introducing the witness without calling their attention to the fact that the testimony was only to impeach the testimony of the other witness, though, when the testimony of the impeaching witness was received, the court told the jury they could only consider it for the purpose of contradicting the witness impeached.

5. Amended Sup. Ct. Rule 27 (46 S. E. 111), providing that when testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge

to again instruct the jury specially on the nature of such evidence, unless his attention is called to the matter by a prayer for instruction, has no application to a case where the judge afterwards in his charge marshals evidence along with substantive evidence in the case without again calling the attention of the jury to its nature.

Appeal from Superior Court, Haywood County; Hoke, Judge.

Action by G. R. Westfeldt and others against W. S. Adams and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Shepherd & Shepherd, Jos. J. Hooker, Moore & Rollins, and Merrimon & Merrimon, for appellants. F. A. Sondley and Julius C. Martin, for appellees.

MONTGOMERY, J. This case was before this court at its August term, 1902, and is reported in 131 N. C. 379, 42 S. E. 823. It is an action in the nature of ejectment. Several of the most important questions raised by the defendants' appeal on the former hearing and decided against them are before us again on the present appeal of the defendants. The plaintiffs, to make good their allegation of title to the land described in the complaint, introduced in evidence a grant from the state to E. H. Cunningham, dated April 28, 1860, and numbered 2,325; a duly certified copy of a proceeding in voluntary bankruptcy of Cunningham, and a deed from F. S. H. Reynolds, assignee of the estate of Cunningham, bankrupt, to George Westfeldt, dated April 24, 1869, registered in Swain county September 16, 1881, for the land covered by the grant numbered 2,325. That deed was without a seal. In their answer the defendants denied that the plaintiffs were owners of the land, and in further defense they averred that, if the grant from the state to Cunningham embraced the land described therein, yet that the defendants were the owners of two tracts of land of 100 acres each, situated within the boundaries of the land described in the grant of the state to Cunningham. That claim of the defendants rested, as they averred, upon two state grants, No. 1,545 and No. 1,546, of prior date to that of the grant to Cunningham, to William R. and John McDowell, respectively. The defendants in their first appeal struck at the deed from Reynolds, the assignee in bankruptcy, to Westfeldt, contending that it was void because neither the official nor private seal of Reynolds was attached to his signature, and the same question is raised on the present appeal.

The court, in its former decision, recognized the rule of law that a plaintiff might recover in an action of ejectment upon an equitable title, and also recognized the rule of practice that, where it was necessary to establish equitable ownership by extrinsic testimony, the facts and circumstances should be particularly set out in the complaint. But the court there held that in cases where the

naked legal title was outstanding in another, or where, upon the face of the record evidence introduced on the trial, a court of competent jurisdiction would, in an ex parte proceeding, and as a matter of course, order the correction of a mere formal defect in a deed, for instance, it is not necessary to set forth the particular facts constituting the equity in the proceedings; and the court cited *Geer v. Geer*, 100 N. C. 679, 14 S. E. 297, on that point. The defendants did not except to that proposition of law or to that rule of practice, but contended then, and contend now, that the deed from Reynolds, the assignee in bankruptcy, to Westfeldt, does not fall within the principle decided in *Geer v. Geer*. In the case as first reported we decided that it did, and we refer to the reasons for our decision to those given in the case as formerly reported. In addition, we will say that the proceedings in bankruptcy under the act of 1867 were conducted through the several United States District Courts. The assignee, by virtue of his election or appointment, was vested with the title and right of possession of the property, real or personal, of a bankrupt. The assignee was also authorized by the law to make sale of the property of a bankrupt, the proceeds to be distributed among his creditors. Reynolds, the assignee, sold the land to Westfeldt, received the purchase money, and the same was distributed as by law required. In executing the deed to the purchaser the assignee omitted to affix his seal. Can there be a doubt that a judge presiding over the court under whose jurisdiction proceedings in bankruptcy were conducted would hesitate for a moment to order a commissioner to execute a deed to the purchaser in cases where the assignee was dead or had discharged his duties and closed his trust? We think not. In the former appeal, the defendant contended that the probate of the deed from Reynolds, assignee, to Westfeldt, was fatally defective, in that it was had before the judge of probate of Buncombe county, the land being situated in the county of Macon, afterwards in the new county of Swain (formed in 1871—Pub. Laws 1870-71, p. 155, c. 94), and the signature of the probate judge not being attested by the seal of his office or by his private seal. The court there held neither at the time of the probate of the deed—May, 1860—nor when it was registered in Swain county on September 16, 1881, did the law require the certificate of the probate judge to be attested by the seal of the probate officer, and the Acts of 1868-69, p. 134, c. 64, and *Battle's Revisal*, c. 35, § 5, were referred to. But the defendants now insist that the court made a mistake in the former opinion in its citation of chapter 64, p. 134, of the Acts of 1868-69, and refer us to chapter 277, p. 653, of the same session, ratified a month later than chapter 64. The defendants contend that the last-mentioned act, in full effect when the probate of the deed was had before the judge of probate of Buncombe

county, required the official seal of that officer to be affixed to the probate. We knew at the time of the former decision in this case, as we know now, that chapter 277, p. 653, of the Acts of 1868-69, brought forward in *Battle's Revisal*, c. 35, § 14, referred to the probate of deeds only where the right, title, and interests of married women were concerned and attempted to be conveyed. Those acts did not affect the deeds of unmarried men.

The defendants, in undertaking to locate the grants 1,545 and 1,546, under which they claimed, introduced many witnesses whose evidence tended to prove that the lands embraced in those grants were situated on Little Fork ridge, and there was a contention between the plaintiffs and the defendants as to where Little Fork ridge was; the defendants contending and introducing much evidence to show that it lay in the Smoky Mountains, between Sugar Fork creek and Haw Gap creek, and that it occupied all the space between those two streams, running down to the water's edge on both sides, and extending back in a northerly direction to and connecting with what is known as "Jenkins' Trail Ridge." The defendants introduced evidence to show that a mountain oak, the beginning corner of one of their grants, stood upon this Little Fork ridge, as claimed by them. The plaintiffs introduced evidence tending to show that Little Fork ridge was located two or three miles northwest of the ridge as it is located and claimed by the defendants, and that it divided Eagle creek from Paw Paw creek, and undertook to show that there was a mountain oak marked as a beginning corner on the ridge claimed by them to be Little Fork ridge. To show that Little Fork ridge was located where the defendants claimed it to be, his honor allowed a witness for the defendants—Joel Crisp—to testify that when he was a boy 14 or 15 years old his father, who was dead at the time of the trial, had told him, while they were standing on the east side of Haw Gap creek, the names of the ridges, creeks, and streams, and showed him the edge between Sugar Fork and Haw Gap creeks, and that his father said that ridge was Little Fork ridge. The witness was then asked by the defendants if on that occasion his father had spoken to him of a tract of land called by the name of "Hill" or "Munday" land lying on Little Fork ridge. The witness answered "Yes," and then in that connection the counsel for the defendants submitted to the court in writing that they proposed to show by this witness that the father then pointed right in the direction of the land in controversy, and said, "The reason I did not enter those lands was that they were covered by older grants, the Hill or Munday lands, or the Hill and Munday lands"—which one, the witness said, he did not remember. The witness further said that the ridge to which his father pointed was about $2\frac{1}{2}$ miles long

and the witness did not know which Hill his father referred to, nor where the lands were. Johnathan Hill, introduced by the defendants, had testified that the entries for the two tracts of land described in the defendants' grants had been made by Munday in his (Hill's) name, and that he (Hill) had no interest in them. His honor refused to allow the witness Crisp to testify to what his father had said, when he was pointing toward Little Fork ridge. It was proper in his honor to admit the testimony of Crisp as to the location of Little Fork ridge. It was most natural evidence for the defendants, because it bore directly on the question of the location of their grants, and because the plaintiffs had introduced evidence the tendency of which was to show that the land claimed by the defendants was away and out of the neighborhood of Little Fork ridge as claimed by the defendants. But the attempt of the defendants to show the boundaries and the location of a tract of land by the hearsay evidence of a disinterested and deceased person, who had pointed in the direction of lands in the distance, and said that he did not survey or enter those lands because they had been entered by some one else, is altogether another matter. We are of the opinion that his honor ruled correctly in holding that the evidence was incompetent, and in refusing to receive it. The defendants, in their brief, insist that the evidence was as competent as that of Francks, who on the former trial was allowed to testify that his deceased father had told him about the beginning corner of a tract of land while they were 25 miles from the land, and although Francks, the witness, never identified the land afterwards. We do not see the similarity between the evidence of Francks (the subject of consideration in the former appeal) and that of the testimony offered on the part of the witness Crisp in the present appeal. Crisp's evidence was not offered to show where a boundary line was, or the beginning point of a tract of land, but to prove boundary or location by a pointing by one deceased in the direction of the land, the boundaries of which were in dispute. In the matter of Francks' testimony the evidence went to fixing the corner of the plaintiffs' land. If, in Francks' testimony, he had said his father, who was dead, and had no interest in the land, had told him on the spot that a certain point was the beginning point of a certain tract of land, there could have been no doubt, under all our decisions, of the competency of the evidence. But the conversation between Francks and his father about the beginning point of the tract of land in dispute occurred 25 miles away from the land, and Francks never identified it himself. The court said there: "The particular witness Francks had never afterwards actually identified the boundary as fitting the description given by the deceased declarant. Other witnesses, however,

testified that they found a tree at the alleged beginning corner answering the description given by the deceased to the first witness. If the beginning corner had not afterwards been identified, then the testimony of Caber and Francks would have been inadmissible; because it was afterwards found, we think it was competent." That ruling was going just as far as we thought the court ought to go in reference to the competency of hearsay evidence on the question of boundary, and we are not disposed to carry it further.

There was an exception made, but not urged on the argument, that the declaration of McDowell, the surveyor, as to boundary, was incompetent, because he had received \$50 as compensation for pointing out the beginning corner of the tract by the plaintiffs. The judge held that the disqualifying interest must be an interest in the subject-matter of the controversy, and that the compensation the witness got as a surveyor in fixing the beginning point in the survey did not make the declaration incompetent. This ruling was correct.

There is one error, however, committed in the trial below, and which is pointed out in the appeal of the defendants, on account of which a new trial must be ordered. It was an error, however, more of inadvertence than a misapprehension of the law. The trial of the case consumed more than two weeks. One hundred and twenty-five witnesses were introduced, and 11 days were taken up in hearing the evidence. Many perplexing questions of law were raised on the trial. The verdict was for the plaintiffs, and it was for them on the first trial, and we dislike to send this case back for a new trial. But under the law and our precedents it must be done. The plaintiffs, to locate the land covered by their grants, introduced evidence tending to show that the beginning corner was at a single chestnut tree on the left-hand side of the Jenkins trail, just above the Flint spring. The defendants, to show that the single chestnut tree near the Flint spring was not the true beginning point of the plaintiffs' grant, introduced J. B. Crisp, who testified that he was a chain bearer upon the survey made when the plaintiffs' grants were issued, and that the surveyors did not begin at the single chestnut tree ("H" on the map), as claimed by the plaintiffs, but at a chestnut marked on the map "Double Chestnut," about one mile northeast of the single chestnut, the point claimed by the plaintiffs as the beginning point. The plaintiffs then put in evidence an affidavit made by Crisp before the trial in the following words: "Personally appeared before me, the undersigned justice of the peace, John Bennett Crisp, and maketh oath that the chestnut tree on the left hand side of the trail leading from Flint spring to Haw Gap in the Smoky Mountains, is the beginning of four 640 acre tracts of land which

he was chain bearer for, which was surveyed for Daniel Lester; also to the place where a white oak stood in the south boundary line of said two tracts." Crisp on cross-examination denied that he had made the affidavit, and denied that he had ever told anybody that the single chestnut tree, the beginning point as claimed by the plaintiffs, was the beginning point or the corner of said tracts, or that the white oak was in the line of any of the tracts. A witness named Buchanan testified that he had heard John B. Crisp say the same thing as to the beginning corner of the land that was contained in the affidavit alleged to have been made by him. When Buchanan's evidence was received, his honor told the jury that it was received by him, and that they could only consider it, as evidence for the purpose of contradicting Crisp; but when his honor came on to instruct the jury as to the plaintiffs' contention that their beginning corner was at the single chestnut just above the Flint spring on the Jenkins trail, in reciting the evidence for the plaintiffs in that contention, he called the attention of the jury to the substantive evidence of many witnesses, and amongst the number he mentioned the evidence of the witness Buchanan, without directing their attention to the evidence of this witness as being purely contradictory of that of Crisp, and going to impeach his evidence in chief. After reciting what the other witnesses for the plaintiffs had said as to the beginning point of the plaintiffs' land, his honor went on to say: "A witness named Buchanan testified that he had heard John B. Crisp, a chain bearer, say that the Westfeldt corner was just above Flint spring, and that he also spoke of a white oak to the south as one of the Westfeldt corners." In not calling the attention of the jury, at that juncture of the trial, and in connection with the recital of the substantive evidence of the various witnesses of the plaintiffs as to the beginning corner, to the fact that the evidence of Buchanan was not substantive evidence on the subject of boundary, but only to impeach Crisp and to contradict his evidence, there was error. *Sprague v. Bond*, 113 N. C. 551, 18 S. E. 701; *Bullinger v. Marshall*, 70 N. C. 520; *State v. Parker* (at this term) 46 S. E. 511.

The court, at this term, has amended rule 27 (46 S. E. 111) by adding at the end thereof: "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground for exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose

shall be restricted." The amendment was made on the 16th March, 1904, and went into effect on that day. This case was tried at September term, 1903, of the superior court of Haywood county; but, if the case had been tried after the amendment to rule 27, the error we have pointed out would not be cured thereby. The amendment would not apply to a case where the judge below should instruct the jury, at the time of the admission of the evidence, that they should consider it only as corroborative, or for purposes of contradiction, if he afterwards in his charge should marshal that evidence along with the substantive evidence in the case. If he afterwards makes allusion to such evidence in his charge to the jury, he must again call attention to its nature.

For the error pointed out there must be a new trial.

CLARK, C. J., and WALKER, J., concur in result.

(102 Va. 791)

GREEN'S ADM'R v. SOUTHERN RY. CO.
(Supreme Court of Appeals of Virginia. June 16, 1904.)

RAILROADS—TRESPASSER ON TRACK.

1. Where an engineer, after becoming informed of the peril to which a trespasser on defendant's track was exposed, fails to take steps to stop the train, as he could have done, thereby avoiding the accident, the railroad company is liable for the resulting injuries.

Keith, P., and Cardwell, J., dissenting.

Error to Circuit Court, Halifax County.

Action by Green's administrator against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Lee & Howard, Hy. Edmunds, and Jas. H. Guthrie, for plaintiff in error. Munford, Hunton, Williams & Anderson, for defendant in error.

HARRISON, J. This action was brought by Green's administrator against the Southern Railway Company to recover damages for the death of the plaintiff's intestate, caused, as alleged, by the negligence of the defendant company.

After the evidence for the plaintiff and defendant had been delivered to the jury, the defendant demurred to the evidence. Thereupon the jury ascertained the damages to be \$2,750. Upon consideration of the demurrer, it was sustained, and judgment given for the defendant. This action of the court is excepted to, and is the sole question presented for our consideration.

At the time of the accident the deceased was a trespasser; having fallen asleep upon the track of the defendant company, where he lay until run over by one of its trains. The law governing this class of cases is well

¶ 1. See *Railroads*, vol. 41, Cent. Dig. §§ 1276, 1279, 1285.

settled. Indeed, it is not disputed. It is the application of the law to the facts that constitutes the subject of this controversy.

This court, in *Joyner's Case*, quoting from *Shearman & Redfield on Negligence*, has laid down the law in these words: "The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief." *Seaboard R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773; *Tucker v. Norfolk R. Co.*, 92 Va. 549, 24 S. E. 229; *Norfolk & W. R. Co. v. Dunnaway's Adm'r*, 93 Va. 29, 24 S. E. 698.

It appears that on the morning of the accident the deceased, a boy about 17 years of age, in company with *Patterson Hankins*, a boy 16 years of age—the latter with a gun—went upon the right of way of the defendant company to shoot rabbits. Shortly after reaching the railway track, the deceased lay down either at the end or upon the end of a cross-tie, and fell asleep. In this position *Hankins* left him, and went northwardly on the track with his gun. On his way back, *Hankins* saw a freight train coming, and immediately commenced running up the track towards the train, waving his hat for it to stop, and continued to run and wave his hat at the persons upon the approaching engine, whom he could plainly see looking toward him, until the sleeping boy was struck and killed, when he jumped off the track. Upon the demurrer to the evidence, these facts are established by the evidence of *Patterson Hankins*. The fact is established by the evidence of the fireman, introduced on behalf of the defendant, that, before the train reached the whistle post, a distance of more than 300 yards from the sleeping boy, as shown by actual measurement, he saw a boy running towards the train, with his hat in his hand, and saw the deceased lying on the track, and that he immediately notified the engineer. The fact is established by the evidence of the engineer, introduced on behalf of the defendant, that the appliances were in good condition for making a quick stop, and that he did actually stop his train in 200 yards. So that we have the engineer in charge of the train informed of the danger of the deceased when about 300 yards off, and his own admission that he could have stopped the train in 200 yards. If, therefore, he had, as was his duty, taken steps to stop the train as soon as he was informed of the peril to which the deceased was exposed, he could have brought

the train to a full stop about 100 yards before he reached the boy sleeping upon the track.

The case is stronger in favor of a recovery than *Joyner's Case*, supra, and is controlled by the principles therein enunciated. In the case cited, the engineer mistook the object lying near the track for an abandoned tie, and the only notice he had of danger ahead was two men running up the track, one of whom was waving his hat. In that case the defendant company was held liable.

In the case at bar there was not only the boy running up the track, waving his hat, but the fireman saw that there was a human being lying on the track, and notified the engineer in time for him to avoid killing the deceased.

For these reasons, the judgment complained of must be reversed, and judgment entered by this court in favor of the plaintiff in accordance with the verdict of the jury.

KEITH, P. (dissenting). In this case I am unable to concur in the opinion of the majority of the court.

To my mind, the evidence is clear and uncontradicted that the engineer in charge of the train which inflicted the injury upon plaintiff's intestate did everything within his power to prevent the accident after he became aware of his peril.

GARDWELL, J., concurring.

(902 Va. 837)

WASSERMAN et ux. v. METZGER.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

APPEAL AND ERROR—NECESSARY PARTIES—PROCEDURE.

1. Although no objection was made in the trial court, nor before this court, upon the ground that necessary parties are not before the court, the court on appeal will, where there is such a defect, send the case back, in order that the proper parties may be brought before it by proper amendment.

2. In a suit to set aside a sale under a deed of trust to secure a note, a bank that took the note as collateral security from one who had no title to it, long after it had been fully paid, was a necessary party.

Appeal from Law and Chancery Court of City of Norfolk.

Bill by *Sophia Metzger* against *Samuel Wasserman* and wife. Decree for plaintiff. Defendants appeal. Reversed.

Alfred P. Thom, for appellants. *Burroughs & Bro.* and *Thomas H. Willcox*, for appellee.

BUCHANAN, J. This suit was instituted by *Sophia Metzger* to set aside a sale made by *L. B. Allen*, trustee in a deed of trust executed by *Samuel Wasserman* and wife, to secure to *Mrs. Metzger* the payment of \$2,500. The ground upon which it was sought to set aside the sale made by the trustee was that

it was made without authority, and was therefore void.

The facts of the case, briefly stated, are as follows: By a deed dated December 10, 1892, Samuel Wasserman and wife conveyed to L. B. Allen, trustee, a house and lot in the city of Norfolk to secure to Sophia Metzger the payment of two negotiable notes, for \$1,250 each, payable one and two years after date, respectively, and dated December 10, 1892. In January, 1902, one P. J. Morris, representing himself to be the owner of one of the notes secured by the deed of trust, and the National Bank of Commerce of Norfolk, claiming to be the holder of that note as collateral security for a debt due it from Morris, informed Allen, trustee, that default had been made in the payment of the note, and directed him to sell the trust subject to satisfy the debts secured. The trustee thereupon advertised and sold the property at public auction, and Morris became the purchaser, at the price of \$2,200, on the 21st day of January, 1902. The trustee conveyed the property to Morris by deed dated as of the day of the sale, which was acknowledged for recordation two days afterwards. On the 25th of that month Morris and wife conveyed the property to trustees to secure to the Mutual Building & Loan Association of the City of Norfolk the payment of \$2,000, which Morris had borrowed from it. On the 30th day of the next month Morris and wife conveyed the property to David Kalberman, as trustee for Mrs. Rikchen Wasserman, the wife of Samuel Wasserman (but who was divorced from him soon afterwards), at the price of \$2,400; the grantee in the deed assuming the payment of the debt due the building and loan association, secured upon the property. After deducting the costs and expenses of the sale made by Allen, trustee, to Morris, the trustee paid one-half of the proceeds of the sale upon the note which Morris and the Commercial Bank claimed to be the owner and holder of, as before described, and notified Mrs. Metzger, the payee and holder of the other note, that he had a sum of money in his hands to be paid upon that note. A few days afterward the agent of Mrs. Metzger, who seems to be quite an old woman, called upon the trustee, pursuant to the notice. The agent denied any knowledge of the sale made by the trustee; stated that the note held by the parties who had directed the trustee to make sale of the house and lot had been paid, and that his mother held the other note which was still due and unpaid; and declined to receive the money in the hands of the trustee. Subsequently he did receive and credit it upon the note held by his mother, but at the time he received the money he did not have knowledge of all the facts, nor had he or his mother taken the advice of counsel at that time. The note claimed by Morris and the bank had been paid five years or more before the sale by the trustee, and had been delivered by the payee or her agent

to Samuel Wasserman, the maker. Mrs. Metzger, who lived in the city of Norfolk, had no notice of the sale made by the trustee, and gave him no direction to sell. Mrs. Wasserman, the vendee of Morris, and the present holder of the house and lot, had no actual notice of the fraud of Morris (who was in collusion with Samuel Wasserman) in claiming the note and causing the property to be sold by the trustee, nor that the sale made by Allen, trustee, was not made in accordance with the terms of the trust.

Upon the case made by the evidence as it now stands, it appears that the Bank of Commerce took the note from Morris, who had no title to it, without assignment by Mrs. Metzger, long after it had matured and been fully paid. All persons connected with the transactions set forth, and interested in the questions involved, were made parties to the suit, except the said National Bank of Commerce of the City of Norfolk, at whose instance and for whose benefit, in part, the sale by the trustee was made.

We are of opinion that, upon the state of facts presented by the record, no final decree could be entered in the case in the absence of said bank which might not do injustice, and that the trial court erred in not directing the complainant to amend his bill so as to make the said bank a party.

Although no objection was made in the trial court, nor here, upon that ground, this court will, where there is such a defect of parties, send the case back, in order that the proper parties may be brought before it. *Jameson's Adm'r v. De Shields*, 8 Grat. 4, 13; *Taylor's Adm'r v. Spindle*, 2 Grat. 44, 72; *Richardson v. Davis*, etc., 21 Grat. 708, 711; *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671.

The decree appealed from will be reversed without passing upon the merits of the case, and the cause remanded to the court of law and chancery, in order that the said bank may be brought before the court by the proper amendment of the bill.

WHITTLE, J., absent.

(102 Va. 677)

NEWPORT NEWS PUB. CO. v. BEAUMEISTER.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

NEGLIGENCE — PRESUMPTION OF LAW — EVIDENCE — MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.

1. The presumption of law that the instinct of self-preservation forbids the imputation of recklessness to any one can be considered only in the absence of evidence tending to show negligence.

2. Where a servant has a choice of two ways in performing his duty, one of which is perfectly safe and the other dangerous, and he voluntarily chooses the latter and is injured, he is

¶ 2. See Master and Servant, vol. 24, Cent. Dig. §§ 746, 749.

gully of contributory negligence, and the master is not liable—as where, with knowledge, to stop machinery he attempts acts which are dangerous to perform while it is running.

Error to Circuit Court of City of Newport News.

Action by W. H. Beaumelster against the Newport News Publishing Company. Judgment for plaintiff. Defendant brings error. Reversed.

R. M. Lett and O. D. Batchelor, for plaintiff in error. Bickford & Stewart and C. A. Ashby, for defendant in error.

HARRISON, J. The question involved in this case is the liability of the Newport News Publishing Company for the alleged negligent injury of the plaintiff, W. H. Beaumelster, while in the service of the defendant company as pressman in charge of its printing press.

The plaintiff alleges that, in operating the printing press of the defendant company, it became necessary for him to occasionally enter the pit under the press, in order to adjust certain parts of the machine; that it was the duty of the defendant, in the exercise of reasonable care, to properly light the pit, so that the plaintiff might, with due caution on his part, perform his duties therein; that the defendant failed to provide sufficient light in the pit for his safety, though it had promised to do so, and that, in reliance on such promise, plaintiff had continued in defendant's employment; and that on the day of the accident he had, in the performance of his duties, entered the pit, and, by reason of the insufficient light, was so injured that he suffered the loss of his hand.

Upon the plea of not guilty, issue was joined, and a verdict returned in favor of the plaintiff for \$2,000, which the circuit court refused to set aside.

Among the errors assigned is the action of the court in giving the following instruction for the plaintiff:

"The court instructs the jury that contributory negligence is as distinctly a wrong in the plaintiff as negligence is in the defendant, and that it is as much against the principles of the law to presume it upon the one side as on the other. And that the instinct of self-preservation forbids the imputation of recklessness to any one."

The last paragraph of this instruction would only be pertinent in a case where there was no evidence to sustain the theory of negligence on the part of the plaintiff. It has, however, no application where, as in the case at bar, the evidence is abundant to show the circumstances of the accident. In support of this instruction, *Southern R. R. Co. v. Bryant's Adm'r*, 95 Va. 212, 28 S. E. 183, is relied on. In that case Bryant was killed at a crossing, and the evidence was silent as to whether he had listened before attempting to cross. Under these circumstances, the court said it could not be inferred, as

a matter of law, that Bryant did not listen, because he drove upon the track without stopping, the instinct of self-preservation forbidding the imputation of recklessness to any one; that, where a traveler approaches a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. The court was dealing with the presumption of law attendant upon the absence of evidence. No such condition is presented by the case at bar. On the contrary, the evidence tends to show negligence on the part of both the plaintiff and the defendant. In such a case the verdict of the jury must rest upon the facts proven, and the inferences to be reasonably drawn therefrom, and not upon the presumptions of law in favor of either party. The instruction under consideration was therefore misleading, and calculated to create upon the mind of the jury the belief that the court was of opinion that there was no evidence tending to establish the negligence of the plaintiff.

The refusal of the court to give instruction No. 6 on behalf of the defendant is assigned as error. This instruction told the jury that an employé was not entitled to recover for an injury received while doing his work in an obviously dangerous way, when it could have been performed without danger in a way well known to the employé, and that, if they believed from the evidence that it was not necessary for the plaintiff to go into the pit while the machine was running, and that it was obviously dangerous to do so, and that the duty to be performed in the pit could have been performed in safety after first stopping the machine, and the plaintiff ignored the safe way and adopted the dangerous method of doing the work, he could not recover.

The gravamen of the declaration is that it was dangerous to go under the machine without a light while it was running. The plaintiff was a man of experience, and had the entire control and management of the printing press in question. His own evidence, as well as that of the defendant, shows that it was very dangerous to go into the pit under the machine while the machine was running, and that the absence of the electric light greatly enhanced the danger. The evidence further shows that there were two levers on the outside, and one in the pit, by the use of which the machine could have been stopped in an instant. The plaintiff says that he could have stopped the machine before going into the pit, and that, if he had done so, it would have been absolutely safe.

It was proper to instruct the jury that it was the duty of the defendant to repair the electric light for use in the pit, and that the plaintiff had the right to rely upon its promise to repair, and that such promise relieved the plaintiff from the implication of assump-

tion of risk in attempting to proceed with his work without the light, unless his doing so involved a degree of recklessness that no reasonably prudent man would encounter. But while the plaintiff may have been justified in proceeding with the work while the light was absent, that did not preclude an inquiry into the question of his contributory negligence in doing the work. The absence of the light increased the danger, and imposed upon the plaintiff enlarged obligations to exercise due care and caution in the performance of his duty. Notwithstanding the darkness and the promise of the master to repair the light, there was the absolutely safe way of repairing the defect in the machine; and the question arises whether the plaintiff did not owe to his master, as well as to himself, the duty of adopting the method of doing the work with respect to which there was no danger. It is a well-settled principle that where a person has a choice of two ways in performing his duty, one of which is perfectly safe, and the other dangerous, and he voluntarily chooses the latter and is injured, he is guilty of contributory negligence, and the master is not liable. *Street's Ex'x v. N. & W. R. Co.*, 101 Va. —, 45 S. E. 284; *Norfolk & W. R. Co. v. Mann*, 99 Va. 180, 37 S. E. 849.

In Labatt's recent work on Master & Servant, § 338, on page 870, it is said: "The doctrine that negligence may be inferred, as a matter of law, when it is apparent that the act which caused the injury was done in an unnecessarily dangerous manner, has been applied in the predicaments exemplified in the following paragraphs." Among the predicaments mentioned is the following, at page 876: "Failing to Stop Machinery When Work is to be Done Which is Dangerous while the Machinery is in Motion. A servant who, with knowledge of the risk he is incurring, does acts about machinery while it is in motion, is guilty of contributory negligence, if he could have accomplished his purpose safely after stopping the machinery."

Enough has been said of the facts of the case under consideration, and the law applicable, to make manifest the error in refusing the instruction in question. The defendant relied on the contributory negligence of the plaintiff as the ground of its release from liability, and especially his contributory negligence in not stopping the machine before going into the pit. No other instruction had sufficiently submitted that question to the jury, and, in view of the evidence to which we have adverted, the defendant was entitled to an instruction limited and directed to the submission of that material and important question.

As the judgment must be reversed for the errors already pointed out, it is unnecessary to comment upon the numerous other instructions given and refused, except to suggest that, in point of number, they are wholly out of proportion to the necessities of the case.

The controlling facts and circumstances are few, and two or three instructions, limited and directed to the material questions presented, would have been ample to properly submit the case to the jury. The numerous irrelevant and unnecessary instructions given are well calculated to mislead and confuse the jury, and operate as a hindrance, rather than an aid, to the administration of justice.

For these reasons, the judgment complained of must be reversed, the verdict set aside, and the case remanded for a new trial.

(102 Va. 820)

NOTTINGHAM COAL & ICE CO. v. PREAS.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.

1. Where a vendor fails to furnish the articles he has contracted to sell, the measure of damages is the difference between the contract and the market price at the place of delivery, and, if there be no market at that place, the value in the most available market, with the cost of transportation added, and the expense of making the repurchase.

2. On failure of seller to deliver the goods sold in order to recover resulting damages, it is not necessary that the vendee should have actually gone into the market and bought other goods to supply the place of those not delivered.

Error to Circuit Court of City of Roanoke.

Action by R. A. Preas against the Nottingham Coal & Ice Company. Judgment for plaintiff. Defendant brings error. Reversed.

Watts, Robertson & Robertson and Cocke & Glasgow, for plaintiff in error. Scott & Staples and S. V. Kemp, for defendant in error.

BUCHANAN, J. On the 2d day of March, 1900, the Nottingham Coal & Ice Company, an ice manufacturer in the city of Roanoke, and R. A. Preas, an ice dealer in Bedford City, entered into a contract by which the former agreed to sell and the latter to purchase all the ice which she might need for her purposes in Bedford City during the season of 1900 at the price of \$3.50 per ton of 2,000 pounds on board the cars at Roanoke City. Both parties complied with the terms of their agreement until about the middle of July, when the ice company failed to furnish all the ice ordered, and finally, after some correspondence, ceased to furnish it at all; and Mrs. Preas, not being able to get ice from the ice company, quit the business, and instituted this action in December, 1900, after the ice season had closed, to recover damages for her losses by reason of the ice company's failure to keep and perform its contract.

The question involved here is the measure of the plaintiff's damages. That question was attempted to be raised by demurrer to the declaration, and was raised by objections to

¶ 1. See *Sales*, vol. 43, Cent. Dig. §§ 1175, 1182, 1195.

evidence introduced, by instructions given and refused, and upon a motion to set aside the verdict of the jury.

The court sustained the demurrer to the fourth count on the declaration, and overruled it as to the other three counts. No question is made as to the action of the court in sustaining the demurrer to the fourth count; and, as the first, second, and third counts each averred sufficient facts to entitle the plaintiff to some damages, nominal at least, the demurrer was properly overruled.

The plaintiff's counsel contends that this case does not come within the general rule that the measure of damages is the difference between the contract price and the market price of the goods at the time and place of delivery, because at the time the contract was entered into the ice company knew that the plaintiff was purchasing the ice for sale in Bedford City, where she had been engaged in the retail ice business for some years, and had regular customers, and because there was no ice market at Bedford City upon which she could purchase ice upon the failure of the ice company to furnish her ice according to the contract.

The evidence shows that the plaintiff had been in the retail ice business at Bedford City for some years, and that she had customers who were in the habit of purchasing ice from her, and that there was no market at Bedford City at which she could purchase the ice required for her business. The evidence further shows that she had no actual contract with any one for the resale of the ice, and it also appears that, while ice was in great demand, it could be purchased at other points, especially at the city of Alexandria, but at a higher price, at a greater freight rate, and with more loss from melting, as the distance for shipping was much greater.

The case made seems to be the ordinary case of a wholesale dealer or manufacturer failing to furnish to a retail dealer for the purpose of resale goods which he had agreed to furnish, which can be purchased in the market. There does not seem to be any real difference between this case and that of the miller who buys wheat to grind and furnish to his trade, or the butcher who purchases cattle to furnish beef to his customers, or the merchant who buys goods to sell to those who are in the habit of trading with him. In all such cases, if the wheat, or cattle, or goods can be purchased in the market, and there had been no resale of them by the vendee, the measure of damages, where the vendor fails to furnish the articles he has contracted to sell, is the difference between the contract price and the market price at the time and place of delivery. If for any reason there be no market at the place of delivery, then the value in the nearest and most available market to which the buyer must resort in order to supply himself, with the cost of transportation added, together with compensation for the time, trouble, and expense of

making the repurchase, is the measure of damages. 2 Mechem on Sales, § 1742.

In order for the buyer to recover as damages the difference between the market price and contract price at the time and place of delivery, it is not necessary that he should have actually gone into the market and bought other goods to supply the place of those not delivered. "It would not advantage the defaulting party," as was said by the Court of Appeals of New York in *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14, "if he should do so, for, if he buys at the market value, the result to the other party is the same as if he simply proved the market value." 2 Mechem on Sales, § 1758.

We are of opinion that the measure of damages upon this case made was the difference between the market price and the contract price of ice at the time and place of delivery, and that the trial court in not so holding erred, and for that error its judgment must be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

(102 Va. 643)

BALTIMORE & O. R. CO. v. BURKE & HERBERT.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

ASSUMPSIT—IMPLIED PROMISE—MONEY HAD AND RECEIVED—COLLECTION OF CHECKS.

1. As between a promisor and a promisee there is privity, and if the facts raise an implied promise on the part of the defendant, or if the defendant has money in his possession which he ought to pay to the plaintiff, the law will imply a promise on the part of defendant to do his duty and pay the money.

2. Where a bank received certain checks, the property of plaintiff, from the hands of his agent for collection, and the checks were not properly indorsed, they did not receive the money of the plaintiff, as that money could only be taken from the banks on which the checks were drawn on a proper indorsement of those payable to plaintiff, and the bank was not liable to plaintiff for such sums, though the bank was the depository of plaintiff, there being no privity to support the action between them.

Error to Circuit Court of City of Alexandria.

Action by the Baltimore & Ohio Railroad Company against Burke & Herbert. Judgment for defendants, and plaintiff brings error. Affirmed.

Hamilton & Colbert and Jas. R. & H. B. Caton, for plaintiff in error. Munford, Hunton, Williams & Anderson, for defendants in error.

KEITH, P. The Baltimore & Ohio Railroad Company brought its action of trespass on the case in assumpsit against Burke & Herbert in the circuit court of the city of Alexandria. The declaration contains 18 counts, 17 of which are founded upon checks

drawn by customers of the Baltimore & Ohio Railroad Company, payable to its order, upon various banks, and indorsed by D. P. Hurley, its agent. The averment in each of these counts is that the defendants had been designated as the depository of the funds of the plaintiff in the city of Alexandria, and that as such depository they received the several sums of money represented by the checks to the use of the plaintiff, the amount so received on each check being set out in a separate count. The eighteenth count comprises the ordinary money counts in assumption. Along with the declaration a bill of particulars was filed. The defendants pleaded non assumpsit, and upon the trial it was shown in evidence that Burke & Herbert had accepted the appointment as depository of the funds of the Baltimore & Ohio Railroad Company in the city of Alexandria; that D. P. Hurley was the agent of the railroad company; that as agent he received from its customers, in payment of freight and other charges, checks payable to its order upon various banks, which he indorsed, and upon which Burke & Herbert paid him the money, received the checks, and thereafter collected the amount of said checks from the banks upon which they were drawn.

The claim of plaintiff is that Hurley had no authority, as its agent, to indorse its checks, and that, Burke & Herbert being its depository, the money collected by them upon the checks so indorsed should have been credited to the plaintiff upon the books of the defendants, as its duly designated and authorized depository.

Much evidence was taken pro and con, and a number of instructions were given, but, in the view we take of the case, it will be necessary to consider only one of them.

The court told the jury that "they must believe from the evidence that the defendants had and received for the plaintiff the money claimed in the bill of particulars before they can find a verdict for the plaintiff; and, although they may believe from the evidence that the checks in evidence were not properly indorsed, but were cashed by the defendants, and the defendants received the credit for them at the banks upon which they were drawn, yet the court instructs the jury that these facts created no privity between the plaintiff and the defendants, and there can be no recovery by the plaintiff against the defendants under the count for money had and received."

As the 17 special counts are for money had and received, and the only averment in the eighteenth count upon which the plaintiff could recover is that for money had and received to its use, upon the evidence in this case there could be no recovery by the plaintiff except upon the terms stated in this instruction. This instruction, in other words, if it properly states the law, is conclusive of the case, and renders it unnecessary for us to consider it in any other aspect.

In considering this instruction it must be assumed that Hurley had no authority to indorse the checks set out in the declaration. It thus appears that, as agent of the railroad company, in payment of charges due to it, he received from its customers the checks set out in the bill of particulars, drawn upon various banks, payable to the Baltimore & Ohio Railroad Company; that he indorsed them without authority; that they were cashed for him by Burke & Herbert; and that the checks were subsequently collected by Burke & Herbert, and the money placed to their own credit, they being at the time the depository of the Baltimore & Ohio Railroad Company in the city of Alexandria. There was no express promise upon the part of Burke & Herbert to pay to the plaintiff the money in controversy. Did the facts, as stated, create an implied promise? for a promise, express or implied, must be shown by the plaintiff to entitle it to a recovery.

As between a promisor and promisee there is privity, and if the facts be such as to raise an implied promise upon the part of the defendant, if the defendant has money in his possession which in good conscience he ought to pay to the plaintiff, the law will imply a promise upon the part of the defendant to do his duty and to pay the money; and this implied promise is as effectual to create privity between the parties as an express promise would be.

These propositions, we think, are fundamental, and we shall cite but little authority in support of them.

In *Attorney General v. Perry*, 2 Comyn's Rep. 481, it was held that: "Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake under color, and upon apprehension, though a mistaken apprehension, of having a good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver."

Lord Mansfield, in *Moses v. Macferlan*, 2 Burr. 1005, said: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract." And in the course of the same opinion uses the following language: "In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money." See, also, *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576.

In *State v. St. Johnsbury*, 59 Vt., at page 337, 10 Atl. 533, the court said: "In order to maintain this action there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has

no right conscientiously to retain. In such case the equitable principle on which the action is founded implies the promise. When the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable ground for keeping it, the law creates the privity and the promise."

Barton's Law Practice, vol. 1, p. 125, says: "The action of assumpsit is a liberal and equitable one, and is applicable to almost every case where money has been received which in equity and good conscience ought to be refunded. An express promise is not necessary to sustain it, but it may be maintained wherever anything is received or done from the circumstances of which the law implies a promise of compensation."

We deduce from these authorities that wherever there is a promise there exists privity between the promisor and the promisee, whether that promise be express or implied.

We are not concerned with the right of the plaintiff against the banks upon which these checks were drawn, nor with that of the drawers of those checks upon those banks. The sole question for us to determine is the liability of Burke & Herbert to the plaintiff in this action, and not otherwise. When they paid over to Hurley the money for the checks which they received from him, they paid what was their own, and upon that transaction there was surely no money in their hands belonging to the plaintiff. When they presented the checks to the banks upon which they were drawn, and received the money upon them, they received it as and for their own money. If the checks were not properly indorsed, they did not receive the money of the Baltimore & Ohio Railroad Company, for that money could only be taken from the banks upon a proper indorsement of the checks payable to and held by the Baltimore & Ohio Railroad Company. But, as we have said, with the law applicable to the facts as between Burke & Herbert and the banks for the money received by them we have here no concern. The theory of the plaintiff is that being the depository of the Baltimore & Ohio Railroad Company rendered them liable for the money thus received, and if they had received it as depository, or if they had received it in any character as money belonging to the Baltimore & Ohio Railroad Company, or if the facts, whatever their intention at the time may have been, were such as to constitute the money thus received the property of the Baltimore & Ohio Railroad Company, the law would have implied the promise upon their part to pay it, and they would be liable as for money had and received to the use of the plaintiff. But, as we view the case, there was no promise, express or implied, and therefore no privity which could support the action.

There was no error in the instruction given, and that instruction concludes the case. The judgment must be affirmed.

(102 Va. 749)

WILLIS v. GORRELL et al.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

ATTORNEYS — CLAIMS — COLLECTION — AUTHORITY—TERMINATION—PAYMENT.

1. Plaintiff's husband held a debt against defendant, and delivered the same to an attorney for collection, taking the latter's receipt therefor. Thereafter the attorney reported to his client that he had secured the debt by taking a deed of trust on a quantity of real estate, at which the client expressed satisfaction, but left the claim in the attorney's possession, thereafter, however, receiving interest direct from the debtor until he assigned the claim to plaintiff, of which assignment the debtor was notified. *Held* that, the attorney having taken security for the debt, it was no longer in his hands for collection, and his authority to receive payment was terminated.

2. An attorney empowered to collect a claim accepted security therefor to the satisfaction of his client, and thereafter accepted a note of the debtor for the amount of the claim, which he discounted, converting the proceeds to his own use. He thereafter satisfied the security without the knowledge of an assignee of the claim. The debtor, notwithstanding the giving of such note, continued to make semiannual payments of interest on the debt to such assignee for several years. *Held*, that the payment of such note did not constitute a payment of the debt.

Appeal from Circuit Court, Culpeper County.

Action by Bettie K. Willis against J. B. Gorrell and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Barbour & Rixey, for appellant. Grimsley & Miller, for appellees.

CARDWELL, J. In 1885 James A. Willis held the bond of J. B. Gorrell for \$500, which he delivered to G. D. Gray, a practicing attorney of Culpeper county, for collection, taking the attorney's receipt therefor. A few days thereafter Mr. Gray reported to Willis, by letter, that he had his debt against Gorrell secured, and it appears that on January 30, 1885, Gorrell made a deed of trust on a large quantity of real estate, securing the Willis debt with a number of others. Willis, satisfied with having his debt thus secured, left the bond in the possession of Mr. Gray, but received directly from Gorrell interest thereon in advance, paid to him every six months until a subsequent date, when he assigned the bond to Bettie K. Willis, his wife, of which assignment Gorrell was notified, and the interest was thereafter paid regularly every six months in advance by Gorrell to Mrs. Willis directly, or by giving her credit on her account in his drug store. On the 2d day of April, 1898, Mr. Gray, without the knowledge or consent of either Mr. Willis or Mrs. Willis, and without receiving or pretending to receive payment thereof from Gorrell marked on the margin of the deedbook in which said deed of trust was recorded, the following words: "The bond of \$500 to James

A. Willis is paid. [Signed] G. D. Gray, Attorney," and Gray's signature is duly attested by the clerk, as required by statute; and on the same day all of the other debts secured by the deed of trust were also released, and Gorrell then conveyed the same property, with other property, to G. D. Gray, trustee, to secure to one Bickers a bond for a loan of \$6,450. The evident purpose of this release was to clear Gorrell's title to the land from all incumbrances, so that he could give a first lien to Bickers, and thus secure the loan then made. It is not pretended that a dollar was paid to Mr. Gray for the release of the Willis bond, nor was the bond delivered to Gorrell at that time, though it was at some time thereafter marked, "Paid in full. G. D. Gray, Atty.," and delivered to Gorrell, and was produced by him in response to a demand in the bill filed in this cause, and when produced it was indorsed, in the handwriting of G. D. Gray, "Int. paid to August 1898," although, as before remarked, the interest had been regularly paid directly to Willis or Mrs. Willis every six months in advance and never to G. D. Gray. Notwithstanding the release of the deed of trust as to this bond, before stated, Gorrell continued from that time down to February, 1902, to pay interest in advance on the bond to Mrs. Willis directly, without an intimation of any claim to having paid the principal of the bond, until August, 1902, when Mr. Gray was in his last illness, and an installment of interest became due, which Gorrell failed to pay, whereupon Mrs. Willis, through her nephew, wrote to Gorrell, requesting a remittance of the interest. To this request Gorrell made the response: "To my surprise a note for amount due her was placed in bank by Mr. G. D. Gray, and was paid by me at maturity, 5th of August. So Mrs. Willis will write him although he is too ill to attend to business, and it is doubtful if he lives. Yours truly, [Signed] J. B. Gorrell."

This was the first intimation which Mrs. Willis had of any claim on the part of any one that the debt was paid, or its status in any way changed, except by the payment of interest, and Mr. Gray was then, as stated by Gorrell in his note, too ill to attend to business, and he died in August, 1902, being too ill all the time to have his attention called to the matter, or to make any explanation as to the transactions between him and Gorrell touching the bond in question. Upon the receipt of the above note from Gorrell, Mrs. Willis employed counsel to investigate the facts concerning the bond she had held against Gorrell, and filed her bill in this cause setting out the attempted release of 1898; that Gorrell had on August 3, 1902, paid, at the Farmers' & Merchants' Bank, his note for \$500, payable to G. D. Gray, dated in February, 1902, at six months, which had been discounted at the bank by Gray, and which was a renewal of a note of similar description discounted originally

in February, 1899, and renewed at regular intervals of six months thereafter, which Gorrell claimed to be a settlement of complainant's secured bond; that Gray had died totally insolvent; that the bond which Gray attempted to release had never been paid; denying Gray's authority to release the deed of trust securing the bond, and calling upon Gorrell to produce the bond and any notes claimed by him to have been given in renewal or payment of the bond; the prayer of the bill being that Gray's release of the deed of trust securing her bond and his receipt of its payment be canceled and annulled, and that the land conveyed by the deed of trust be subjected to the payment of the bond. To this bill Gorrell and others were made parties defendant, and the bill was taken for confessed as to all parties except Gorrell, who filed his demurrer and answer thereto, his answer setting out that "on the 3d day of February, 1900 [two years after the pretended release of 1898], the whole principal of said bond was paid to the plaintiff's attorney in cash, as may be seen from an indorsement on the face of said bond made by said G. D. Gray, attorney for plaintiff." The answer then proceeds to relate that on that day (February 3, 1900) Mr. Gray had come to respondent, stating that Mrs. Willis wanted her money at once; that he (Gorrell) then stated his inability to raise the money on such short notice, and that thereupon Gray departed from him, returned in a short time, and suggested to him to make a note to him (Gray) for \$500, which he would indorse and have discounted, and thus pay off the bond; that he did this, and Gray took the note away, returning in a short time with the bond, and informed him (respondent) of the amount of the discount, which he paid to Gray in cash, and thereupon Gray marked the bond "Paid" and delivered it to him; that from that time until Mrs. Willis' demand for interest he heard nothing more of the matter, and supposed, of course, that Gray had accounted to Mrs. Willis for the note. The answer further claims that respondent since that time had carried the said note in bank with Gray's indorsement, he (respondent) paying the discount at each renewal thereof until its final payment.

Upon the hearing of the cause upon the bill, the demurrer and answer of Gorrell, and the testimony adduced by the parties, the circuit court overruled the demurrer, and held that the debt asserted by Mrs. Willis against Gorrell for the amount of the bond in question had been fully paid by Gorrell to G. D. Gray, as the duly authorized attorney of Mrs. Willis to collect the same; that Gorrell was discharged from further liability on account of said debt; and dismissed the plaintiff's bill, with costs to the respondent, Gorrell. This decree is before us for review upon an appeal taken by Mrs. Willis.

We have in the outset stated fully the facts as disclosed by the record, and from

them it appears that the claim made by Gorrill, the appellee, in his answer, that the bond in question was marked "Paid" and delivered to him at the time that he claims to have given Gray his note for the amount of the bond, upon which he received the money at bank, is wholly incorrect, the fact being that at that time the bond was not marked "Paid" and delivered to appellee by Gray. When appellee obtained possession thereof is not made to appear, except that it was at a date subsequent to the release of the deed of trust securing the bond made by Gray in 1898, and subsequent to the execution of the note by appellee to Gray. But, be this as it may, and whatever may have been the transactions between appellee and Mr. Gray, or their motives concerning the debt of appellant, the question remains whether or not appellant can be bound by these transactions, and her debt rightly adjudged to have been satisfied thereby. Appellee, as the record clearly discloses, knew that the dealings of Mr. Gray with him concerning this debt were unauthorized; otherwise it would be inexplicable that he should not only have paid the discount on the several notes given to Gray in settlement of the debt, but continued till February, 1902, to pay promptly in advance, every six months, as it accrued, the interest due to appellant, as though she still held the bond unpaid, and thereby concealing from her any claim whatever that he had paid the bond to her attorney. The contention of appellee that the proceeds of the original note given by him to Mr. Gray in settlement of appellant's bond were paid over by Mr. Gray to appellant, or should have been, is therefore absolutely inconsistent with the admitted facts in the case.

As has been remarked, when Gray notified Mr. Willis that he had taken a deed of trust in 1885 to secure the debt due to him from appellee, the debt thereafter was no longer in the hands of Mr. Gray for collection, but was treated both by the debtor and creditor as an investment, and stood thus for about 17 years. There is not the slightest proof in the record that the relation of attorney and client was ever created between appellant and Mr. Gray, except that the bond of appellant, assigned to her by her husband, remained in Mr. Gray's possession—whether for safe-keeping or for what purpose we are unadvised, and are not concerned. But, even if the relation of attorney and client had been established as between appellant and Mr. Gray concerning the bond in question, it is well settled that an attorney having in his hands a claim for collection has no authority whatever to receive anything but money in payment thereof, without previous authority obtained from his client, the owner of such claim.

In *Smith's Ex'r v. Powell*, 98 Va. 431, 86 S. E. 522, it is held that an attorney simply to collect a debt has no authority to receive anything but money for it, and, if he accepts

a note for it, no subsequent dealings of his with reference to the note, without previous authority or subsequent ratification of the client, can be deemed a ratification by the client.

It is not pretended in this case that appellant had ever authorized Mr. Gray, as her attorney, to collect the debt due from appellee, and there is not a syllable of evidence in the record that she, by word or deed, consented to or ratified the acceptance by Mr. Gray from appellee of the note which he claims to have given to Mr. Gray in settlement of her debt. The transaction set up by appellee, which he claims to have been in satisfaction of appellant's debt, had been concealed from her in the manner we have hereinbefore stated, until not only the insolvency of the attorney to whom he claims to have thus paid the debt years before, but until his fatal illness. Under these circumstances it would be unjust and inequitable, as it appears to us, to throw the loss of the debt upon appellant, instead of upon appellee.

It follows that we are of opinion that the decree of the circuit court is erroneous, and it will therefore be reversed and annulled, and the cause remanded to be further proceeded with in accordance with the views herein expressed.

(102 Va. 649)

GORDON BROS. v. CITY OF NEWPORT NEWS.

(Supreme Court of Appeals of Virginia. June 18, 1904.)

TAXATION—POWER OF CITIES—LICENSE TAX—TAILORS.

1. The authority of a municipality to impose a license tax on trades, professions, and callings depends upon its charter, and, if it contains a grant of such a power, an ordinance in pursuance of it occupies the same place as an act of the Legislature.

2. Under Const. art. 13, § 170, providing that the General Assembly may levy a license tax on any business which cannot be reached by the ad valorem system, whether a business can be so reached is a question for the Legislature or the municipality, and the courts will not interfere except in the case of a plain departure from the constitutional requirement.

3. The charter of the city of Newport News conferring on that city all the power possessed by the state in respect to the imposition of taxes, it can in its discretion impose taxes on all subjects within its jurisdiction amenable to tax by the state, so that a license tax on the business of a tailor is valid.

Error to Corporation Court of Newport News.

Gordon Bros. were convicted of violation of a city ordinance, and bring error. Affirmed.

Raymond M. Hudson, for plaintiffs in error.
J. A. Massie, for defendant in error.

WHITTLE, J. Plaintiffs in error were fined by a police justice of the city of Newport News for carrying on the business of tailors and of merchant tailors without license, in violation of section 83 of the license ordinance of that city. Upon appeal the judg-

ment of the police justice was affirmed by the corporation court, and the case is here upon writ of error to the judgment of affirmance.

There is no denial of the fact that plaintiffs in error are, as partners, conducting the businesses referred to without license; but it is insisted that the ordinance requiring such license is invalid, and that the judgment complained of is therefore erroneous.

A license upon trade or business can only be justified upon one of two grounds: either it is a tax upon the occupation, or else it is a police regulation.

In the former case the legality of the exaction depends upon its compliance with constitutional limitations upon the power of taxation; while in the latter its warrant rests upon the prevention of threatened evil. This controversy involves merely the consideration of the first branch of the subject.

In this commonwealth the power of taxation is vested in the legislative department of the government, and, subject only to constitutional restrictions, may be exercised to the utmost extent with respect both to the subjects of taxation and the amount of tax. It extends "to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession." *Cooley on Constitutional Limitation*, p. 678; *Ould & Carrington v. City of Richmond*, 23 Grat. 464, 14 Am. Rep. 139.

The authority of a municipal corporation to impose a license tax on trades, professions, and callings depends upon its charter, and the crucial test in such case is whether that instrument contains a grant of the power sought to be exercised. If it does contain such grant, an ordinance passed in pursuance of it occupies the same plane with an act of the Legislature.

In *Woodall v. City of Lynchburg*, 100 Va. 318, 40 S. E. 913, this court held: "The grant to a municipal corporation of a general power of taxation is a grant by the Legislature of all the power possessed by itself in relation to the imposition of taxes, in its discretion, upon all subjects within its jurisdiction not withheld from taxation by the Legislature, whether they be taxed by the state or not."

The ruling in the case of *Newport News & Old Point Ry. & Elec. Co. v. City of Newport News*, 100 Va. 157, 40 S. E. 645, is to the same effect. In that case the court was construing the charter now under consideration, and holds that it confers upon the city all the powers possessed by the state in respect to the imposition of taxes, and that it can, in its discretion, impose taxes upon all subjects within its jurisdiction, amenable to tax by the state, whether actually taxed by it or not. The court also holds that: "A city charter which authorizes a license tax upon certain pursuits therein named, and 'upon all other business and pursuits upon which a license tax is levied by the state, and such other business as is lawful,' confers the power to

impose a license tax on a street railway company, though not specifically named."

So, also, in the yet more recent case of *City of Norfolk v. Griffith-Powell Co.*, 101 Va. —, 45 S. E. 839, the court observes: "We think it follows from what has been said that an ordinance which imposes a tax in a city clothed with full power of taxation stands on the same footing with an act of the Legislature, and the courts, looking alone at the power to tax, will consider the ordinance without reference to the tax imposed by the Legislature. If the Legislature could have imposed the tax, but for reasons satisfactory to itself refrained from doing so, that will not invalidate the ordinance in the absence of the expressed or necessarily implied intention to withdraw the subject from taxation, or to require that it shall be taxed only in a particular mode."

Article 4, § 10, of the Constitution of 1869 (article 13, § 170, of the present Constitution), provides that the General Assembly may levy a license tax upon any business which cannot be reached by the ad valorem system.

The Legislature, or a municipality possessing full powers of taxation under its charter, must decide primarily whether a particular business can or cannot be reached by the ad valorem system; and with the exercise of their discretion the courts may not interfere, except in case of a plain departure from the constitutional requirement. The question is one of power, and not of policy, so far as the courts are concerned; and they are without authority to control legislative discretion, even if, in their opinion, it is violative of sound principles of political economy, unless, in its exercise, it contravenes some provision of the Constitution of the state or of the United States. Subject only to that limitation, the discretion of the legislative department of the government in the administration of the fiscal affairs of the commonwealth is exclusive and supreme.

The Legislature has for years exacted a license tax from merchant tailors, as in case of other merchants, for the privilege of carrying on their business (Acts 1899-1900, p. 858, c. 796), and its power to impose a similar tax on the business of tailors cannot be doubted in light of the repeated decisions of this court in cognate cases. The contention that a tailor carries no stock and does not do a business, but simply labors for a living, exercising an inherent right, and not a privilege, is not sustained by the conceded facts of this case. It is admitted that plaintiffs in error have a place of business, that they employ journeymen tailors to assist them, and conduct a regular tailoring business in the city. But, were the facts otherwise, the objection would apply with more or less force in case of lawyers, physicians, dentists, auctioneers, surveyors, butchers, bakers, barbers, and the like. Yet it is

matter of common knowledge that the tax bills of cities and towns throughout the commonwealth embrace these avocations, and many others of like kind.

Neither is the contention that the tax constitutes a poll tax sound. On the contrary, the amount of the exaction is unaffected by the number of individuals who may compose the firm or company by which the business is conducted.

It follows from these views that the judgment complained of is without error, and must be affirmed.

(102 Va. 324)

STANDARD OIL CO. v. WAKEFIELD'S ADM'R.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

DEATH — DAMAGES — TORTS — USE OF DANGEROUS ARTICLE — CONTRACT RELATIONS — GAS NAPHTHA — EXPLOSION — PROXIMATE CAUSE — INTERVENING ACT — HARMLESS ERROR — EVIDENCE — SUFFICIENCY — CORPORATIONS — AGENTS — NOTICE.

1. Gas naphtha being a dangerous article, a company shipping a tank of it to a city was liable for the death of a city employé, caused, while attempting to unload the tank, by the negligent manner said company had closed the discharge pipe of the tank.

2. Defendant's negligence in failing to close a valve in the discharge pipe of a tank of gas naphtha which it shipped to a city, was the proximate cause of the death of a city employé occurring from an explosion on the intervening act of the city in removing the cap from the pipe in an attempt to unload the tank in the ordinary manner.

3. Where a city employé was killed while attempting to unload gas naphtha shipped to the city, any error, in certain counts of a petition therefor against the shipper, in failing to allege that plaintiff's decedent was an employé of the city, was harmless in view of evidence proving that fact.

4. In an action for the death of plaintiff's decedent from an explosion occurring while he was attempting to unload a tank of gas naphtha shipped by defendant, evidence examined, and held that the question of contributory negligence was for the jury.

5. Evidence that the agent of a corporation engaged in selling oil supervised the filling of the tank cars for delivery to purchasers, and had been at the gasworks of one of its purchasers one or more times under an understanding with such purchaser to notify the corporation's employés when assistance was needed in unloading leaking tanks, and knew or had opportunity of knowing the conditions under which the tanks were there unloaded, tended to sustain the hypothesis of an instruction treating his knowledge as notice to the corporation.

Error to Law and Equity Court of Richmond.

Action by Wakefield's administrator against the Standard Oil Company for damages for the death of plaintiff's decedent. Judgment for plaintiff, and defendant brings error. Affirmed.

Munford, Hunton, Williams & Anderson, for plaintiff in error. Meredith & Cocke and H. B. Pollard, for defendant in error.

BUCHANAN, J. On or about the 23d day of December, 1901, the Standard Oil Com-

§ 1. See Explosives, vol. 22, Cent. Dig. §§ 4, 5.

pany shipped in a tank car about 8,000 gallons of gas naphtha from Manchester, and delivered the same on the gasworks siding of the Chesapeake & Ohio Railway Company in the city of Richmond, under a contract with that city, for use in its gas plant. The tank cars used for delivering the naphtha were provided by the Standard Oil Company. Each had a discharge pipe in the bottom of the tank some 4 inches in diameter, and projecting 10 or 12 inches below the bottom. The pipe was threaded to receive and upon it was a cap screw. Upon the upper part of the pipe is a valve to prevent the escape of naphtha. In the lower part of the valve there are concaves which permit the naphtha to flow when the valve is raised. An inflexible iron rod is attached to the valve, and extends to or near the top of the tank. Near the upper end of the rod is a coil wire spring, arranged to hold the rod down and to keep the valve in position when closing the discharge pipe. The iron rod near the top has an arm attached to it, by using which the pressure of the spring can be relieved and the valve raised so that the naphtha can enter the discharge pipe. The arm for raising the valve is fastened to the rod by an iron key passing through both. The rod and its attachments are covered by the dome of the car, on the top of which is a slide or manhole large enough for a man to get inside the car. The oil is unloaded through the discharge pipe by unscrewing the cap on its lower end and connecting the discharge pipe by a union with a pipe leading to the tanks of the city gasworks. When this union or connection has been made, the valve is raised by means of the arm keyed to the rod, and the naphtha permitted to flow into the city tank. The place for unloading tank cars was on a trestle 20 or 25 feet above the ground in the yard of the gasworks of the city, where for a number of years they had been delivered for that purpose. Under the trestle there was a large opening, the beginning of a sewer, which ran into and across the yard of the gasworks. After entering the yard, the sewer, being partly open and partly closed, ran alongside the engine room and the building in which the furnaces and retorts for making gas were situated.

On the day the car in question was delivered, the foreman of the lower gasworks of the city directed McCauley, one of its employés, who alone, or with another of its employés, generally did this work, to unload the car. When McCauley commenced to unscrew the cap on the end of the discharge pipe he saw a little naphtha. He turned the cap a little more, and, seeing the naphtha coming a little freer, he shut it up, and reported to the foreman that there was a leak, and that he could not make the connection by himself. The foreman thereupon directed him to get Mr. Wakefield, the plaintiff's intestate, to go with him and make the connection. When they reached the car, they undertook to make the connection in the usual

way, Wakefield unscrewing the cap and McCauley connecting the pipes; but when the cap came off the naphtha came out with such force that both of them were unable to make the connection. McCauley jumped from under the car and went on top of it, removed the seal placed upon the plate covering the manhole, and swung it to one side for the purpose of forcing the valve down so as to stop the flow of naphtha. He then saw that the valve was out of order—that it was keyed improperly—and that he could do nothing with it. He at once jumped off the car and rushed to the office of the foreman, some 75 yards distant, and informed him that the valve was not in place, and was out of order, and that all the naphtha was escaping. They rushed back together, but just as they reached the trestle and car there was an explosion, which killed Wakefield, who was still under the car, attempting to save the naphtha. The explosion was caused by the gas from the naphtha coming into contact with the fire of the gashouse retorts as the naphtha flowed near by in the sewer, partly open and partly closed, leading from the trestle by the gashouse to the creek.

Upon examination the day after the accident it was ascertained that the key used for fastening the handle to the rod by which the valve was raised was under the bottom of the valve, holding it about three-fourths of an inch above the top of the discharge pipe, and that the handle was fastened to the rod by a piece of bent wire.

Wakefield's personal representative instituted her action on the case against the Standard Oil Company and the city of Richmond to recover damages for negligently causing the death of her intestate. Both defendants appeared and made defense. The trial resulted in a verdict and judgment in favor of the plaintiff against the Standard Oil Company. To that judgment the oil company obtained this writ of error.

The oil company denies its liability upon three grounds:

(1) That it did not owe to Wakefield the duty of keeping the valve in the car in a reasonably safe condition, and was not, therefore, guilty of negligence as to him.

(2) That the condition of the valve, even if the oil company were negligent, was not the proximate cause of his death.

(3) That, if it was, he was guilty of contributory negligence.

As to the first ground of defense: The contention of the oil company is that, in order for negligence to be actionable, it must occur in a breach of legal duty arising out of contract or otherwise, owing to the person unloading the cars; that there was no contractual relation existing between the plaintiff's intestate and the oil company; and that, this being so, the only duty upon which the plaintiff could rely was the duty owing to the public by the oil company, and that the character of the shipment was not so dangerous as to make a failure to properly ad-

just the valve to prevent the escape of the naphtha a breach of duty to a third person who might suffer injury resulting from such failure.

It seems to be a well-settled rule of the common law that a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself at fault. The liability does not depend upon privity of contract between the parties to the action, but on the duty of every man to so use his own property as not to injure the persons or property of others. *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682.

Whether this rule of the common law is applicable only, as the counsel of the oil company insists, to such agencies as are essentially and in their elements instruments of danger to life and property, may be doubted. Pollock, in his work on Torts (6th Ed.) p. —, says that "gas (the ordinary illuminating gas) is not of itself perhaps a dangerous thing, but, with atmospheric air, forms a highly dangerous explosive mixture, and also makes the mixed air incapable of supporting life. Persons undertaking to deal with it are therefore bound at all events to use all reasonable diligence to prevent an escape which may have such results. A gas fitter left an imperfectly connected pipe in the place where he was working under a contract with the occupier. A third person, a servant of that occupier, entering the room with a light, in the fulfillment of his ordinary duties, was hurt by an explosion due to the escape of gas from the pipe so left. The gas fitter was held liable as for a misfeasance independent of a contract." In the case referred to (*Parry v. Smith*, 4 C. P. Div. L. R. 325, 327) the judge delivering the opinion said: "I think the plaintiff's right of action is founded upon a duty which I believe attaches in every case where a person is using or dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done amount to a public nuisance. It is a misfeasance independent of contract." See 2 *Shear. & Red. on Neg.* (5th Ed.) §§ 116, 690; *Wharton on Neg.* § 851; *Smith (Horace) on Neg.* pp. 231 to 236; *Thompson on Neg.* (1901 Ed.) §§ 821 to 829; *Heaven v. Pender*, 11 Q. B. Div. 513, 517.

It is a matter of common knowledge that naphtha is a dangerous substance (and it is generally so treated by the courts), and the gas which it gives off when exposed to the atmosphere is liable to explosion by contact with fire; and when it does it is impossible to guard against its consequences.

since it is instantaneous, and extends to persons and property within its reach. See *Wellington v. Oil Co.*, 104 Mass. 64, 67; *Standard Oil Co. v. Tierney* (Ky.) 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595; *Weir's Appeal*, 74 Pa. 234; *Lee v. Vacuum Oil Co.*, 54 Hun, 156, 7 N. Y. Supp. 426.

In the case of the *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583, so much relied on by the counsel of the plaintiff in error, it was held that crude petroleum was not essentially and in its elements dangerous, and that under the facts of that case—which are in some respects similar to the case under consideration—the Standard Oil Company was not liable for the destruction of the property of a third person. It was not denied, however, in that case, that it was the duty of the shipper, under its contract with the purchaser or consignee of the crude petroleum, to so equip its car that its contents might be safely discharged in the ordinary way by the exercise of due care. Under that decision it was the duty of the Standard Oil Company, in shipping the naphtha to the city of Richmond, even if gas naphtha be no more dangerous than crude petroleum, to so equip its car that the naphtha could be safely discharged in the ordinary way by the exercise of ordinary care on the part of the city. If it owed this duty to the city, why did it not owe it to Wakefield and the other employes of the city, whose duty it was to unload the naphtha? for the oil company must have known that when the car arrived at the city gasworks it would have to be unloaded by the servants of the city. It knew that the purchaser or consignee of the naphtha, a municipal corporation, could only act through its employes. Having this knowledge, even if the naphtha was not so highly dangerous that the oil company owed to the public generally the duty of exercising ordinary care in shipping it, it at least owed that duty to the employes of the city whose duty it was to unload the oil, so that they might do so in the ordinary way with safety.

Shearman & Red. on Neg. § 116, state the doctrine which should govern in cases like this as follows: "Negligence which consists merely in a breach of contract will not afford ground for an action by any one except a party to the contract, or a person for whose benefit the contract was avowedly made. * * * But where, in omitting to perform a contract in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission."

Thompson, in his late work on Negligence, vol. 1, § 821, after citing cases illustrating the liability of vendors of dangerous goods, says that: "The doctrine of these cases, stated in a general way, is that, if a per-

son sells goods, chattels, or machinery which possess some concealed defect, or tendency to do harm, such as will, according to the probabilities of ordinary experience, do harm to innocent persons, he must respond in damages if such harm ensue without the intervention of the negligence or fault of others; and upon principle it would be immaterial whether the knowledge of the concealed vice or defect was withheld from the purchaser through the vendor's unskillfulness, ignorance or fraud."

Watson (the author of the work on *Damages for Personal Injuries*), in his article on "Negligence" in the *Am. & Eng. Enc. of Law*, vol. 21, pp. 461, 462, states the rule as follows: "Where there has been negligence in the construction or preparation of the article sold or supplied—that is, where, under the circumstances, injuries to the other contracting party or third persons might reasonably have been anticipated as a result of defects or errors therein—the question of privity of contract seems wholly immaterial. The liability depends upon the rule of natural and proximate cause and contemplation of consequences."

The reason upon which the rule, as stated by those text-writers, is based, is clearly and strongly stated by Brett, M. R. (afterwards Lord Esher) in his dissenting opinion in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503. "Every one," he says, "ought, by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who might be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care and skill and injury ensues, the law, which takes cognizance of and enforces the rules of right and wrong, will force him to give indemnity for the injury. * * * The proposition which these recognized cases suggest, and which is therefore to be deduced from them, is that whenever one person is, by circumstances, placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or the property of the other, a duty arises to use ordinary care and skill to avoid such injury."

The next question is, was the oil company's negligence, if established, the proximate cause of Wakefield's death?

It is insisted that, while the condition of the valve was in a sense the cause of the injury, the intervening and independent act of the city in its effort to unload the car was the efficient cause by which the negligent act of the oil company was rendered effective in producing the injury, which was not the probable and natural cause of its act. Whilst the act of the city in taking the cap off the discharge pipe was an act intervening

between the negligence of the oil company and the injury, was it such an intervening cause as excused that company?

It is said by Shearman & Red. on Neg. § 32—and their statement seems to be fully sustained by decided cases—that: "In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one if it is the culpable act of a human being who is legally responsible for such act."

It is conceded and is clear that the city's act in attempting to unload the car was not a superseding cause. The city's act was one for which it was legally responsible, but was it a culpable act? It was not under the averments of the declaration, and there was evidence tending to sustain these averments, if the act of the city was one which might, in the natural or ordinary course, be anticipated as not entirely impossible, and the oil company's negligence was an essential link in the chain of causation. 1 Shear. & Red. on Neg. § 32; 1 Thompson on Neg. § 55; Watson on Damages for Personal Injuries, §§ 45, 75.

The Supreme Judicial Court of Massachusetts, in *Lane v. Atlantic Works*, 111 Mass. 136, 139, states the rule on this subject as follows: "The act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer if such act ought to have been foreseen. The original negligence still remains a culpable direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." See *Watts v. So Bell Telephone Co.*, 100 Va. 45, 40 S. E. 107.

"In view of the rule," says Thompson on Neg. § 49, "that the question whether a given injury was the proximate or remote result of an antecedent wrong, is generally a question of fact for the jury, it is perceived that the rule last announced [that of the Massachusetts court quoted] is the rule of common sense and practical justice."

The intervening act of the city in attempting to unload the car was not only one which might, in the natural and ordinary course of things, be anticipated, but was one which the oil company knew would occur, for it was a necessary act in order to unload the car in the usual and ordinary way. We are of opinion, therefore, that the averments of the declaration in the second and fourth counts stated a case which showed that the oil company owed Wakefield the duty of exercising ordinary care to see that the valve was in a reasonably safe and proper condi-

tion, and that its alleged negligence in that respect was the proximate cause of his death.

It is unnecessary to decide whether or not the first and third counts, which did not charge that Wakefield was an employé of the city of Richmond, stated a good cause of action, as the case made by the evidence showed that he was an employé of the city, and was applicable to those counts alone. To reverse the case, even if we were of opinion that the first and third counts did not state a good cause of action, and to remand the case for a new trial upon the second and third counts, would be reversing for a mere technical error, which in no way prejudiced the oil company, if there be no other error in the proceedings.

The third and remaining ground of defense relied on by the oil company is that, even if it had been guilty of negligence, Wakefield was guilty of contributory negligence.

Under the facts of the case, as already briefly stated, this was clearly a question for the jury.

This brings us to a consideration of the assignment of error to the action of the court in instructing the jury.

The giving of instruction No. 1 offered by the plaintiff, and the refusal of the court to give instruction No. 30 offered by the defendant oil company, are assigned as errors. These instructions involved the question of the duty which the oil company owed to the plaintiff's intestate. As the court's action in giving the one and refusing the other was in accord with the view hereinbefore expressed in discussing that question, no further notice need be taken of those assignments of error.

The refusal of the court to give instruction No. 31 offered by the oil company is also assigned as error. By this instruction the court was asked to tell the jury that they must disregard all the evidence tending to show that the escape of the naphtha was due to the condition of the valve. What has heretofore been said in discussing the question of proximate cause shows that the court properly refused that instruction.

The giving of instructions Nos. 4 and 5 offered by the plaintiff is assigned as error; the former because there was no evidence upon which to base it, and the latter because the evidence upon which it was based was the knowledge of Bowen, the foreman of the oil company's warehouse at Manchester, and whose duty it was to load the tank cars, and his knowledge of the conditions under which the tank cars were to be unloaded at the city gasworks was not notice to the oil company of those conditions. It was Bowen's duty to supervise the filling of the tank cars for delivery to purchasers. He had been at the gasworks one or more times to aid in unloading a car in which a valve was frozen, under an understanding with the city or the superintendent of the gasworks to

notify the oil company's people at the warehouse when assistance was needed in unloading leaking tanks. He knew, or had the opportunity of knowing, the conditions under which the cars were unloaded at the gasworks. The general rule is that knowledge acquired by the agents of corporations when acting within the scope of their agency becomes notice to or knowledge of the corporation for all judicial purposes. Thompson's article on "Corporations" in 10 Cyc. L. & P. p. 1064.

The knowledge of Bowen, which the instruction in question treated as notice to the oil company, was acquired whilst performing duties for that company, and, it would seem, within the scope of his agency. The evidence tended to sustain the hypothesis upon which each of the instructions (4 and 5) was based, and the court did not err in giving them.

A number of other errors are assigned to the action of the court in giving and refusing to give instructions asked for, but it is simply impossible in an opinion of reasonable length to discuss in detail all of the numerous objections made to the action of the court in dealing with more than 30 instructions, and covering over 13 pages of the printed record. We have considered at length what seems to us to be the more important errors assigned. As to the others it is sufficient to say that we have fully considered them, and are of the opinion that the instructions given fairly submitted the case to the jury, that the court did not err in refusing to set aside the verdict of the jury, that we see no error in the case to the prejudice of the plaintiff in error, and that the judgment complained of should be affirmed.

(102 Va. 800)

RICHMOND & P. ELECTRIC RY. CO. v. RUBIN.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

STREET RAILROADS—ELECTRICITY—TROLLEY WIRES—INTERSECTING LINES—FIRE—LIABILITY—CONTRIBUTORY NEGLIGENCE—WITNESSES—LEADING QUESTIONS—HARMLESS ERROR—EXPERT TESTIMONY—BILL OF EXCEPTIONS.

1. Where plaintiff's goods were burned by fire caused by an electric current introduced by telephone wires coming in contact with the live wires of an intersecting railway line, the question whether the defendant railway company used due care in the construction of its line, intersecting the telephone line, was for the jury.

2. It was immaterial to plaintiff's right of recovery whether the defendant company or the telephone company had the prior or superior right in erecting their respective wires, as it was the duty of both to exercise due care to see that their wires did not come in contact.

3. Where, in an action against a street railway company for fire caused by the alleged negligent manner in which it constructed its wires at a point where they intersected telephone wires connecting with plaintiff's building, the manner in which the telephone line had been constructed was before the jury, it was not error to refuse to instruct that the law pre-

sumed that the telephone company in erecting its line used all ordinary precautions for making its wires safe.

4. Plaintiff was not guilty of contributory negligence in failing to use a device to be attached to telephone wires entering houses to guard against the admission of an unusual and dangerous flow of electricity.

5. When and under what circumstances a leading question may be put is in the discretion of the trial court, and, as a general rule, is a matter which cannot be assigned as error.

6. Any error in permitting a leading question was harmless where the witness had already testified to the matter called for by the question.

7. Evidence showing by which party a witness was summoned is admissible to show that that party thought him worthy of credence.

8. In an action for damages from fire on electric wires, an expert witness was asked whether or not a certain kind of fuse was in common use, and answered that he did not know. On the next day he was called, and asked if he had made inquiries about its use, and whether or not he could make any statement in addition to that made the day before. *Held*, that his knowledge on the subject was not of such a character as to fit him to answer the question.

9. The answer expected to a question which is not permitted to be answered must be shown in the bill of exceptions.

Error to Circuit Court, Chesterfield County.

Action by Harry J. Rubin against the Richmond & Petersburg Electric Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William L. Royall, for plaintiff in error.
P. V. Cogbill and D. L. Pulliam, for defendant in error.

BUCHANAN, J. Harry J. Rubin instituted his action of trespass on the case to recover damages for the burning of his stock of goods, alleged to have been caused by the negligence of the Richmond & Petersburg Electric Railway Company. Upon the trial of the cause there was a verdict and judgment for the plaintiff, and to that judgment the railway company obtained this writ of error.

The first error assigned is the action of the trial court in refusing to give the defendant company's instruction numbered 4, which is as follows:

"If the jury believe from the evidence that the fire which consumed plaintiff's store was not caused by defendant's agents moving the poles of the Long Distance Telephone Company of Virginia, or otherwise weakening the wires of the said Long Distance Telephone Company so that one or more of them broke and fell upon the wires of the defendant, and took up and carried from them electricity to plaintiff's store, thereby setting fire to it; and if they further believe from the evidence that when defendant, in constructing its railway line, reached the turnpike where its wires had to intersect with the wires of the Long Distance Telephone Company of Virginia it found the line of the said telephone company properly constructed, and with wires as good and as strong as are usually used in the construction of long distance tele-

phone lines in the country; and if they further believe from the evidence that defendant, in running its wires under the wires of said Long Distance Telephone Company, placed them far enough from those wires to avoid risk of contact between them by reason of said telephone wires sagging from natural causes—then they are instructed that defendant was under no obligation to erect guard wires or other safeguards between its wires and the wires of said telephone company. And if they further believe from the evidence that the wires of said Long Distance Telephone Company of Virginia were broken by a sleet caused by a storm so violent and extraordinary that the history of climatic variations and other conditions in this region afforded no reasonable warning of it, and that, being thus broken, they fell on the defendant's wires, and took up from them electricity, which they carried to plaintiff's store, and thereby set it on fire, then they are instructed that defendant is not liable for its electricity being so carried to plaintiff's store, and their verdict should be for defendant, unless the wire broke at a place where defendant's agents cut and mended the same."

By this instruction the court was asked to tell the jury, among other things, that, as a matter of law, the defendant company, in running its wires under the telephone wires, was under no obligations to erect guard wires, or other safeguards, between its wires and the telephone wires, provided the distance between them was sufficient to avoid contact between them by reason of the sagging of the telephone wires, if they believed the telephone line was properly constructed, and its wires as good and as strong as are generally used in the construction of long distance telephone lines in the country. It is true, as insisted by counsel for the defendant company, that in the construction and maintenance of its wires under the telephone wires it was only required to exercise reasonable or ordinary care. But what is reasonable or ordinary care is to be graduated and determined by the danger under all the circumstances of the case. The danger to persons and property from permitting a telephone wire to come into contact with a trolley wire heavily charged with electricity is very great, and the care required to avoid such contact must be commensurate with the danger. 1 Thompson on Neg. (2d Ed.) §§ 797, 804; Joyce on Electricity, § 445.

The fact that the defendant company had legislative authority to operate an electric railway did not lessen its duty to exercise a degree of care proportionate to the danger to be avoided. A steam railway company has legislative authority to employ the powerful and dangerous agency of steam, but that does not make it any the less incumbent upon such company to avail itself of the best mechanical contrivances and inventions in known practical use, which are effectual in

preventing the burning of private property by the escape of sparks and coals from its engines, and it is liable for injuries caused by its omissions to use them. *Brighthope Ry. Co. v. Rogers*, 76 Va. 443, 450. The agency by which an electric railway operates its cars is certainly as dangerous as steam, and at least as high a degree of care should be required of such a company as is imposed upon a steam railroad company.

Many accidents occur which are caused by the current of high tension wires being transmitted through low tension wires when such wires come into contact by sagging or breaking. "The number of such accidents," says Thompson on Negligence, vol. 1, § 804, "raises the obvious conclusion that the exercise of reasonable care, which is graduated to the danger, demands in this relation a very high and exact measure of foresight, skill, diligence, and inspection." Joyce on Electricity, § 445. To guard against such danger, guard wires, insulation, and other devices are frequently employed; and where a company negligently fails to maintain such devices between its trolley wires and telephone wires, and injuries result from telephone wires coming in contact with its trolley wires, it becomes responsible for such injuries, its negligence being the proximate cause of the accident. 1 Thompson on Neg. §§ 805-807; Joyce on Electricity, §§ 517a, 445; 1 Shear. & Red. on Neg. § 698.

The defendant introduced witnesses more or less experienced in the construction and maintenance of electric lines, who testified that they had never known guard wires to be permanently used to prevent telephone wires from coming into contact with trolley wires. Their evidence did not establish the fact that such was the general usage or custom of ordinarily prudent persons engaged in the business of operating electric lines. If it had, it would not have brought the case within the doctrine laid down in *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791; 22 S. E. 869, as the counsel for plaintiff in error contends.

In this case the defendant was using a highly dangerous motive power, and, as we have seen, as in the use of steam power, it was its duty to avail itself of the best mechanical contrivances and inventions in practical use which are effectual in preventing injury to private property from its wires coming into contact with the telephone wires. Such a high degree of care is not incumbent upon the master towards his servant. "The master," say Shearman & Redfield (1 Shear. & Red. on Neg. § 195)—and this is well settled law—"is not required to use more than ordinary care and diligence (as already defined) for the protection of his servants, under circumstances which would entitle a passenger or stranger to the use of great or extreme care. * * * The master is not bound to provide the very best materials, implements, or accommodations which can

be procured; nor those which are absolutely the most convenient and most safe. His duty is discharged by providing those which are reasonably safe and fit." *Bertha Zinc Co. v. Martin*, supra; *Norfolk & W. Ry. Co. v. Cromer's Adm'r*, 99 Va. 763, 40 S. E. 54. See, also, *Thompson on Neg.* §§ 30-32.

Whether or not the defendant had exercised the proper degree of care in guarding its wires from coming into contact with the telephone wires was a question for the jury, to be determined by all the facts and circumstances of the case, under the instructions of the court. The question of negligence or due care is one peculiarly within the province of the jury, and cannot be established as a matter of law by a state of facts about which reasonably fair-minded men may differ. *Carrington v. Ficklin's Ex'rs*, 32 Gr. 670; *Kimball & Fink v. Friend's Adm'r*, 95 Va. 140, etc., 27 S. E. 901.

The question of whether or not the breaking of the telephone wire and its contact with the trolley wire were caused by a storm so extraordinary in its character as to amount to an "act of God," upon which the court was asked to instruct in the latter part of instruction No. 4, was properly submitted to the jury by other instructions given by the court.

The second assignment of error is the giving of instruction "AA" by the court on its own motion. The objection made to it is that it left to the jury to say whether or not, under all the facts and circumstances of the case, the defendant had exercised due care in guarding its wires from contact with the wires of the telephone company. That was a question for the jury, as we have seen in considering the defendant's instruction No. 4, and, as instruction "AA" properly submitted that question to them, there was no error in giving it.

The third error assigned is the refusal of the court to give the defendant's instruction No. 10. By that instruction the court was asked to tell the jury that, if the right of the defendant to erect its wires at the point where they intersected with the telephone line was prior to that of the telephone company, it was under no obligation to put up a guard wire between its wires and the telephone wires, and that, if they further believed that the telephone wires fell upon the wires of the defendant, and took from them electricity which was carried to and destroyed the plaintiff's store, the defendant was not responsible for the fire and loss thus caused, unless the telephone wires broke where the defendant's agents cut and mended the same.

This instruction was properly rejected. It was wholly immaterial to the plaintiff's right of recovery whether the defendant company or the telephone company had the prior or superior right in erecting their respective wires. It was the duty of both to exercise due care to see that their wires did not come

in contact, and, if the defendant failed to do this, it was liable for the consequences of its negligence. 1 *Thompson on Neg.* § 805; *Joyce on Electricity*, § 517.

The refusal of the court to give the defendant's instructions numbered 5, 6, 7, 8, and 9 is assigned as error. Instructions 5, 6, and 7 define the measure of the defendant's duty in guarding against its wires and those of the telephone company coming into contact, and are in conflict with what we have seen, in discussing the defendant's instruction No. 4, is the correct rule on the subject, and were therefore properly refused.

By instruction No. 8 the court was asked to tell the jury that the law presumed that the telephone company, in erecting its line, used all the ordinary precautions for making its wires safe, so that they would not cause injury to its clients and customers. The manner in which the telephone line had been constructed was before the jury, and artificial presumptions do not generally come into play where the evidence shows the conditions under which an accident occurs. 1 *Thompson on Neg.* § 482. The instruction was properly refused.

By instruction No. 9 the court was asked to instruct the jury that if they believed, from the evidence, that at the time of the accident there was in common use a device to be attached to telephone wires entering houses, which was an effectual guard against the admission of an unusual and dangerous flow of electricity, and that the plaintiff had failed to use such device, then the plaintiff was guilty of contributory negligence, and could not recover.

"As there is a natural presumption that every one will act with due care (in the absence of evidence to the contrary)," say *Shearman & Redfield* in their work on Negligence, § 92, "it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant or a stranger. He has the right to assume that every one else will obey the law (including not only the common law, but also statutes or city ordinances), and to act upon that belief." Ordinarily prudent men would scarcely think it necessary, when they have telephones placed in their houses, to use devices to prevent their property from being destroyed by an unusual and dangerous flow of electricity, transmitted to the telephone wire by the negligence of an electric railway company in allowing its heavily charged wires to come into contact with the telephone wire. Clearly, the failure of the plaintiff to guard against such a contingency was not contributory negligence as a matter of law, as the defendant's instruction made it.

The next assignment of error is to the action of the court in giving its own instruction "BB" and the instructions "A," "B," "C," "D," and "E," asked for by the plaintiff. The objection made to each and all of

these instructions is that they made the jury the judges of whether or not the defendant exercised reasonable care in guarding against contact between its wires and those of the telephone company. This was manifestly a question for the jury, for the reasons given in discussing the defendant's instruction No. 4.

In stating his case to the jury, plaintiff's counsel made certain statements as to what he expected to prove, which were objected to by the defendant on the ground that there were no averments in the declaration which authorized such proof. The action of the court in permitting such statement to be made is assigned as error.

There is no merit in this objection, as the averments in the declaration clearly entitled the plaintiff to put in evidence the facts which his counsel stated he expected to prove.

Another assignment of error is to the action of the court in allowing the following question to be asked, upon the ground that it was leading, viz.: "As an expert, state whether or not, if a telephone wire, which was a copper one, had been spliced with an iron wire, would it not have been a defective way to have done it?" When, and under what circumstances, a leading question may be put, is in the discretion of the trial court, and, as a general rule, is a matter which cannot be assigned as error. 1 Greenleaf on Ev. (Redfield's Ed.) § 435. But, if it could be, no injury resulted to the defendant in allowing the question to be asked, since the witness had already testified that an iron wire and a copper one would not splice well.

During the examination of a witness, who was put upon the stand by the plaintiff, he was asked if he was not summoned by the defendant. He answered that he did not know. The clerk of the court was then called upon to see if the witness was not so summoned, whereupon the counsel for the defendant admitted that he was, but afterwards moved the court to strike out the admission. The court overruled the motion, and this is assigned as error.

The plaintiff was entitled to have the fact admitted in evidence as tending to show that the defendant thought the witness was worthy of credence by having him summoned, and the court properly refused to strike out the admission.

Another error assigned is the refusal of the court to allow the witness Tucker to answer a question propounded to him as an expert. The witness was asked on one day of the trial whether or not a certain kind of fuse was in common use, and answered that he did not know. On the next day he was put upon the stand, and asked if he had made inquiries about its use, and whether or not he could make any statement in addition to that made on the day before as to the fuse being in general use in February, 1902. This question was objected to, and

the court refused to allow it to be answered, upon the ground that the witness' expert knowledge on the subject was not of such a character as to fit him to answer the question.

The court's ruling was plainly right; but, if it were not, the exception could not be considered, since the bill of exceptions does not show what the answer of the witness would have been if he had been permitted to answer. He may have known no more on the subject on that day than he did the day before. A judgment will not be reversed because evidence has been excluded or rejected by the trial court, unless its materiality be made to appear. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 157, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Kimball & Fink v. Carter*, 95 Va. 77, 80, 27 S. E. 823, 38 L. R. A. 570.

The refusal of the court to strike out certain answers of Nunnally and Martin, witnesses for the plaintiff, because the answers were immaterial, is assigned as error. It is unnecessary to decide whether or not the court erred in not excluding the evidence in question, as it is clear that it could not have affected the verdict of the jury.

The remaining assignment of error is the refusal of the court to set aside the verdict because not warranted by the evidence. There were two theories as to the cause of the fire which destroyed the plaintiff's goods. One—that of the defendant—was that the storehouse caught on fire from the stove which was in it, and there was some evidence tending to sustain that contention, but the great weight of evidence tended to show that there had been no fire in the store for some hours prior to the accident, and that the building did not catch on fire from that source. The other theory was that the storehouse was set on fire by the telephone wire when it fell upon or came in contact with the defendant's wires. The evidence, which covers more than 200 pages in the printed record, sustained that theory, and fully justified the jury in reaching the conclusion they did.

Upon the whole case we are of opinion that there is no error in the record to the prejudice of the plaintiff in error, and that the judgment of the circuit court should be affirmed.

(102 Va. 753)

BALTIMORE & O. R. CO. v. FIRST NAT. BANK OF ALEXANDRIA.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

CHECKS — ASSIGNMENT—NEGOTIABLE INSTRUMENTS LAW.

1. Under the direct provisions of section 189 of the negotiable instruments act, approved March 3, 1893 (Acts 1897-98, p. 917, c. 866), a check does not operate as an assignment of the fund on deposit, and the bank is not liable to the holder unless and until it accepts or certifies the check.

¶ 1. See Assignments, vol. 4, Cent. Dig. §§ 89, 91.

2. Under sections 182 and 185 (Acts 1897-98, pp. 911, 917, c. 866) the acceptance of a check must be in writing, and signed by the bank, in order to afford a cause of action against it.

Error to Circuit Court of City of Alexandria.

Action by the Baltimore & Ohio Railroad Company against the First National Bank of Alexandria. Judgment for defendant, and plaintiff brings error. Affirmed.

Hamilton & Colbert and Jas. R. & H. B. Caton, for plaintiff in error. Gardner L. Boothe and John M. Johnson, for defendant in error.

KEITH, P. The plaintiff in error brought its action of trespass on the case in assumpsit in the circuit court of the city of Alexandria against the First National Bank of Alexandria. The declaration contains numerous counts, the last of which embraces the ordinary money counts in assumpsit, and the others are special counts, identical in form with that given below, except as to names, dates and amounts:

"The plaintiff complains of the First National Bank of Alexandria, Va., defendant, which has been duly summoned to answer the plaintiff in this action, of a plea of trespass on the case, in assumpsit, for this, to wit: That heretofore, to wit, on the 1st day of October, 1900, in the city aforesaid, the firm of John P. Agnew & Co., depositors with the defendant, made their certain draft or order in writing for the payment of money, commonly called a check, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and then and there directed the said draft or order to the said defendant, and thereby required the said defendant to pay to the plaintiff, or order, the sum of two hundred and seventy-one and thirty one-hundredths dollars (\$271.30), and then and there delivered the said draft or order to the said plaintiff; and the said plaintiff avers that after the making of the said draft or order, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at the city aforesaid, the said draft or order was presented and shown to the said defendant for payment thereof, and that the said defendant then and there, to wit, on the day and year aforesaid, accepted the said draft or order, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of its said acceptance thereof, but did not pay the same when due, although demanded by the plaintiff of the said defendant."

The defendant demurred to the declaration, but we prefer to deal with the questions of law arising upon the demurrer when we come to consider the instructions. The defendant pleaded non assumpsit, and the case was submitted to the jury, who found a verdict for the defendant, upon which the court

entered judgment, and the case is before us upon exceptions to rulings made during the trial.

Although there is much conflict in the testimony, we shall consider the case as though the following facts were established: That the Baltimore & Ohio Railroad Company had a freight office at Alexandria; that D. P. Hurley was its agent, with authority to make collections of charges for the transmission of freights; that when freight bills were paid by check the checks were required to be made payable to the order of the company; that the checks sued on were presented to the bank, and paid upon the indorsement of D. P. Hurley, and the amounts thereof charged to the accounts of the drawers of the checks in the bank, and the checks returned to them on settlement of their accounts with the bank; that shortly after the date of the last check sued upon—that is to say, in the month of April, 1901—Hurley left the city of Alexandria while his accounts were under examination by the traveling auditor of the railroad company, which examination disclosed that he was short in his accounts a large sum for moneys received and unaccounted for by him; that Hurley was not authorized by the railroad company to indorse checks, and that it never received the money nor the benefit thereof from the checks sued upon; that it does not appear that the bank made any inquiry as to Hurley's authority to indorse checks or receive money thereon, nor as to the necessity therefor, or that the company had any knowledge that Hurley was in the habit of indorsing checks and collecting the proceeds thereof, until he absconded. Such being the facts, the court gave the following instruction:

"The court instructs the jury that they must believe from the evidence that the defendant had and received for the plaintiff the money claimed in the bill of particulars before they can find a verdict for the plaintiff; and although they may believe from the evidence that the checks in evidence were drawn on the First National Bank by depositors of said bank, who had sufficient funds to their credit in said bank to pay the same, and that in settlements between said bank and the said depositors the said bank charged said depositors with the amount of such checks, and it was allowed a credit for the payment of them, yet the court instructs the jury that such facts created no privity between the said bank and the Baltimore & Ohio Railroad Company, and there can be no recovery by the plaintiff against the defendant under the count for money had and received, even though they may believe from the evidence that the defendant paid the money on said checks to an unauthorized person; that is, to a person not entitled to receive the money on said checks."

That instruction traverses the plaintiff's en-

the cause of action. If it be a correct statement of the law, no other conclusion was possible than that arrived at by the judgment under review. The instruction presents questions upon which there has been much diversity of opinion among courts and text-writers, but which have, in our judgment, been set at rest by the act of assembly entitled "An act to revise, arrange and consolidate as one act the laws relating to negotiable instruments (being an act to establish a law uniform with the laws of other states on that subject)," approved March 3, 1898 (Acts 1897-98, p. 896, c. 886).

Section 127 (page 911) of that act declares that: "A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same." Section 132 provides that: "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money." Section 135 (page 917) declares that: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." And section 139 is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Now, if there be any virtue in that law, the checks in question did not assign to the holder the funds, or any part thereof, of their respective drawers on deposit with the defendant; nor could it have that effect unless and until the checks were certified; and section 135 expressly declares that the provisions of that act with respect to bills of exchange payable on demand shall apply with equal force to checks; and, turning to section 132, already quoted, we find that the acceptance must be in writing, and signed by the drawee, in order to constitute a cause of action by the holder against the bank.

This opinion might be greatly prolonged by citation of conflicting cases and a discussion of the discordant views entertained by courts and text-writers of the greatest ability upon these questions; but the object, as we understand it, of the codification of the law with respect to negotiable instruments, was to relieve the courts of this duty, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question.

We are of opinion that the instruction com-

forms to the provisions of the statute, and that it concludes the case in favor of the defendant in error.

(102 Va. 795)

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. HAMPTON ROADS RY. & ELECTRIC CO. (two cases).

(Supreme Court of Appeals of Virginia. June 16, 1904.)

MUNICIPAL CORPORATIONS — STREET RAILWAYS — CONTROL OF STREETS — VESTED RIGHTS — COMPETING LINES — ORDINANCE — LIMITATION OF TIME FOR COMPLETING LINE — RIGHT TO TAKE ADVANTAGE OF BREACH.

1. Where a street railway company has lines of railway constructed in territory under authority of the board of county supervisors, and the territory is subsequently incorporated as a city, the control of the streets, including those on which railway lines have been built, passes from the board of supervisors to the municipal authorities.

2. Where a street railway company merely has permission for the laying of a double track on a street which is subsequently included within the limits of a city, but the company took no advantage of the right to lay a double track, and used a single track, in disobedience of the orders of the city authorities, it has no vested rights which will prevent the city from granting to another street railway company the right to put down a double-track car line on the street.

3. Where a street railway company had the right to put down a track for the operation of its lines within a limited time, but failed to put the track down in the time limited, the waiver of the forfeiture of the company's franchise by the state or municipality is not the granting of a new right.

4. Where the failure to complete a street railway within the time limited for its construction is due to an injunction being granted against the company by a competitor, the right to put down the line is not lost by the expiration of the period limited.

5. The failure to complete a street railway line within the time limited for its construction cannot be taken advantage of in a private action by a competitor to enjoin construction of the line, but any forfeiture can be enforced only on behalf of the public at the election of the state.

Appeal from Circuit Court, Elizabeth City County.

Suits by the Newport News & Old Point Railway & Electric Company against the Hampton Roads Railway & Electric Company, and by the Hampton Roads Railway & Electric Company against the Newport News & Old Point Railway & Electric Company, heard together. From a decree for defendant in the first suit, and complainant in the second, the Newport News Company appeals. Affirmed.

S. Gordon Cumming, for appellant. R. G. Bickford, Thos. W. Shelton, and W. J. Nelms, for appellee.

CARDWELL, J. In October, 1898, the Newport News, Hampton & Old Point Railway Company was the owner of an electric street railway between the city of Newport

News and the federal reservation at Old Point, which passes through the said city, portions of the counties of Warwick and Elizabeth City, and of the town of Hampton. Its system consisted of a single track, with occasional turn-outs and switches, and a branch line extending from the main line, a distance of about $2\frac{1}{2}$ miles, to Buckroe Beach, a summer resort. In the month of October, 1898, the Newport News & Old Point Railway & Electric Company, for a valuable consideration, purchased all and singular, the rights, privileges, franchises, and properties of the said Newport News, Hampton & Old Point Railway Company, and immediately after its purchase began to improve its property, preparing plans for the eventual double-tracking of the entire system.

This new company obtained a franchise to double-track and parallel itself in the city of Newport News. In May, 1899, it obtained from the council of the town of Hampton the right to construct and operate an additional street railway track on, over, and along Armistead avenue and Queen street—being the streets theretofore occupied by a single track—and during the same month (May, 1899) obtained from the board of supervisors of Elizabeth City county the right to double-track where there had been theretofore a single track, "from Gatewood's corner to Libby's corner, on Mellen street; on, over and along the county road now occupied by said company." A portion of this latter grant from the board of supervisors was over certain county roads and streets, which on April 1, 1900, became part of the town of Phoebus, which town was incorporated by an act of the General Assembly of Virginia, approved January 22, 1900, and in force on and after April 1, 1900. Acts 1899-1900, p. 98.

That portion of the route authorized to be double-tracked by the board of supervisors, described as "from Gatewood's corner to Libby's corner, on Mellen street," is a distance of 7,176 feet. The distance from Gatewood's corner to the corporation line of the town of Phoebus is 2,994 feet—approximately one-third the entire double route granted by the board of supervisors of Elizabeth City county—and from the corporate line to the intersection of Mallory and County streets is 2,401 feet, and from the intersection of Mallory and Mellen streets to Libby's corner, in Mellen street, is 1,681 feet. The Newport News & Old Point Railway & Electric Company has maintained a switch or turnout on Mallory street, between Mellen and County streets, thus affording a double track of this block; and prior to January 1, 1900, it, acting under the authority of the order of the board of supervisors, had double-tracked, and was operating its cars on such double track, from Gatewood's corner to the intersection of County and Mallory streets, but it did not at that time, nor up to the beginning of this litigation, double-track the

bed of Mellen street, as it had leased a piece of track running on County street, one block distant from Mellen street, from the Citizens' Railway, Light & Power Company, and was using that for the return route for its cars from Old Point to Hampton, and now owns the track on County street. So that at the beginning of this litigation the Newport News & Old Point Railway & Electric Company had not exercised the right conferred upon it by the order of the board of supervisors to lay a double track in Mellen street, but for more than a year had only operated thereon a single track, upon which its cars ran in going to Old Point from Newport News, and in returning 'passed over and along County street, one block from Mellen street, and in the meantime had taken up its old track, and replaced it with new rails as a single track, and thereby indicated its purpose to continue to run its cars in only one direction along Mellen street. At the session of the General Assembly of Virginia of 1899-1900 (Acts 1899-1900, p. 495) the Hampton Roads Railway & Electric Company was granted a charter, and authorized to construct and operate, or otherwise acquire, a line of street railway in the city of Newport News, the town of Hampton, in the town of Phoebus, and in the counties of Elizabeth City and Warwick; and it has constructed the larger portion of its line, through the agency of the Vandegrift Construction Company. In December, 1900, this last-named company was granted by the council of the town of Phoebus the right to construct and operate a double-track street railway system within the limits of the said town, over certain streets therein, designated as "beginning on Mallory street, opposite Segar street, a double track on, over and along Mallory street from the said Segar street to the farthest side of Mellen street from said starting point; a double track on, over and along Mellen street from Mallory street to and across Water street, and into Mill Creek as far as the boundary line of the town of Phoebus extends. * * * For the purposes herein named, said company is hereby authorized and empowered to parallel or straddle any existing track upon said streets, or that may be placed upon the same hereafter. * * * The said company shall, unless prevented by the mandate of the highest court having cognizance of the litigation (should there be any) operate at least one track along the streets above mentioned, and all of its cars bound in a westerly direction shall go over said line. * * * And if it shall be finally determined that the said company has the legal right to operate a double-track street railway on Mellen and Mallory streets, then that part hereof which permits the said company to operate a railway on Segar street and Willard avenue shall become null and void six months from the date of such final determination * * * unless the said railway company shall operate a fifteen minutes'

schedule on said Mallory, Mellen and Segar streets, and Willard avenue," etc.

Under the provisions of section 8 of the above-mentioned ordinance, it was provided that the Hampton Roads Railway & Electric Company commence its work in Phoebus within one year, and that its road be completed within two years from January 1, 1901; and in December, 1901, shortly before the expiration of the first year, and before it had begun any work within a mile and a half of Mellen street, the Hampton Roads Railway & Electric Company began to lay its track on Mellen street on both sides of the existing single track of the Newport News & Old Point Railway & Electric Company, whereupon the Newport News & Old Point Railway & Electric Company enjoined the Hampton Roads Railway & Electric Company and the Vandegrift Construction Company from proceeding with this work, upon the ground that it would constitute a deprivation of the vested rights of the complainant. Upon the granting of this injunction the general manager of the Newport News & Old Point Railway & Electric Company on the next day put a force of men to work tearing up the work done by the Hampton Roads Railway & Electric Company, and to install a double track on Mellen street, whereupon it was enjoined by the Hampton Roads Railway & Electric Company. By the terms of the injunction order granted the Newport News & Old Point Railway & Electric Company against the Hampton Roads Railway & Electric Company and the Vandegrift Construction Company, it was subject to dissolution on a hearing after 24 hours' notice, but no steps were taken to dissolve either of the injunctions until 1903, when the two causes were brought on to be heard together in vacation before the learned judge of the circuit court of Elizabeth City county, and by decree then entered the injunction theretofore awarded the Newport News & Old Point Railway & Electric Company was dissolved, and the injunction awarded the Hampton Roads Railway & Electric Company against the first-named company was continued. It is from this decree that the case is now before us for review, upon an appeal allowed the Newport News & Old Point Railway & Electric Company.

The decision of the case turns upon whether or not the appellant, by reason of the grant to it by the board of supervisors of Elizabeth City county, had a prior and exclusive vested right to use and occupy Mellen street with a double-track system of electric railway. The purpose of the ordinance of the council of Phoebus in conferring the rights it did upon the appellee company was to obtain a better system of electric car service on Mellen street, to meet the needs of the traveling public and business interests in the town of Phoebus. The council of Phoebus on April 27, 1900, requested the president of the appellant company to so or-

der the running of its cars that those from Old Point might run along Mellen street, so as to give a more satisfactory car service on that street, but no attention was paid to this request, and the original method of running the cars was persisted in, certainly up to the time this litigation began.

The only authority the board of supervisors of Elizabeth City county had to confer the right upon appellant to occupy with its tracks any of the roads or streets within the limits of the county grows out of the terms of the charter of appellant, which provides that, before appellant could occupy the county roads and highways in the counties of Elizabeth City and Warwick, the consent of the board of supervisors of the respective counties should be first obtained to the location of the line or lines on the streets and highways within their respective limits and jurisdictions. The fifth section of the charter by which the company is authorized to locate its line or lines on the streets and highways in the counties and towns through which it proposed to run its line or lines provides that it might be done "after having first obtained the franchise or permission so to do from the duly constituted authorities," and further provides that "for the purposes of this act the said company shall and is hereby expressly invested with all the powers, rights, privileges and franchises conferred, and subject to all the restrictions imposed by chapter 40 of the Code of Virginia of 1887, and the acts of the General Assembly of Virginia amendatory thereof, and other laws of the State of Virginia as far as applicable." Section 1093 of the Code of 1887, which is in chapter 46, above referred to, is as follows:

"Sec. 1093. Streets," etc., "of City or Town not to be Occupied without Their Assent—Damages to Lots to be Paid Owners. No company shall cross or occupy with its works the streets or alleys, public or private, of any city or town, without the assent of the corporate authorities thereof, unless such assent be dispensed with by special provision of law; and in case any lot or lots along the line of such streets or alleys, shall by such occupation or crossing, be impaired in value, such company shall before crossing or occupying such streets or alleys, make compensation therefor to the owner of the same; said compensation, if the parties cannot agree upon the same, to be ascertained in the mode prescribed by this chapter."

This section indicates an adherence to the general policy of this state to require municipal consent to the occupancy of its streets by a railway company. In accordance with this policy, it was held in Wash., Alex. & Mt. V. Ry. Co. v. City Council of Alexandria, 98 Va. 344, 36 S. E. 385, that the power of a city to control and regulate its streets is an inherent and a continuing power, to be exercised as often as and whenever the city council may think proper, subject only to the limitation that it must act in good faith, and

that the regulation must be reasonable, and not imposed arbitrarily or capriciously; the presumption being in favor of the propriety and validity of what the city has directed to be done.

In *R. F. & P. R. R. Co. v. City of Richmond*, 26 Grat. 83, it is said the right of a municipality to control the use of the streets, and to provide for the safety, comfort, and general welfare of the citizens therein residing, is an inherent right. In that case, which was appealed to the Supreme Court of the United States (96 U. S. 521, 24 L. Ed. 734), the decision of this court was affirmed, which held that the ordinance of the city of Richmond forbidding the use of steam engines upon its streets by the Richmond, Fredericksburg & Potomac Railroad Company, though the railroad company had so used Broad street for many years, and claimed the right to continue such use by virtue of its contract with the city, was a valid exercise of the authority in the city to control the use of its streets; the court being of opinion that the ordinance did not impair any vested right conferred upon the company by its charter, nor deprive the company of its property without due process of law.

In *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1180, it was held that the right of a street railway company under an ordinance to lay tracks in the streets is subject to reasonable regulations by subsequent ordinances as to the use of the streets, and that, although a street railway company had been granted a franchise to lay a double track in a street, a subsequent ordinance restricting its right to the use of a single track is not an unreasonable restriction of the company's right, or a material modification of a prior ordinance granting the company permission to lay double tracks in the street for many miles, and that a failure to provide any compensation to the street railway company for taking up one track in the street in which it has laid a double track, after notice from the city authorities to permit but one track on the street, does not make the ordinance unreasonable. According to that case, which is a well-reasoned one, it would have been a valid exercise of the town council of Phœbus' discretion to provide that appellant should not lay a double track in Mellen street, even had that right been conferred by a previous ordinance of the town, and that it would not have been a violation of any vested right in appellant, growing out of the previous ordinance. The right of the board of supervisors to control Mellen street after it had been severed from the county of Elizabeth City and became a part of the territory within the limits of the town of Phœbus ceased, and the control of Mellen street was from that time as absolutely under the control of the town authorities of Phœbus as if the town had been incorporated before the charter of appellant was granted.

In *Ogden City Ry. Co. v. Ogden City*, 7 Utah, 207, 26 Pac. 288, the city granted the plaintiff railway company the right to lay a track in a street, and afterwards granted defendant the right to lay a double-track railway in the same street. Before defendants commenced work, plaintiff sued to enjoin them from laying their track, and to have the ordinance giving them a right of way declared void; alleging that it (plaintiff) had constructed a single track, and that, if it were to lay down its other track, and defendants their two tracks, other modes of public travel would be obstructed, and also that defendants' wires and poles would interfere with plaintiff's rights as the owner of property abutting on the street. Held, "that a demurrer to the complaint was properly sustained." This decision is in accordance with the principle enunciated in the authorities cited above—that a municipality has an inherent and continuing right to control and regulate the use of its streets within its limits.

In *Henderson v. Ogden City Ry. Co.*, cited in the last-named case, the opinion says such railroads and their business are subject to the police power, which the government cannot divest itself of by contract or otherwise, and, being so possessed of it, it is its duty to make use of it whenever the public good demands that it shall. The Legislature did not authorize the city council of Ogden City to grant to the appellants the exclusive right of way upon the street in question, nor do we think it had the power to do it. 7 Utah, 199, 26 Pac. 286.

Whether the establishment of a double-track system of electric railway in a street, in addition to a single-track system already there, would unduly overcrowd the street and render it unsafe to travelers thereon, is a matter for the public to deal with, and not a competing corporation seeking to maintain a monopoly in the street. *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585.

In *Elliot on Roads & Streets*, § 745, the learned author says: "There is some conflict in the decided cases upon the question of the power of the Legislature to grant an exclusive right to a street railway company to occupy and use a highway. Some authorities hold that the Legislature cannot create a monopoly by granting an exclusive privilege, and there is much reason for this doctrine. [Citing numerous authorities.] At all events, the construction should be liberal in favor of the public, and strict as against the corporation claiming an exclusive privilege or monopoly." Again, in section 746, the same author says: "The effect of a grant to use a designated part of a highway is to license the company first in point of time to occupy and use the designated space, but it does not follow from that that the statute creates a monopoly, since others may occupy other parts of the same highway." Again, in section 750, he says: "If the company which secures the first

grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is paramount and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vest its right. But to have this effect, the company, as it seems to us, must take possession in good faith, and for the purpose of constructing and operating such a railway as the grant contemplates. A colorable possession, taken solely for the purpose of keeping out other companies, and unaccompanied by acts indicating an intention to furnish reasonable facilities for the accommodation of the public, ought not to be regarded as sufficient to vest a right under the general license." In section 751 the same author, in discussing "when grant may be made to other companies," says: "We very much doubt whether a general grant which would prevent the Legislature or the municipal authorities from granting privileges to other companies would be valid in cases where the right to use the highway is left entirely to the licensee, for this, as we believe, would be a surrender of the police power, which the Constitution will not permit. The Legislature cannot bind itself not to legislate for the welfare of the public, and it would seem to follow that it cannot rightfully place itself in a position where it cannot make provision for the public necessities. If it cannot do this, then it cannot make a grant which leaves it entirely in the discretion of a private corporation to provide, or decline to provide, the facilities for travel upon the highways which are demanded by the public welfare. We think there is sufficient reason for affirming that the Legislature must retain the power to provide for the necessities of the public, and that a general grant to occupy highways is only effective when something is done vesting the right granted, and securing what the public requires. Until something is done vesting the granted privilege, it is within the legislative power to secure the welfare of the public by granting the necessary license to another company, although there may be a prior general grant."

In the case at bar the appellant for about 18 months had used only a single track on Mellen street—the cars thereon running but in one direction, and returning, as has been remarked, upon another street—and did no act indicating an intention to furnish reasonable facilities for the accommodation of the public on Mellen street, until appellee, in the exercise of the right conferred upon it by its charter and the ordinance of the council of Phoebus, began work in locating its tracks upon Mellen street, and had been enjoined at the suit of the appellant from further proceeding with its work. There is nothing whatever in the charter of appellant, or in the permit granted it by the board of

supervisors of Elizabeth City county, authorizing it to lay a double track upon Mellen street, that indicates an intention on the part of the granting power to confer upon appellant exclusive right to use and occupy Mellen street for the operation of a street-car line. There is nothing in the acts done by appellant indicating a purpose on its part to provide the necessary facilities for the traveling public on Mellen street, and, under the circumstances, the council of Phoebus was well warranted in the exercise of its right to promote the welfare of its citizens by conferring upon the appellee company the right to occupy the street with its tracks. If, as contended for appellant, the appellee has forfeited any of its rights under its charter or the ordinance of the town of Phoebus by reason of its failure to complete its line within the time limited in the charter or ordinance, the forfeiture could undoubtedly have been waived by the state of Virginia and the town of Phoebus, and the waiving of the forfeiture is not the granting of a new right. Therefore the provision of the new Constitution to which appellant refers does not apply. The charter of appellee has been so amended as to extend the time for the completion of the appellee's road to 1906, and section 9 of the franchise granted it by the town of Phoebus was so amended as to give two years and six months after January 1, 1901, in which to complete the work in that town. The construction of appellee's railway in Mellen street was stopped by the injunction sued out by the appellant. "Where the failure to complete the road is due to extrinsic causes, and in no wise the fault of the company—for example, by injunction.—* * * the right of the company is not lost." 28 Am. & Eng. Enc. of L. (old Ed.) 973-4. If from any cause appellee has forfeited its right to lay its tracks and operate its cars on and over Mellen street, such forfeiture cannot be taken advantage of in a private action, and can only be enforced on behalf of the public at the election of the state. *Pixley v. Roanoke Nav. Co.*, 75 Va. 320; *Grand Rapids, etc., Co. v. Prange*, *supra*; *People v. Albany & Ver. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295; *Mackall v. C. & O. Canal Co.*, 94 U. S. 308, 24 L. Ed. 161; *Nellis on St. Rys.* 127.

It abundantly appears in the record that from the coming into existence of the appellee company it has been obstructed, wherever obstruction was possible, by the appellant company in the progress of its work at many points along its line, while in its failure to construct a double track on Mellen street the appellant company considered only the item of cost to itself, and the advantage to it in suppressing competition, and seems not to have considered the convenience or necessity of the traveling public in the town of Phoebus. The facts and circumstances surrounding appellant at the time this litigation was begun indicate that the public

Interest was never even remotely considered.

The argument of the case has taken a very much wider range than the issues to be determined justify, and therefore we have not undertaken to consider all of the many questions discussed, nor to review the innumerable authorities cited.

Upon the whole case, we are of opinion that the decree appealed from is right, and should be affirmed.

KEITH, P., absent.

(102 Va. 733)

CITY OF RICHMOND et al. v. WILLIAMS et al.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

TAXATION—SPECIAL ASSESSMENTS—OWNER—LIENORS.

1. Creditors secured by a deed of trust are not the owners of the land, within the meaning of Act Feb. 19, 1892 (Acts 1891-92, p. 505, c. 312), providing that the owners shall be given notice and opportunity to be heard before assessments for improvements are levied against property.

Appeal from Chancery Court of Richmond.

Bill by C. U. Williams and another, trustees, against the city of Richmond and others. From the decree, the city appeals. Reversed.

H. R. Pollard, for appellant. Leake & Carter and L. L. Lewis, for appellees.

CARDWELL, J. On the 14th day of October, 1889, C. E. Belvin was the owner in fee of certain real estate, situated in that section adjacent to the city of Richmond known as "Lee District," and on that date he conveyed the whole of said real estate to C. U. Williams and N. W. Bowe, trustees, in trust to secure the payment of the sum of \$13,440, evidenced by nine negotiable notes of even date with the deed, which deed was duly recorded in the clerk's office of Henrico county court on October 17, 1889. On the 19th day of February, 1892, an act of the General Assembly of Virginia was passed (Acts 1891-92, p. 505, c. 312) by which the corporate limits of the city of Richmond were extended in such manner that all of the said real estate was brought into the limits of the city; and by deed dated March 14, 1892, recorded in the office of the clerk of the chancery court of Richmond City, and in Henrico county court clerk's office, Belvin and wife conveyed the same property described in the deed of October 14, 1889, to H. Seldon Taylor, Chas. A. Rose, and M. M. Gilliam, trustees, in trust to secure certain negotiable notes, all of which were paid at maturity, except one for \$22,800, which has not been paid in full. This note was held and owned by Charles R. Skinner, W. M. Walton, and Mary Walton Kent. Default having been made in the payment of the note of \$12,000, secured by the deed of trust to Williams and Bowe, trustees, by direction of

the holders of the note they proceeded under their deed of trust, on October —, 1900, to sell enough of the land to pay the said debt and interest, costs of sale, the execution of the trust, and to pay the state and city taxes in arrears on the property. The land left unsold at this sale was not sufficient to pay the debt still due Skinner and others by at least \$1,500. Among the taxes assessed against the property sold by Williams and Bowe, trustees, in favor of the city of Richmond, was a special assessment for grading the streets upon which said lands front, which grading bills so assessed were made under ordinances of the city of Richmond passed after the recordation of the trust deed from Belvin and wife of March 14, 1892, to Taylor and others, trustees, to wit, in the years 1892 and 1893; the assessments of said grading bills being made in the years 1897 and 1898, and amounting to \$941.22, principal and interest, as of December 1, 1900. A question having arisen as to whether Skinner and others, holding the lien of the trust deed of March 14, 1892, or the city of Richmond, by reason of its lien for the grading bills assessed on the property sold by Williams and Bowe, held a prior lien on said property, Williams and Bowe, trustees, filed their bill of interpleader in the chancery court of the city of Richmond, making the city, H. Seldon Taylor, and others, trustees in the deed of March 14, 1892, and Charles R. Skinner and others, the holders of the unpaid debt secured by said deed, parties defendant; and upon the hearing of the cause upon the bill, the answers of the several defendants thereto, and a statement of facts agreed by all parties, the chancery court held that the claim asserted by Skinner and others upon the funds remaining in the hands of Williams and Bowe, trustees, and deposited by them in the City Bank of Richmond to the credit of the court in this cause, was a superior lien thereon to that of the city for the grading bills in question, and so decreed. It is from this decree that an appeal was taken to this court by the city of Richmond.

The assessments for the grading of the streets through the property of Belvin, upon which the lien of the deed of trust held by Skinner and others rests, were made under sections 3 and 4 (pages 505 and 506) of the act of Assembly extending the corporate limits of the city of Richmond, above referred to, which provides as follows:

"Sec. 3. The city council of the said city may make such improvements within said territory as it now has the power as to the property within its present limits; but no improvement shall be made at the expense of the abutting owners until after allegations shall have been heard."

And the fourth section contains the provision that the assessments for the improvements authorized by the act "shall be a lien on such lots until paid," meaning the lots

abutting upon the improvements made. The improvements in question here were made in proceedings commenced on the petition of Charles E. Belvin himself, by resolutions of the city council directing the committee on streets of the city council to hear "allegations" for and against the proposed improvements. A time was fixed by the committee for the hearing of said allegations, and it is agreed that Belvin was duly served with notice a reasonable time prior to the hearing given by the committee, and either appeared before the committee and declared in favor of the proposed improvements, or failed to appear or otherwise make protest against them. His petition for the improvements—that is, the opening and grading of the streets through his property—asked that the work should be done under and in accordance with the provisions of the act of Assembly extending the city limits so as to bring his property within the limits of the city, of February 19, 1892, *supra*, and the provisions of the charter of the city as it then stood; and in a suit instituted by him thereafter, and after the improvements he asked for had been made, he attacked the said act extending the corporate limits of the city as unconstitutional, but it was held by the chancery court of the city of Richmond, in which the cause was pending, that he was then estopped to assert the unconstitutionality of the act, and he was denied an appeal from that decree by this court.

A decision of the case turns upon the question whether or not the appellees, Skinker and others, creditors secured by the deed of trust above mentioned, are owners, within the meaning of the act of February 19, 1892, and entitled to notice and an opportunity to be heard before the assessments in question upon the property of Belvin, upon which their debt was secured, became final and constituted a lien upon the property.

It may be said in the outset that the custom and form of procedure in the levying of an assessment upon lots abutting upon a street improved, to meet the costs of such improvements, has not, so far as we have been able to ascertain, recognized the right of a deed of trust creditor to notice and an opportunity to be heard before an assessment is made upon lots abutting on the improvements.

When the act of February 19, 1892, *supra*, was passed, the council, by the charter of the city as it then stood, was expressly authorized to make improvements of streets by grading, paving, etc., at the expense, in whole or in part, of abutting owners, and was further invested with the power to collect the cost of such improvements by the same processes which it was authorized to use to collect taxes. Acts 1869-70, p. 120, c. 101. And by ordinance of the council it was expressly provided that "all amounts which hereafter become due and payable to the city by property owners by and on account of

any paving, grading, sewers, sewer connections and other improvements made by the order of the council are to be collected as and in the manner prescribed for the collection of city taxes." City Code 1885, pp. 172, 173.

The contention that a lienor by deed of trust or otherwise is to be recognized or dealt with, in the assessment of taxes, finds nothing to sustain it in the statutes providing for the assessment and collection of taxes for general purposes. By an examination of the statute (chapter 24 of the Code of 1887), and other statutes in *pari materia*, it will be seen that, in the assessment of lands with a tax, the owner (that is, "the person who by himself or his tenant has the freehold in possession") is alone dealt with or recognized as entitled to notice of the proposed tax. The conveyance of land to trustees to secure the payment of a debt is not regarded as changing the ownership or the status of the land, with respect to the proceedings necessary to subject it to taxation. Section 459 of the statutes (Code 1887) provides for the making out by the clerk of the court of lists of all deeds of conveyance of land admitted to record in the office of such clerk during the current year, which is to be furnished to the commissioner of the revenue for the proper transfer of lands from the grantor in such deeds to the grantee, but that section expressly requires that such list shall not include deeds of trust or mortgages made to secure debts. It is only by express provision of the statute and of the charter of the city of Richmond, or its ordinances, relating to the redemption of real estate delinquent for state or city taxes, that "any person having the right to charge such real estate for a debt" may redeem.

In *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813, it was held that a lien for taxes is superior to a vendor's lien; and in *Stevenson v. Henkle*, 100 Va. 591, 42 S. E. 672, it was expressly decided that "a lien for taxes assessed on land is superior to a prior deed of trust to secure the payment of money." It is well settled that assessments to meet the costs of local improvements are made under the taxing power, and that the statute under which it is proposed to make such an assessment must provide for reasonable notice to the "owner" of the land to be assessed, and an opportunity to appear before a designated tribunal and have a hearing for or against the assessment at some stage in the proceedings before the assessment becomes final. It must also be made to appear that such notice and hearing has been given him, to contest the legality, justice, and correctness of the assessment, before it is finally determined upon; otherwise the requirement of "due process of law" would not be met, and the assessment would be void. This is the law as laid down repeatedly by this court and by the Supreme Court of the United States, the latest decision of this court being in *Adams v. City of Roan-*

oke, 101 Va. —, 45 S. E. 881; and one of the latest by the Supreme Court of the United States is *Voight v. Detroit*, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459. In neither of these cases, nor in the cases they cite and review, is there anything to be found that sustains the contention that a deed of trust creditor or mortgagee is to be regarded as an "owner of the land," to whom notice and an opportunity to be heard is to be given as to a proposed assessment to meet the costs of local improvements. In the later case of *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70, when referring to proceedings for the imposition of special taxes for local improvements, practically the same expression is used, viz., that, in proceedings for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. It is true that this court has said in *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, and in other cases, that trustees in a deed of trust and the creditors secured are regarded as purchasers for a valuable consideration, but it is not thereby meant that they become the owners of the land conveyed. "They," as was said in *Williams v. Lord & Robinson*, 75 Va. 404, "acquire title to the security of the deed of trust, and stand in the attitude of bona fide purchasers of this"; but this, we repeat, does not make them owners of the land conveyed, within the contemplation of the statute authorizing the imposition of a general tax, or of a statute authorizing an assessment of a special tax to meet the cost of local improvements, and requiring notice, etc., as to the assessment proposed. If they are to be so regarded, why not a judgment creditor, or one holding a mechanic's lien, or any other lien, upon the property benefited by a local improvement? Assessments for local improvements proceed upon the theory of peculiar benefits conferred upon the persons liable to the assessment, in the enhancement of the value of their property by the improvements, and the enhancement of the value of the property upon which a debt is secured cannot be considered as the taking of the property of the creditor in any sense.

"In the assessment of a general tax, the law does not regard the different interests in the assessment. It looks to the person having the present right of enjoyment of the land to be assessed, whether tenant for life or years, for the tax on the fee-simple value of the land, and such person is the one to be assessed with the land." *Burroughs on Taxation*, 223.

"As a general rule, taxes are imposed upon the owner or person in possession of real estate, as a whole or as one entire interest, without reference to the particular estates or interests in the property. The land being charged with the taxes, all claims and pretensions must yield to such charge,

and all persons must take notice." 25 Am. & Eng. Enc. of L. (1st Ed.) 122.

"The word 'owner' includes any person who has the usufruct, control, or occupation of the land, whether his interest in it is an absolute fee or an estate less than a fee." 17 Am. & Eng. Enc. of L. (1st Ed.) 299, 300. See, also, note to above text on page 301, where it is said, upon authority of a number of cases cited, that the owner or proprietor of a property is the person in whom, with his or her assent, it is for the time being beneficially vested, and who has the occupation or control or usufruct of it; e. g., a lessee is, during the term, the owner of the property demised.

In *City of Norwich v. Hubbard*, 22 Conn. 587, the same contentions were made that are made in the case here under review, but it was held otherwise, the opinion saying: "A mortgagee out of possession is not the proprietor of the mortgaged premises, and in common parlance was never spoken of as such. Nor is he to be so recognized in a legal sense. * * * In truth, the mortgagee has only a lien, and cannot be considered or treated as a proprietor or owner of the mortgaged estate. This view is corroborated by analogous cases. In laying out new highways, either by selectmen or by the county courts, or in repairing old ones, no provision is made by law for notice to be given to mortgagees, nor, in practice, is this ever done. The interests of mortgagees are not regarded in these proceedings. They are necessarily connected with the interests of the mortgagor, and, in this respect, subject to them. However reasonable we may believe it to be that a mortgagee should, by a timely notice, have an opportunity of protecting his rights, which the mortgagor has neglected, yet, as neither the charter of the city, nor any other law, has provided for this, we cannot require it, without the exercise of powers which we do not possess. It is sufficient, in order to create and enforce this lien [an assessment for a local improvement], that the city has done everything required of it by the charter and the law." To the same effect is the similar case of *Schumacker v. Toberman*, 56 Cal. 508.

It is the property, primarily, that is taxed for local improvements, not the individual. *Asberry v. City of Roanoke*, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636, and authorities cited.

In *Osterberg v. Union Trust Co.*, 93 U. S. 424, 23 L. Ed. 964, it is held that "a lien for taxes does not stand upon the footing of an ordinary incumbrance, and, unless otherwise directed by statute, it is not displaced by a sale of the property under a pre-existing judgment or decree."

There is nothing in the case of *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829, so much relied on by appellant, that is opposed to the view we take of the case at bar. It is true that the Supreme Court of Minne-

sota, in construing the charter of the city of Duluth, under review, and under which an assessment upon land had been made for local improvements, held that mortgagees were included in the terms "persons interested" and "owner," as used in the charter, and had the right to appear and oppose the confirmation of the assessment and the entry of the judgment therefor; but it was also held that they had in that case failed to do so, they were concluded thereby, and the lien of the judgment was upheld as a lien paramount to the title or claim of the mortgagees. In other words, the effect of the decision is merely that, under the peculiar phraseology of the city's charter, all persons interested in the assessment, as well as the owner of the property proposed to be assessed, are given the right to appear at the hearing on the application for confirmation of the assessment, and it was the duty of the court to hear them. The opinion in the case fully refutes the contention that is made in this case, viz., that the lien of an assessment for local improvements cannot be upheld as a prior lien on the property upon which the assessment is made, unless expressly made so by statute. It says:

"It is true, as claimed by plaintiff, that the lien of the assessment attaches at a time fixed by the charter—that is, from and after the time of the confirmation of the assessment roll, and filing thereof—but this does not justify the conclusion that the lien is subordinate to all prior liens on the land, although the charter does not expressly declare that the lien of the assessment is paramount to all other liens.

"When the several provisions of the charter to which we have referred are read and considered together, it is clear that the only reasonable construction which can be given to them is that the lien of the assessment, when it once attaches, affects all interests in or liens upon the property, without reference to the time when they are acquired. Therefore the assessment is the paramount lien on the property, precisely as if the assessment were a general tax. Any other construction would practically defeat the whole scheme for local improvements provided for by the charter. The Legislature had the undoubted power to so make the assessment the paramount lien. *Provident Institution for Savings v. Jersey City*, 113 U. S. 506 [5 Sup. Ct. 612, 28 L. Ed. 1102].

"The proceeding authorized by the charter to charge land with the cost of local improvements to the extent of benefits received therefrom is one in rem. It is the whole interest in the land that is assessed for the improvement, not some particular estate therein. The improvement is for the benefit of all interests in the land—for that of the lienholder as well as that of the fee owner—and necessarily the lien of the assessment for the improvement must be coextensive with the estate benefited and assessed. 2

Blackwell, Tax Tit. § 606. If the land is sold under the judgment, the whole estate and interest of all parties therein passes to the purchaser, subject to the right of redemption, and the deed is made prima facie evidence of title in the grantee. The title conveyed by the deed is the whole interest in the land, not simply that of the fee owner.

"It is true that liens of the class to which assessment liens belong are purely statutory, and that their existence and extent depend on the statute. But our construction of the charter is that it does, by necessary implication, provide that the lien of the assessment on the property benefited by the improvement shall be paramount to all other interests therein, including prior mortgages or other liens thereon."

The cases of *Sherwood v. City of Lafayette*, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414, and *State, etc., v. Insurance Co.*, 117 Ind. 251, 20 N. E. 144, also relied on as sustaining the view of the lower court in this case, are not applicable. The first named was a condemnation proceeding, and all that was decided is that the mortgagee, and not the mortgagor and owner in fee of the land taken for a street, was entitled to the damages awarded, although the amount had already been paid to the mortgagor. In the second-named case, the court was dealing only with the question whether the lien of a drainage assessment levied under a statute of the state of Indiana is junior to the lien of a pre-existing mortgage, and, reviewing briefly the statute, held merely that it was, as the Legislature had not by express terms given the lien of the assessment priority over pre-existing mortgages.

The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. "It involves no violation of due process of law when it is executed according to customary form and established usages, or in subordination to the principles which underlie them." *Turpin v. Lemon*, supra, and authorities cited.

In *Stevenson v. Henkle*, supra, referring to the cases of *Simmons v. Lyle's Adm'r*, 32 Grat. 752, Com. v. *Ashlin's Adm'r*, 95 Va. 145, 28 S. E. 177, and *Thomas v. Jones*, supra, as holding that a tax lien is superior in dignity to judgment liens and to the vendor's lien, and in fact "prior in dignity to all other liens," the opinion by Harrison, J., well says that, if this were not the law, "the liens upon the land, as in this case, would often be greater than the value of the land, and, the tax lien being inferior, the land would escape all taxation." The principle that a tax lien is superior in dignity to all other liens upon the land on which it is assessed, upheld by the foregoing authorities, must, upon reason as well as authority, be extended to assessments by municipalities for local improvements, which are in the nature of a tax; oth-

erwise the whole scheme for local improvements provided for in the charters of the several cities and towns in this state would be, as said in *Morey v. City of Duluth*, supra, "practically defeated," since such improvements might be completely prevented by a mortgage or deed of trust on property equal to the value of the property.

Upon the whole case, we are of opinion that the decree appealed from, holding that "the paving bills of the city of Richmond mentioned in these proceedings are not a valid lien upon the funds deposited in the City Bank of Richmond * * * to the credit of the court in this cause, as against the beneficiaries in the deed of trust from Charles E. Belvin and wife to H. Seldon Taylor and others, trustees, of March 14, 1892," is erroneous, and should be reversed and annulled, and the cause will be remanded to the chancery court of the city of Richmond to be further proceeded with in accordance with this opinion.

(102 Va. 654)

**CITY OF PETERSBURG v. PETERSBURG
AQUEDUCT CO.**

(Supreme Court of Appeals of Virginia. June 16, 1904.)

**MUNICIPAL CORPORATIONS — POLICE POWER —
STREETS — OBSTRUCTION — WATER COM-
PANY — CHARTER RIGHTS.**

1. Under Code 1887, § 1093, providing that no company shall occupy with its works the streets of a city without the consent of the council, and that the city shall have power to prevent the incumbering of the streets in any manner whatever, a city has power to prohibit a water company organized and chartered when the city was a sparsely settled town, and which had never since attempted to extend its system beyond the limits then established from digging up and obstructing the streets in extending its limits, even though the charter of the company authorizes it to dig up streets to lay and repair its pipes.

2. Conceding that a water company was entitled under its charter to dig up and obstruct the streets of a city without the latter's consent in order to extend its system, it was not entitled so to do where the facts show it to be insolvent, and without adequate means either as to capital or water supply of properly enlarging its system.

Appeal from Circuit Court of City of Petersburg.

Suit for an injunction by the city of Petersburg against the Petersburg Aqueduct Company. From a decree for plaintiff, defendant appeals. Reversed.

Geo. Maron and W. B. McIlwaine, for appellant. Davis & Davis, for appellee.

WHITTLE, J. The object of this suit is to enjoin appellee from digging up or otherwise obstructing the streets of the city of Petersburg for the purpose of laying water mains therein, without the consent of the city council. At the hearing the trial court dismissed the bill on demurrer, and from that decree the city appeals.

The bill presents the following case: By

an act of the General Assembly passed February 22, 1822 (Acts 1821-22, p. 73, c. 96), the aqueduct company was chartered for the purpose of conducting a full and sufficient supply of water from springs within the corporate limits of the town of Petersburg, or within a mile of the same, or from the falls of the river, or the basin of the canal, to and along the streets of the town, provided the streets or highways were not to be opened in such manner as to prevent the passing of teams or carriages therein with convenience; and that, after opening the ground in the streets or highways, the company should put the same in good repair under penalty of being prosecuted for a nuisance. At that time the population of the town numbered only a few thousand, and the inhabited part of it was mostly confined to the lower district of the present city along the tide-water level of Appomattox river. Soon after its incorporation the company acquired certain springs in the town and in the county of Chesterfield, and conveyed the waters therefrom through very small pipes, supplying some little water for domestic purposes, mainly for drinking purposes, to the inhabitants of the district referred to along the lower levels near the river. Many years ago the company installed a few fire hydrants, but they have long since been abandoned, doubtless on account of the insufficiency of the water supply. The small spring in the city from which the company in part drew its supply has become so contaminated as to require its absolute abandonment, so that the company's entire available source of supply is from the springs in Chesterfield county. The water from those springs is collected in two reservoirs, only a few feet square, from which it flows through a four-inch main, under Appomattox river, into the lower section of the city.

These conditions continued from the date of the charter until within a short time before the institution of this suit. In the meanwhile, as the town increased in size and population, the company became wholly unable to meet the growing demand, and to supply the community with sufficient water for drinking purposes alone, and made no attempt to do so. Nearly the whole city was devoid of any water supply, except from private wells, and no provision was made for protection against fire.

In this situation of affairs, in the year 1857, the city was compelled to establish, and by virtue of authority of its charter did establish, at a cost of a half a million of dollars, a thorough and adequate water system furnishing the community with an abundant supply of clear, pure, and wholesome water. The distribution of pipes and conduits conducts water through all parts of the city, and the pressure from high-service reservoirs and pumps forces the water to the highest elevations within the corporate lim-

its, furnishing it in ample quantities for hygienic and protective purposes, and enabling the city to maintain an efficient fire department. Even in the lower parts of the city, traversed by the company's pipes, many citizens are obliged to take city water on account of the otherwise inadequate supply.

The bill further charges that if the company ever had a right to lay its pipes and conduct its water into any other parts of the city than those already occupied, which is denied, the presumption has long since arisen that it has surrendered such right, which surrender has been accepted by the commonwealth. In addition to that, it is alleged that the company is debarred, by reason of vested riparian rights, from taking water from the falls of the river or the basin of the canal, and is therefore limited by that fact, as well as by election to the springs in Chesterfield county, as a source of supply, which, as remarked, is wholly insufficient to furnish even its present system. It is also insisted that the company is financially embarrassed, having recently permitted a note for \$5,000 to go to protest; and that only \$10,000 of its maximum capital of \$15,000 has been subscribed. That it is without artificial or mechanical means of forcing its meager water supply to higher levels than those which it at present occupies.

Petersburg was chartered as a town in May, 1784, and empowered to keep in order the streets and lands within its limits; and its hustings court was authorized to appoint surveyors of streets, but no general police power over its streets was expressly granted to the town authorities. In the year 1850 appellant was chartered as a city, and a new charter was granted it in March, 1875, which from time to time has been since amended as the exigencies of the community required. At the revision of the statutes of the state, in 1849, the Legislature adopted the general policy as to towns, which has since been applied to cities, that "no company shall cross or occupy with its works the streets or alleys, public or private, in any city or town, without the assent of the corporate authorities thereof, unless such assent be dispensed with by special provision of law" (Code Va. 1887, § 1098); and that policy has been vigorously upheld in the charters of the city.

It is charged that, in utter disregard of these salutary provisions of law governing such matters, and of the charter rights of the city, without any warrant of authority from it, and in derogation of its rights, and in defiance of its municipal agencies, the company had been for several days and was still engaged in digging up the streets and pavements of the city, and laying eight-inch pipes therein, where it had never had water pipes before, and at an elevation considerably higher than the source of its water supply; and had also deposited piles of its pipes on the roadway of the streets, thereby obstructing them, and making them dangerous to trav-

elers; that the city had recently had constructed, at a very large outlay of corporate funds, pavements of vitrified brick upon concrete foundations and sheet asphalt, and before doing so, in order to prevent injury thereto by disturbing or breaking through the surface, had caused all underground structures, such as sewers, gas pipes, water pipes, etc., to be put in thoroughly good condition, and had all proper and necessary connections laid from the main pipe to the inner side of the curb line of said streets for the use of abutting owners, whether then desired for use or not, so as to be tapped when needed in future, without going beyond the curb line of the sidewalk; that, if the company has the right to dig up the unpaved streets of the city to lay or repair its pipes, it has equal right to dig up such pavements for the same purpose, the result of which would be to destroy the pavements, and involve the city in heavy loss.

Assuming, as the court must assume upon the demurrer to the bill, that all relevant and properly pleaded facts are true, the decree of the circuit court sustaining the demurrer and dismissing the bill is plainly erroneous.

In its last analysis, the contention of the company amounts to this: That a general power contained in a charter authorizing an aqueduct company to open ground in the streets of a city or town for the purpose of laying and repairing its water pipes places the company, with respect to the manner of exercising those rights, beyond legislative control.

To that proposition this court cannot give its assent. Bearing in mind the distinction between public and private corporations in the matter of public control—that the former are regarded as instrumentalities of the state, and liable to visitation and regulation, while the charters of the latter are contracts within the meaning of the contract clauses of the state and federal Constitutions, the obligation of which, in the sense of these clauses, cannot be impaired (New Orleans Water Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943)—nevertheless the police power of a state is a governmental function, the exercise of which neither the Legislature nor any subordinate agency thereof upon which part of its authority may have been conferred can alienate or surrender by grant, contract, or other delegation (Richmond, etc., R. Co. v. Richmond, 26 Grat. 83; a. c. 96 U. S. 521, 24 L. Ed. 734; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Butchers' Union Slaughter-House, etc., Co. v. Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Powell v. Penna., 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253).

The prohibition of state laws impairing the obligation of contracts has never been construed as depriving the state of the power of protecting the public health, morals, or safety of its citizens as one or the other may be affected in the execution of such contract. So that while the state cannot deprive a company of the lawful exercise of its functions under its charter, it may unquestionably, in the interest of public welfare, regulate the use and prevent the abuse of charter powers.

It follows, as a necessary consequence from the foregoing statement of the law, that there is an implied reservation of the police power of the state in every charter granted by the Legislature. There is no conflict, therefore, between the provision of the charter in this case, authorizing the company to open ground in the streets and highways of the city for the purpose of laying or repairing its pipes, and the general statute found in section 1093 of the Code of 1887, and the provisions of section 6, cl. 8, of the charter of the city, that "no company shall occupy with its works the streets of the city without the consent of the council," and clause 9 of the same section, that the city shall have power "to prevent the cumbering of streets * * * in any manner whatsoever." Acts 1874-75, p. 147, c. 163. It would be a mischievous precedent for this court to hold that a company chartered over three-quarters of a century ago for the purpose of supplying water to a sparsely settled town of a few thousand inhabitants, with the privilege of opening streets and highways for that purpose (a privilege which during all these years it had never essayed to exercise beyond its original sphere of operations), should now be permitted, after the town had grown to be a city, under a general grant of power, to attempt to extend its system beyond former limits, and in so doing to obstruct and dig up the streets of the city in violation of general and special statutes of the state. Even if the charter was susceptible of such interpretation, the alleged facts that the company is practically insolvent and without adequate means, either as regards capital or water supply, of properly enlarging its present system, would justify the conclusion that its undertaking is an abuse, rather than a legitimate exercise, of charter rights.

The case of *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672, is relied on as controlling authority for the contention of appellee, but the facts of the two cases are essentially different. In the former case the court was dealing with the reasonableness of, and right to enforce, a penal ordinance of the city of Alexandria, while this case involves the police power of the state.

The bill sets out a condition of facts which, if proved, would clearly entitle the city to the injunctive relief prayed for. The decree complained of is therefore erroneous, and must be reversed.

(102 Va. 633)

PORTSMOUTH ST. R. CO. v. PEED'S ADMINISTRATOR.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

STREET RAILROADS — NEGLIGENCE — DEATH — ACTION — DAMAGES — INSTRUCTIONS — PLEADING — WITNESSES — REFRESHING MEMORY.

1. Where a declaration is in two counts, and there is evidence to sustain one of them, so that defendant cannot demur to the evidence, and the one not sustained by the evidence is good in form, the court, on request of defendant, should instruct the jury to disregard the count not sustained.

2. Where, in an action against a street railroad for the death of one killed by being run over by a car, the negligence alleged in the declaration was excessive speed, it was error to instruct on failure to give warnings.

3. Code 1887, § 3384, declares that, where there appears to be a variance between the declaration and proof, there may be an amendment of the declaration, if it will not prejudice the opposite party, or the jury may find the facts, and the court give judgment according to the right of the case. *Held* that, in case of a variance between the evidence and allegations, the correct practice is to object to the evidence when offered, or move to exclude it; the attention of the court being thereby called to the variance, and an opportunity afforded to meet the emergency under the statute.

4. It is proper to refuse an instruction where there is no evidence to support it.

5. In an action against a street railroad for the death of one run over by a car, an instruction that failure to look for an approaching car by a person about to cross a street railway track, especially at a street crossing, was not negligence, as a matter of law—the street car having no superior right to that of a pedestrian, and the question being whether a prudent person, acting prudently, would have thought it necessary to do so—was erroneous, as misleading.

6. While, generally speaking, one who is about to cross a street railroad should look and listen for cars, it is not an inflexible rule; and the question is whether a prudent man, acting prudently, would have thought it unnecessary to do so.

7. Where, in an action for death, there is no evidence of payment by plaintiff of doctors' bills and burial expenses, an instruction authorizing their recovery is erroneous.

8. In an action for death, evidence that deceased left a family, and followed a trade which gave practically constant employment, is sufficient to warrant an instruction that the jury, in estimating the damages for his death, may take into consideration compensation for the loss of his care, attention, society, and comfort to his family, and for solace to them for the sorrow, suffering, and mental anguish occasioned by his death.

9. In an action against a street railroad for the death of one run over by a car, plaintiff's evidence showed that deceased was walking outside defendant's track, with his back turned to an approaching car, when he attempted to cross the track, and that he had not taken more than two steps when he was struck, and that he was deaf. Defendant requested an instruction that it was the duty of a person approaching a street car track to exercise the care which ordinarily prudent persons would exercise, and make such use of his faculties as ordinarily prudent persons would make use of under the circumstances, and that, if such person were deaf, it was more incumbent on him to exercise his sight, and that if deceased failed to exercise such care, and his failure contributed to the

¶ 6. See *Street Railroads*, vol. 44, Cent. Dig. § 208.

accident, the jury should find for defendant. The instruction was given, with the addition that if the jury further found that the motor-man saw or might have seen deceased go on the track, or approach it with apparent intention to cross it, and thereafter used ordinary care to stop the car, they should find for defendant. *Held*, that defendant was entitled to the instruction, and its modification was error.

10. It was error to refuse the charge that, if deceased stepped in front of a moving car of defendant when the car was so close on him that a collision could not be avoided by the utmost care on the part of defendant's servants, the jury must find for the defendant.

11. In an action for the death of one run over by a street car, it was not error to receive testimony of a witness objected to as giving the rate of speed 80 feet from the scene of the accident.

12. The testimony of the witness was not inadmissible because of the fact that at the time he observed the car he was in his storehouse, 25 feet from the door.

13. A witness may be allowed to refer to the stenographic report of his evidence at a former trial for the purpose of refreshing his memory.

14. Stenographer's notes of testimony on a former trial may not be referred to for the purpose of contradicting a witness.

Error to Hastings Court of Portsmouth.

Action by the administrator of Leroy L. Peed against the Portsmouth Street Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Richard B. Tunstall and T. J. Wool, for plaintiff in error. John W. Happer and Frank L. Crocker, for defendant in error.

WHITTLE, J. On the afternoon of March 3, 1899, plaintiff's intestate, Leroy L. Peed, while attempting to cross Crawford street at or near its intersection with Columbia street, in the city of Portsmouth, was struck by a passing car of the defendant company, receiving injuries from which he died. Thereupon the defendant in error instituted this action against the plaintiff in error to recover damages for the alleged negligent killing of his intestate, which resulted in the judgment now under review.

The declaration contains two counts. The first count alleges that the accident was due to the negligence of the defendant in running its cars "at such a great, high, and rapid rate of speed as to become thereby unmanageable and incapable of being stopped when occasion for stopping the same should arise," whilst the second count attributes the accident to the negligence of the defendant in failing to equip its cars with suitable fenders.

At the trial, after the evidence had closed, the defendant moved the court to strike out an ordinance of the city of Portsmouth with respect to car fenders, on the ground that there was no evidence tending to show a failure of duty on the part of the defendant in that regard, which motion the court sustained. Whereupon the defendant submitted a further motion that the jury be instructed

to disregard the second count of the declaration, as there was no evidence to support it, which motion the court overruled. Sustaining the second motion was a corollary to granting the first, and the court erred in overruling it.

The jury returned a general verdict, and it cannot be affirmed that their finding was not influenced by the ruling of the court with respect to the second count, notwithstanding the fact that there was no evidence to sustain it. The court, in the presence of the jury, had refused to instruct them to disregard the count, and they may naturally have interpreted that ruling to mean that they must regard it.

The only remedy which a defendant has in such case is to move the court to instruct the jury to disregard the unsustained count. Being unobjectionable in form, it is not amenable to demurrer; and the defendant cannot demur to the evidence where, as in this case, there is another count in the declaration with some evidence tending to uphold it. The rationale for disregarding such a count is the same as in case of a variance between the evidence and allegation. Both rest upon the fact of a failure to prove what is alleged. *Roe v. Crutchfield*, 1 Hen. & M. 361; *Bush v. Campbell*, 26 Grat. 431; *B. & O. Ry. Co. v. Whittington*, 30 Grat. 810; *Richmond Ry. & Elec. Co. v. Bowles*, 92 Va. 738, 24 S. E. 358; *Eckles v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545; *Richmond Ry. & Elec. Co. v. West*, 100 Va. 184, 40 S. E. 643; *West v. Richmond Ry. & Elec. Co.*, 102 Va. —, 46 S. E. 83.

While that error alone might not warrant a reversal, the ruling involves a question of practice which ought to be settled.

The next assignment of error relates to the ruling of the court on instructions.

The objection to the first instruction given at the instance of the plaintiff is that it was not justified by the pleading. As remarked, the declaration sets out two grounds of negligence, namely, excessive speed and a defective fender. There being no evidence to support the second charge, the only ground upon which the plaintiff could recover, if at all, was for the alleged excessive speed; yet the instruction injected into the case a new element, and told the jury that either a failure to give warning of the approach of the car, or its excessive speed, would entitle the plaintiff to recover. Under the authorities cited above, the court erred in instructing the jury that they could find a verdict on a case not made by the declaration. It should be observed, however, in that connection, that, in case of a variance between the evidence and allegations, the usual and correct practice is to object to the evidence when offered, or move to exclude it. Attention is thus called to the discrepancy, and opportunity afforded the trial court to meet the emergency, in a proper case, in one of

the modes prescribed by section 3384 of the Code of 1887.

Plaintiff's second instruction is subject to the same objection as the first, and that part of the instruction predicated on the jury's belief from the evidence that the deceased used ordinary care in looking and listening before attempting to cross Crawford street is liable to the further objection that there was no evidence on which to base it.

The third instruction told the jury that failure to look for an approaching car by a person about to cross a street railway track, especially at a street crossing, is not negligence, as a matter of law, the street car having no superior right to that of a pedestrian; the question being whether a prudent person, acting prudently, would have thought it necessary to do so.

While the qualifying language lessens the vice of the instruction, it does not entirely remove its misleading tendency. The doctrine on the subject is thus stated in 2 Shearman & Redfield on the Law of Negligence (5th Ed.) at pp. 869, 870:

"While, generally speaking, one who is about to cross a street railroad should both look and listen for cars, this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of an ordinary steam railroad. It is not negligence, as a matter of law, to omit to do so. The question is whether a prudent man, acting prudently, would have thought it unnecessary to do so."

The above statement of the law is quoted with approval by this court in the recent case of Bass v. Norfolk Ry. Co., 100 Va. 1, 40 S. E. 100. The statement of a part of the rule, without the context, was calculated to mislead the jury, and therefore ought not to have been given.

The remaining instruction of the plaintiff to which objection is made relates to the measure of damages. The instruction told the jury that, "if they shall find for the plaintiff, in estimating his damages they may take into consideration compensation for the loss of his care, attention, and society to his family, together with such sum as they may deem fair and just by way of solace and comfort to them for the sorrow, suffering, and mental anguish occasioned by his death, not to exceed, however, the sum of \$10,000."

The evidence shows that the deceased was 64 years of age; that he left a family consisting of a wife, three sons, and two daughters; and that he was a ship calker by trade, with practically constant employment. This evidence was sufficient to warrant the court in giving the instruction. *Baltimore & Ohio R. R. Co. v. Noell's Adm'r*, 32 Gratt. 894.

The next assignment of error is the refusal of the trial court to give the third instruction asked for by the defendant, and the modification of that instruction.

The instruction told the jury that it is the duty of a person approaching a street car

track to exercise the care which ordinarily prudent persons would exercise; and make such use of his faculties as ordinarily prudent persons would make use of under similar circumstances, and, if such person is deaf, it is more incumbent upon him to exercise his sight; and if they believe from the evidence that the deceased failed to exercise such care, and his failure to do so contributed to the accident in which he met his death, *and if they further find from the evidence that the motorman saw, or by ordinary care might have seen, the decedent go upon the track, or approach the track with apparent intention to cross it, and thereafter used ordinary care to stop the car, they must find for the defendant.* The addendum of the court is italicized.

The instruction, as offered by the defendant, is a correct exposition of the law applicable to the evidence of the only witness for the plaintiff who saw the accident. The car was running on Crawford street, which runs north and south, and is intersected by Columbia street, running east and west. The deceased, who was proved to have been deaf, started from the southeast corner of Columbia street, and crossed that street, walking outside the track until he passed a delivery wagon in front of a store on the northeast corner, when, with his back toward the approaching car, and his head bent forward, he attempted to cross the track, and had not taken more than two steps before the car struck him. The witness further testified that he did not think the deceased was going on the track, and, if he had thought so, he would certainly have called out to save him. The testimony of several of the defendant's witnesses also tends to sustain the theory that the deceased gave no indication of his intention to cross the track until the car was so close upon him that it could not be stopped in time to avert the accident. Upon this evidence the defendant was entitled to the instruction asked for, without the qualification made to it by the court.

The same objection obtains to the court's addition to defendant's instruction No. 4. The amendment involves the principle embodied in the qualification to instruction No. 8, and, for the reason stated in that connection, ought not to have been given.

Instructions 5 and 6, which the court rejected, told the jury that, if they believed from the evidence that the deceased stepped in front of a moving car of the defendant when the car was so close upon him that a collision could not be avoided by the utmost care on the part of defendant's employees, they must find for the defendant.

The evidence referred to tended to sustain that theory, and the court erred in refusing to give the instructions. *Richmond Traction Co. v. Martin*, 102 Va. —, 45 S. E. 886.

There are two other assignments of error

which may be briefly noticed. The first assignment is to the admission of the testimony of a witness for the plaintiff with respect to the speed of the car. His evidence was objected to as giving the rate of speed 80 feet from the scene of the accident, and because the position of the witness, who was standing in his storehouse, 20 or 25 feet from the door, was not such as to enable him to determine the rate of speed of the car.

Of both objections it may be remarked that they affect the weight, rather than the admissibility, of the evidence. There is therefore no error in that assignment.

The remaining assignment is the refusal of the court to permit a witness who had testified on a former occasion to refresh his memory from the stenographer's minutes of his testimony.

It was permissible to allow this reference to the minutes for the bona fide purpose of refreshing the memory of the witness, but not to contradict him. The rule in such case does not require that the paper should have been given to the witness. *Harrison v. Middleton*, 11 Grat. 527, 544; *Greenleaf on Ev.* (16th Ed., Wigmore) § 439c.

For the foregoing reasons, the judgment of the trial court must be reversed and annulled, the verdict of the jury set aside, and the case remanded for a new trial to be had, not in conflict with the views expressed herein.

(102 Va. 683)

AMERICAN BONDING & TRUST CO. OF BALTIMORE v. MILSTEAD.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

PLEADING—CONTRACT UNDER SEAL—COUNT IN ASSUMPSIT—STATUTES—ALLEGATIONS OF DAMAGES—JURY—CHANGE OF VENUE—CONTINUANCES—AMENDED BILL OF PARTICULARS—BILL OF EXCEPTIONS—TRIAL—EXAMINATION OF WITNESSES—BONDS—LIABILITY OF SURETY—NEGLIGENCE OF PRINCIPAL—INSTRUCTIONS.

1. Inasmuch as Acts 1897-98, p. 103, c. 98, provides that in any case where an action of covenant will lie an action of assumpsit may be maintained, counts in assumpsit may be joined in the same declaration on a contract under seal.

2. Where the damages claimed in a declaration are set out in the final count thereof in language broad enough to include the other counts, it is not necessary that the claim for damages be inserted at the end of each count.

3. Since Code 1887, § 893, makes provision for summoning a jury by one other than the sergeant of the city in cases where such officer is unfit to serve, the fact that the officer was plaintiff in a cause was no ground for a change of venue.

4. In an action against the surety on the official bond of an officer the first count of the declaration set out the officer's appointment and the execution of the bond, the default of the

officer, and the amount of damages claimed by reason thereof, and the refusal of the defendant to pay the damages claimed, and the second count set out a renewal of the bond, and identified the covenants therein as those set forth in the first bond. *Held*, that the declaration stated a good cause of action.

5. In an action against the surety on the bond of a deputy sergeant of a city the original bill of particulars gave the names of the persons from whom and for whom he had collected moneys, which he had failed to account for, all of which collections were made within a period of six months before the flight of the officer, and subsequently, and two months after the filing of such bill, another bill was filed on the demand of plaintiff, which merely showed at what time the several amounts collected by the officer had been paid by plaintiff to the parties entitled thereto. *Held*, that it was not error to refuse a continuance on the ground that the amended bill had just been filed.

6. Where the defendant pleaded the general issue, and then sought to file special pleas setting up matters which could have been proven under the general issue, and the order rejecting the pleas reserved to defendant the privilege to offer any evidence under the general issue that would have been proper under the pleas, there was no error.

7. In an action against the surety on the bond of a public officer a witness testified that he called on the officer on a certain day with reference to certain domestic troubles of the officer. *Held*, that it was not error to refuse to permit the witness to answer a question as to whether the officer was intoxicated, and whether he remained intoxicated for several days after, the evidence being immaterial.

8. Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him, which rule is applicable not only to direct but cross examination.

9. In an action by the sergeant of a city against the surety on the bond of plaintiff's deputy sergeant defendant sought to show by a certain witness that the witness had loaned the deputy money on a certain date, the object of the testimony being to prove a loan by the witness at about the same time that plaintiff was claimed to have loaned the deputy, but it appeared that any money loaned by the witness or plaintiff to the deputy was to aid him in certain domestic troubles, and not because of any default in the discharge of his public duties. *Held*, that there was no error in refusing to require the witness to answer questions as to the loan.

10. In an action by the sergeant of a city against the surety on the bond of his deputy sergeant defendant sought to show that plaintiff had notice of the deputy's embezzlement, and committed a fraud on defendant in continuing him in office. A witness for defendant was asked on cross-examination as to whether witness had made any suggestion to plaintiff that the deputy was embezzling money, referring to an occasion when witness spoke to plaintiff with reference to some money which witness was informed the deputy had collected and did not pay over to the witness, as counsel for the party to whom the money was going. *Held*, that the question was proper.

11. Where the sergeant of a city knew that his deputy was failing to remit collections made by virtue of his office, but continued such deputy in office, he could not recover for such embezzlements from the surety on the bond of the deputy, the surety not having been informed of such facts by the sergeant.

12. In the absence of a stipulation a sergeant of a city does not owe it to the surety on the official bond of the sergeant's deputy to make continuous and diligent search into each levy

by his deputy and the payment of money collected thereunder.

13. In an action by the sergeant of a city against the surety on the official bond of plaintiff's deputy, the evidence conclusively showed that plaintiff had no knowledge of the deputy's embezzlements until after his discharge, and the court instructed that knowledge of facts and circumstances naturally calculated to excite suspicion in the mind of a person of ordinary care and to prompt him to inquire is sufficient to affect the party with knowledge of all facts necessarily to be discovered on such inquiry, and to which the facts known furnished a reasonable and natural clue, and, if the jury believed from the evidence that plaintiff had such knowledge, the jury should, in the absence of countervailing evidence, find plaintiff chargeable with notice. *Held*, that defendant could not complain of the instruction.

14. It is not error to refuse instructions on matters fully covered by other instructions.

15. Mere negligence on the part of the obligee in the bond of a public officer will not avoid the contract of suretyship, but good faith is all that is required.

Error to Corporation Court of Newport News.

Action by one Milstead against the American Bonding & Trust Company of Baltimore. Judgment in favor of plaintiff, and defendant brings error. *Affirmed*.

Thomas W. Shelton, for plaintiff in error.
R. G. Bickford and R. G. Lett, for defendant in error.

CARDWELL, J. This is a writ of error to a judgment of the corporation court of the city of Newport News in an action brought by the defendant in error against the plaintiff in error to recover certain damages alleged to have been sustained by reason of the breach of a promise and undertaking set forth in a certain contract in writing executed by one E. L. Herndon, with plaintiff in error as his surety, to guaranty to defendant in error the faithful performance of the duties of Herndon as the deputy for defendant in error, sergeant of the city of Newport News.

The plaintiff in error refused to pay the amounts claimed by defendant in error because of the default of the said deputy upon the ground that defendant in error "knew of Herndon's peculations, and had facts and circumstances brought to his attention equivalent to notice, and not only did not notify plaintiff in error, the surety, but condoned such action by loaning him money."

The declaration in the case contains two counts, to which plaintiff in error demurred, and, the demurrer having been overruled, this action of the court is assigned as error.

The bond sued on is in the usual form used by the bonding and guaranty companies, and recites that plaintiff in error, the surety, and Edwin L. Herndon, the principal, are held and firmly bound unto E. W. Milstead, sergeant of the city of Newport News, state of Virginia, in the sum of \$2,000, to the payment whereof well and truly to be made to the said E. W. Milstead, etc., and the condition of the bond is as follows:

"That whereas the above bound, Edwin L. Herndon, on the 16th day of May, 1898, was duly appointed deputy sergeant of the city of Newport News, state of Virginia, by the judge of the corporation court of the city of Newport News, state of Virginia, upon the recommendation of E. W. Milstead, sergeant of the said city: Now if the said Edwin L. Herndon shall faithfully discharge the duties of the said office, post, or trust, according to law, then this obligation to be void, or otherwise to remain in full force and virtue."

The bond bears date the 1st day of June, 1898, and the first count in the declaration sets out the appointment of Herndon as deputy sergeant, and the execution of the bond; the renewals or extensions thereof upon the reappointment of Herndon as deputy sergeant on several occasions, including the last on the 9th day of July, 1900, to cover the period between May 16, 1900, and May 16, 1901; the default of Herndon in the performance of his duties as deputy sergeant, and the amount of damages claimed by the plaintiff by reason of such default; the refusal of the surety, plaintiff in error, to pay the amount of damages claimed—that is, the amount of the several sums of money received, collected, and retained by Herndon, the deputy—his insolvency; and his departure from the state of Virginia, etc. The defaults, it is claimed in that count, operate as a breach laid to have occurred between the 9th of July, 1900, and the 16th of May, 1901, and is that part of the deputy's term which is particularly covered by the last bond after the renewal or extension thereof on the 9th day of July, 1900.

The second count simply sets out the writing of July 9, 1900, and identifies the condition and covenants therein described as being those set forth in the first bond of the 1st of June, 1898. In this count the conditions and the covenants are identified by a reference to the bond, while in the first count the conditions are identified by recital and averment.

The grounds stated for the demurrer rest upon the erroneous theory that a special count in assumpsit cannot be joined in the declaration with a special count on a contract under seal. The counts in the declaration are but counts in assumpsit.

"In an action in assumpsit, the promise is the legal cause of action, and where a count states that the defendant agreed or undertook, these words import a promise, and the count, therefore, is, in form, assumpsit." 4 Rob. Pract. 230.

In support of the contention of counsel for plaintiff in error, the cases of *Gary v. Abington Pub. Co.*, 94 Va. 775, 27 S. E. 595, and *Booker v. Donahoe*, 95 Va. 359, 28 S. E. 584, are cited; but neither of the cases support the contention, as both are to the point only that counts in tort cannot be joined with counts on contract. Since the act of assembly approved

January 25, 1898 (Acts 1897-98, p. 103), counts in assumpsit can be joined in the same declaration with counts in assumpsit on a contract under seal.

In *Grubb v. Burfort*, 98 Va. 553, 37 S. E. 4, the opinion by Buchanan, J., following the construction of a similar statute with reference to the actions of trespass and trespass on the case given by the court in the case of *Parsons v. Harper*, 16 Grat. 64, says: "The ground of demurrer to the whole declaration is that there is a misjoinder of counts. All the counts are common counts in assumpsit, except the last, which is a special count upon or for the breach of an agreement under seal. There is no doubt that at common law those counts could not be united in one declaration, and that such misjoinder would have been fatal on general demurrer. But by act of assembly approved January 25, 1898 (Acts 1897-98, p. 103, c. 96), it is provided 'that in any case where an action of covenant will lie there may be maintained an action of assumpsit.' Under that act assumpsit can be maintained upon the writing sued on in the special count, and it is clear that an action of covenant would lie upon it. Since an action of assumpsit will lie upon the cause of action in the last count, as well as upon the several causes of action in the other counts, we see no reason why they may not be properly united in one action of assumpsit, as was done in this case."

It is further contended that the demurrer should have been sustained, because damages were claimed only at the end of the second count, and is not in language broad enough to include the first. But this contention is without merit, and the authorities cited do not sustain it. The declaration sets out at the end of each count the breach relied on by the plaintiff, and the damage claimed is stated at the conclusion of the second count in language broad enough to include the first. The gravamen of each count is the same.

In *Postlewaite v. Wise*, 17 W. Va. 24, it was held that the damages claimed at the end of the declaration applied to each of the counts, that it is both unusual and unnecessary to insert the claim for damages at the end of each count, and that damages for all the causes of action in the several counts may be claimed at the end of the declaration.

To the same effect is *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

We are of opinion that the declaration in this case, and each count thereof, set out a good cause of action, and that the demurrer was properly overruled. *Mut. Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594.

At the calling of the case on the 2d of January, 1903, it was continued, but during the term plaintiff in error moved the court for a change of venue, which motion was overruled, and this action of the court is assigned as error.

The sole ground of the motion was that the defendant in error (plaintiff below) was ser-

geant of the city of Newport News, and that it was to be assumed that by reason of his position he would exercise influence over the jury to be selected to try the cause. This was but a broad assertion, unsupported by evidence of any character either at the time the motion was made or at any time during the trial. Section 893 of the Code of 1887 makes ample provision for a case in which the sergeant is unfit from the circumstances in which he is placed to serve process or summon a jury, and it does not appear from the record by whom the jury in this case was summoned. It does appear, however, that, in addition to no good reason being given for a change of venue at the February term of the court, 1903, to which the case had been continued by consent of parties, "a jury of nine persons were called, qualified jurors and free from exceptions, and from the panel two were struck off by the parties, beginning with the plaintiff, each striking off one, and the remaining seven constituted the jury" that rendered the verdict complained of. No suggestion was then made that the jury had been improperly summoned, or that the defendant (plaintiff in error here) could not have a fair trial with the jury thus selected.

The court is further of opinion that the court below did not err in overruling the motion of plaintiff in error, made at the January term, 1903, for a continuance of the cause.

The ground for this motion was that an amended bill of particulars, which plaintiff in error had called for, had just been filed, and which merely showed at what time the several amounts collected by Herndon, deputy sergeant, had been paid by the defendant in error to the parties entitled thereto. This amended bill of particulars was not called for until eleven months after the institution of the suit and over two months after the filing of the original bill of particulars, in which the names of the persons from whom and for whom Herndon collected moneys that he had failed to account for is definitely set forth, and these collections were all made within a period of about six months before Herndon's defalcation and departure from the city of Newport News.

We are unable to see why this information furnished by the amended bill of particulars was material to plaintiff in error, or why it could not have obtained that information from the original bill of particulars and by inquiry of the persons named therein, from whom and for whom Herndon had collected the respective amounts stated. In point of fact the case was continued at the January term upon counsel agreeing, in order to avoid compelling defendant in error to summon again 41 witnesses, that the moneys stated in the bill of particulars were collected by Herndon by virtue of his office as deputy sergeant, as in the declaration alleged, after the 9th of July, 1900, and before the 16th day of May, 1901; that Herndon had not paid these moneys to any person entitled there-

to, but still wrongfully withheld the same; and that the defendant in error had, out of his own private funds, before the institution of this suit, made good the said moneys to the several parties entitled thereto. These terms were not imposed by the court upon plaintiff in error, but were merely an agreement of facts arrived at between counsel, whereupon the continuance was by consent; and it nowhere appears in the record that the facts agreed were not the real facts of the case, or that plaintiff in error was at all injured by embodying the agreement in the order entered.

The court is further of opinion that the court below did not err in refusing to allow plaintiff in error to file the three special pleas offered at the February term of court, 1903, when the cause was tried. Plaintiff in error had pleaded at the prior term the general issue, and not only were the matters set up in the special pleas such as could have been proven under the general issue, but the privilege was expressly reserved to it, in the order rejecting the pleas, to offer any evidence under the general issue that was proper to be offered under the pleas tendered; and there is no suggestion anywhere in the record that plaintiff in error was prevented from introducing any evidence which it desired in support of the matters stated in the pleas, or prejudiced by their rejection.

The court is further of opinion that the court below did not err in its refusal to allow the defendant in error, while on the witness stand, to answer the following cross-question propounded to him:

"Was Mr. Herndon intoxicated, and did he remain intoxicated for several days after that?"

The occasion referred to in the question was on a day in August, 1900, when Herndon was in some domestic trouble, and the witness had called to see him with reference to that trouble. We are unable to see the materiality of the evidence sought to be elicited from the witness by the question. This assignment of error, for another cause, could not be sustained, as the bill of exception is faulty, in that it does not indicate what the plaintiff in error proposed to prove by the witness. It is true counsel explained the object of the question, which goes alone to its materiality, but fails to show what was expected to be proved by the witness and its materiality to the issue in the case. "Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him." And the same rule applies where a question is asked on cross-examination which the witness is not permitted to answer. *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 357, 28 S. E. 421, 86 L. R. A. 271, 64 Am. St. Rep. 715; *Childress v. C. & O. Ry. Co.*, 94 Va. 189, 26 S. E. 424; *Brock v. Bear*, 100 Va. 563, 42 S. E. 307.

The court is further of opinion that the lower court did not err in refusing to allow Dr. H. P. Taylor, a witness introduced by plaintiff in error, to answer the question, propounded by its counsel, as to whether or not the witness loaned Herndon money on a certain date in August, 1900; the object of which question, as counsel stated, being to prove by the witness that he had indorsed for Herndon and loaned him money in August, 1900, about the time defendant in error loaned him \$300. We are wholly unable to see the materiality of this evidence, or that plaintiff in error was prejudiced by its exclusion, especially as it abundantly appears that, if money was lent by the witness Taylor or the defendant in error to Herndon in August, 1900, it was to aid him in removing difficulties confronting him growing out of domestic troubles, and not out of any default in the discharge of the duties of his office as deputy sergeant, of which default defendant in error at that time had no knowledge whatever.

The court is further of opinion that there is no merit in the plaintiff in error's sixth assignment of error (bill of exceptions No. 3). Plaintiff in error had introduced the witness C. A. Ashby on its own behalf, and on cross-examination counsel for defendant in error propounded to him the question, "Did you make any suggestion to Mr. Milstead, Mr. Ashby, that Mr. Herndon was actually stealing or embezzling that money?"—referring to an occasion prior to Herndon's disappearance from Newport News, when the witness spoke to Milstead (defendant in error) with reference to some money which the witness was informed Herndon had collected, and would not pay over to the witness as counsel for the party to whom the money was going; and the objection to the question was on the ground that, the facts having been set out to Milstead, the answer would be mere legal opinion.

It is manifest that this was a proper question, as plaintiff in error was seeking to prove that defendant in error had knowledge of Herndon's peculations, and committed a fraud upon plaintiff in error by continuing Herndon in his office as deputy; and the answer witness made but negated the contention that defendant in error was informed by the witness of Herndon's defaults, the answer being as follows: "No, sir. Mr. Milstead was rather slow about it, but I never knew until Mr. Herndon left here as to his being short. There was no suggestion made then."

At the trial of the cause plaintiff in error asked for six instructions, two of which, viz., the third and sixth, were refused, and the first, second, fourth, and fifth were granted, with a modification of the second, and this action of the court is assigned as error.

The first instruction sets out that the knowledge of the defalcation of Herndon, without dismissal, would release the surety,

and fully covered the law on the point that if defendant in error knew, or might, in justice to Herndon's surety (plaintiff in error), have known, from facts brought to his knowledge, that Herndon was failing to remit collections made by virtue of his office, and continued Herndon in his office, there could be no recovery in this action; and the fourth and fifth instructions given were practically to the same effect, varying only from the first in referring to the facts which it was considered that the evidence tended to prove.

The second instruction, as offered, injected into the case the rule of constructive notice, which was founded on the mistaken theory that there was on the part of defendant in error a duty to make continuous and diligent search into each levy of his deputy and the payment of money collected. The rule of law invoked by plaintiff in error to the effect that "whenever inquiry is a duty the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty," has no application to this class of cases, in the absence of special provisions in the contract sued on; and in this case no such conditions and duties as propounded in the instruction were imposed upon the defendant in error, the bond being conditioned only upon Herndon's faithful discharge of the duties of his office as deputy sergeant.

The instruction, as given, was as follows, the modification appearing in italics:

"(2) The court instructs the jury that knowledge of facts and circumstances naturally calculated to excite suspicion in the mind of a person of ordinary care, and to prompt him to pause and inquire, is sufficient to affect a party with notice of all facts necessarily to be discovered upon such inquiry, and to which the facts known furnish a reasonable and natural clue; and if they believe from the evidence that the plaintiff, Milstead, had such knowledge of such facts and circumstances, they shall, *in the absence of countervailing evidence*, find him chargeable with notice."

Had the court granted the instruction as asked, the record discloses no avenue of inquiry, which, if defendant in error had followed, would have led him to the knowledge of Herndon's defalcation. It is agreed that all the moneys in the declaration mentioned, demanded by defendant in error in this action, were collected by Herndon after the 9th day of July, 1900, and before the 16th day of May, 1901, and the evidence shows unmistakably that Herndon's account was straight on July 6, 1900, and that the defalcations occurred only within about three months before Herndon's discharge, and that knowledge of the default was not brought home to defendant in error until a confession made by Herndon after his discharge. This confession was in writing, and was brought into the record by plaintiff in error,

and the defendant in error testifies as to the date when he received it, and that it was the first intimation that he had of Herndon's defalcation; and there is no evidence that could be considered as tending to successfully contradict that statement. Therefore it is manifest that the modification of this instruction could not have been prejudicial to plaintiff in error, though, as said by the learned judge below, its phraseology is not happy.

All that need be said of plaintiff in error's third instruction refused is that the proposition of law contained therein, namely, that defendant in error was required to observe the utmost good faith toward plaintiff in error, as surety for Herndon, and if, from the evidence, the jury believed that he failed to do so, then the surety would be discharged from liability for the subsequent acts of Herndon, was fully covered by the instructions which the court did give.

Brandt on Suretyship, § 423, says: "The mere negligence of the officers of a bank in examining or checking the accounts of a clerk or cashier does not amount to a fraud or concealment, and will not discharge his surety." To the same effect is *R. F. & P. R. R. Co. v. Kasey*, 30 Grat. 227. And in *Bostwick v. Van Voorhis*, 91 N. Y. 353, relied on by plaintiff in error, it is said at page 361: "Before a bond in such a case can be avoided, the fraud and bad faith should be brought home to the obligee by quite clear and decisive evidence; otherwise bonds of this character will furnish a very precarious security to the parties who take them." "A concealment which will avoid a guaranty must be a fraudulent one. If not fraudulent in fact or in law, the defense is not made out."

The law of vendor and vendee has no analogy to that of surety and creditor, unless special provisions in the surety bond impose like conditions and duties as those imposed by the rule applicable to vendor and vendee, and, as already said, there were no such provisions in the bond in this case.

The sixth instruction offered by plaintiff in error and refused, as did its second as offered, sought to impose upon defendant in error duties not imposed either by the law or by the contract between the parties, and to have done so would have established a rule which would, as was said in *Howe Machine Co. v. Farrington*, 82 N. Y. 127, make instruments of that character of little value. Good faith on the part of defendant in error was the test as to whether or not he was entitled to recover in this action. *R. F. & P. R. R. Co. v. Kasey*, supra; *Crawn v. Com.*, 84 Va. 287, 4 S. E. 721, 10 Am. St. Rep. 839; *Daniel on Neg. Insts.* § 1309; *Stearns on Suretyship*, pp. 154, 157, 455; *Brandt on Suretyship*, supra.

"If the acts of fraud or dishonesty by the principal are not known to the creditor, the duty of disclosure does not apply, even

though the creditor, by the exercise of ordinary diligence, might have discovered the default. Such diligence need not be exercised in the interest of the surety or guarantor."

"Fraud will not be imputed because the creditor, by reason of negligence or inattention to his own affairs, does not know of the facts which materially affect the surety's risk." Stearns on Suretyship, supra.

All that was proper in the instructions refused was embraced in the instructions given, which, in our opinion, covered the entire case, and fairly submitted it to the determination of the jury. When instructions have already been given which cover the entire case and fairly submit it to the jury, to add repeated statements of the law, though in somewhat different form, would only tend to mislead and confuse the jury, and it is not error to refuse the additional instructions. *Ferguson v. Wills*, 88 Va. 189, 13 S. E. 802; *McDonald v. N. & W. Ry. Co.*, 95 Va. 99, 27 S. E. 821; *Myer v. Faulk*, 99 Va. 389, 33 S. E. 178.

The court is further of opinion that the remaining assignment of error, which is to the refusal of the trial judge to set aside the verdict of the jury because contrary to the law and the evidence, is without merit, as the verdict is plainly in accordance with the law and the facts proven.

The judgment of the corporation court is affirmed.

(102 Va. 847)

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. HAMPTON ROADS RY. & ELECTRIC CO.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

STATE CORPORATION COMMISSION—TRACK CROSSING—JURISDICTION—PENDING LITIGATION—FINDING OF COMMISSION.

1. The state corporation commission is not deprived of jurisdiction in controversies arising between two railway companies concerning a desired crossing, given it by Code 1887, § 1094, because of pending litigation, when that litigation is determined.

2. In addition to the presumption arising from the provision contained in paragraph "f," § 156, of article 12, of the Constitution, that the rulings of the state corporation commission are to be regarded as prima facie just, reasonable, and correct, *held*, that the evidence supports the finding of the commission that the crossing between two railroads should be established.

Appeal from State Corporation Commission.

Proceedings by the Newport News & Old Point Railway & Electric Company against the Hampton Roads Railway & Electric Company to determine the necessity and propriety of a certain railroad crossing. From the judgment of the state corporation commission the petitioner has appealed. Affirmed.

S. Gordon Cumming, for appellant. R. G. Bickford, Thos. W. Shelton, and W. J. Nelms, for appellee.

BOARDWELL, J. The Hampton Roads Railway & Electric Company, by an ordinance of the council of the town of Phoebus, was given permission to lay upon certain streets of the town its tracks, and to operate on and over them electric cars plying between the city of Newport News and Old Point Comfort and other points east of the town of Phoebus. The Newport News & Old Point Railway & Electric Company had previously been granted the privilege of using certain streets in said town, had laid its tracks, and was using them. Thereupon, in accordance with the provisions of section 1094 of the Code of Virginia of 1887, the president of the Hampton Roads Railway & Electric Company served notice on the president of the Newport News & Old Point Railway & Electric Company, advising the last-named company of the necessity and propriety of its crossing the tracks of the Newport News & Old Point Railway & Electric Company at four points within the corporate limits of the town of Phoebus, and furnished plans, specifications, appliances, and methods of operating such crossings, indicating the points of crossing, and otherwise complying with the requirements of the statute. The Newport News & Old Point Railway & Electric Company declined to agree to the crossings upon any terms, and elected to apply to the corporation commission to inquire into the necessity and propriety of these proposed crossings, as provided by said section 1094 of the Code. When the matter came on to be heard before the corporation commission upon the petition of the Newport News & Old Point Railway & Electric Company, the notice of the Hampton Roads Railway & Electric Company, the plans, maps, specifications, description of appliances, and methods of operating said crossings, and the arguments of counsel, and the testimony of witnesses, the corporation commission ordered that E. J. Willis, an expert engineer, should report upon the matters set out in the record. This expert made a careful personal inspection of the points and surroundings of the proposed crossings, and made his report to the corporation commission, whereupon the corporation commission, in the light of all the facts brought before it by both companies, and the report of the expert engineer, pronounced favorably upon the necessity and propriety of the Hampton Roads Railway & Electric Company crossing with its tracks the tracks of the Newport News & Old Point Railway & Electric Company at four points in the town of Phoebus, viz.: First, at the intersection of Segar and Mellen streets; second, at the intersection of Willard avenue and Mellen street; third, at the intersection of Mellen and Water streets; and fourth, at the in-

tersection of Mallory avenue and Mellen street; and in the manner indicated upon the plans and drawings filed with the notice and papers in the proceedings. The finding or order of the corporation commission then proceeds to prescribe the rail to be used at all of said crossings, and that the said crossings, both as to the track and overhead wire crossings, be made with the usual approved appliances used in the construction of crossings of electric railroads with solid block crossings and switches; and it further provides that at all of said crossings, the trains or cars of the Newport News & Old Point Railway & Electric Company shall have the right of way, and furthermore provides with the utmost detail the manner in which the cars of the respective companies are to be operated over said crossings.

From so much of this finding or order as permits the crossing of its track at the three last named points, the Newport News & Old Point Railway & Electric Company has appealed to this court.

There are but two grounds suggested by appellant why this finding or order of the corporation commission should be reversed, viz.: First, that the corporation commission was without jurisdiction in the premises; and, second, that the record does not establish the necessity and propriety of the crossings in question.

As to the first ground, it rests solely upon the fact that there was pending at the time in the circuit court of Elizabeth City county a litigation between the same parties over the right of appellee to the use of Mellen street in any way—by a single or double track or otherwise—in which litigation it was being contended, that the ordinance of the town of Phoebus conferring upon appellee the right to the use of Mellen street was ultra vires and void; and, further, if said ordinance was valid, appellee had lost the right thereby conferred by a failure to commence and complete its lines within the town of Phoebus in accordance with the provisions of the ordinance as to the time when the work of laying its tracks in the street was to begin and be completed.

A complete answer to this contention is that the litigation between these parties, referred to, has terminated by a decision of this court just rendered (47 S. E. 839), affirming the decree of the circuit court of Elizabeth City county, the effect of which is that the ordinance of the town of Phoebus is a valid ordinance, and that appellee, by virtue thereof, has the right to lay its tracks in Mellen street and other streets of the town of Phoebus.

As to the necessity and propriety of the crossings in question, authorized by the corporation commission, it need only be said that, in addition to the provision contained in the Constitution (article 12, § 156, par. "f"), that such rulings of the commission are to be regarded as "prima facie just,

reasonable, and correct," and the provisions of the statute referred to, there is nothing whatever in the record that overcomes in the slightest degree the presumption arising upon the finding of the corporation commission that the crossings authorized are necessary and proper to be made; nor is there anything in the record to sustain the contention that they are unnecessary, and would be unsafe. On the contrary, the expert engineer, in his report, says, as to the crossings, when constructed in accordance with the methods and specifications furnished him by the chairman of the corporation commission: "I consider them all necessary and all reasonably safe, considering the conditions to be met. I would make no suggestions as to changes, additions, or safeguards. I believe that, while these complicated crossings would retard the schedules of both roads, and will necessitate slow and careful running down Mellen street by both companies, they are not, with proper care and diligence on the part of both companies, associated with particular danger to passengers or to the public." The right of appellee to cross the tracks of appellant is not in question. It is the manner of crossing, not for the benefit of the railroads, but for the benefit of the public. The object of creating the state corporation commission was to protect the public rights by regulating public utilities. That the commission in this matter has been untiring, most careful, and painstaking in its efforts to ascertain all local conditions before making its finding or ruling, is clearly shown by the evidence before it and the report of the expert.

It follows that the finding or order of the corporation commission is approved and affirmed.

(102 Va. 724)

MACK MFG. CO. v. WILLIAM A. SMOOT & CO. et al.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

ASSIGNOR AND ASSIGNEE—EQUITABLE ASSIGNMENT—GARNISHMENT—NOTICE TO AGENT.

1. An order from a person to whom money is due or to become due, on the person in whose hands or under whose control it may be, to pay to the payee, constitutes an equitable assignment, and the fund cannot be garnished at suit of the assignor's creditors.

2. Notice to an agent bound, in the discharge of his duty, to act upon it, and communicate it to his principal, is notice to the principal.

Error to Circuit Court of City of Alexandria.

Action by William A. Smoot & Co. against Cuvillier & Co. Judgment for plaintiff. Garnishment proceedings by plaintiff and the Mack Manufacturing Company. On a judgment confessed by the same, defendants by agreement submitted the question of priority. Judgment in favor of Smoot & Co., and the

¶ 2. See Principal and Agent, vol. 40, Cent. Dig. § 670.

Mack Manufacturing Company brings error. Reversed.

C. C. Carlin and Samuel G. Brent, for plaintiff in error. J. K. M. Norton and E. B. Taylor, for defendant in error.

CARDWELL, J. By an ordinance of the city council of Alexandria it was provided that certain portions of King street should be graded, paved, and curbed, under the supervision of the city engineer, in a good and substantial manner, using for the pavement vitrified brick, and certain portions of the cost thereof to be paid by the city of Alexandria and the residue by the Washington, Alexandria & Mt. Vernon Railway Company and abutting property holders. To meet the cost of this improvement chargeable upon the city's treasury, the sum of \$24,000 was appropriated by the ordinance, to be paid out as the work progressed, and pursuant to the ordinance a contract was entered into on behalf of the city with Charles M. Cuvillier, contracting under the style and firm name of Cuvillier & Co., whereby the latter undertook to do the work of paving, etc., King street. This contract provided that "all payments under this contract shall be made upon the certificate of the city engineer, countersigned by the committee on streets of the city council, upon the presentation of which to the auditor he shall draw his warrant upon the treasurer for the sum so certified to be due, payable out of the funds of the city treasury available for paving and curbing King street, under the ordinance passed May 27, 1902, and approved by the mayor May 29, 1902." These certificates were to be issued by E. C. Dunn, city engineer, upon estimates made by him about the 1st of each month during the progress of the work, and to be made of the amount of work then done, and of the relative value thereof at the prices named in the contract. In order to carry out this contract, Cuvillier & Co. purchased from the Mack Manufacturing Company the needed vitrified brick, and the Mack Manufacturing Company furnished the brick from time to time as they were called for. On the 15th of October, 1902, Cuvillier & Co. gave to C. H. Yohe, agent for the Mack Manufacturing Company, the following order:

"To E. C. Dunn, Esq., City Engineer: Please pay to C. H. Yohe, Agt. for Mack Mfg. Co., amount due us on block laid in street from time to time as said payments may become due. [Signed] Cuvillier & Co."

Yohe immediately placed this order in the hands of Dunn, the city engineer, and showed the same to E. S. Leadbeater, chairman of the committee of streets of the city council of Alexandria, which order Dunn accepted, as he testifies, and filed the same in his office. On October 24, 1902, Yohe, as agent as aforesaid, called upon Dunn, and received from him an estimate due Cuvillier & Co., amounting to the sum of \$1,000, which Yohe took to Cuvillier & Co., and the latter in-

dorsed it payable to C. H. Yohe, agent for the Mack Manufacturing Company. Yohe then took the estimate to Leadbeater, chairman of the committee on streets, who indorsed the same "Approved," and it was then taken to E. T. Price, auditor of the city, who drew a warrant on the city treasurer for the amount of the estimate, payable to Cuvillier & Co.; Price saying to Yohe that he was in the habit of making the warrant payable in this way, so as not to confuse his accounts, but, if Cuvillier & Co. refused to indorse the same, he (Yohe) could bring it back to him, and he (Price) would make it payable to Yohe as agent for the Mack Manufacturing Company. Cuvillier & Co. indorsed the warrant and Yohe collected the money due thereon from the city treasury. On December 8, 1902, Yohe obtained from Dunn, the city engineer, a further estimate on the work done by Cuvillier & Co., amounting to \$2,700, which he took to Leadbeater, chairman of the committee on streets, who approved the same, and pursuing the same course in collecting this estimate as he had done in collecting the former, Yohe received the amount thereof from the treasury of the city. Cuvillier & Co. having become insolvent, on the 21st day of February, 1903, confessed a judgment in favor of William A. Smoot & Co. in the clerk's office of the circuit court of the city of Alexandria for the sum of \$4,808.82, with interest and costs, and subsequently confessed judgments in favor of other parties, including the Mack Manufacturing Company. Upon the judgment in favor of William A. Smoot & Co. a fieri facias was immediately issued, and a suggestion sued out against the city council of Alexandria and the Washington, Alexandria & Mt. Vernon Railway Company, summoning the council and the railway company to appear before the judge of the circuit court of the city on the first day of the next regular term of the court to answer the suggestion. The city council on the 16th of March, 1903, answered the summons, and subsequently filed a supplemental answer, admitting that the city was indebted to Cuvillier & Co. for paving, etc., King street, under the contract above mentioned, and called attention to the writing given by Cuvillier & Co. on the 15th day of October, 1902, and further admitted that there was due and to become due from the city to Cuvillier & Co. a sum considerably in excess of the amount claimed by the Mack Manufacturing Company upon its order of October 15, 1902, namely, \$1,374.37, and submitted to the court the question whether or not the city should pay this sum of \$1,374.37 to the Mack Manufacturing Company or to the satisfaction of the fieri facias on judgments confessed by Cuvillier & Co. in favor of William A. Smoot & Co. and others. The Washington, Alexandria & Mt. Vernon Railway Company also answered, admitting an indebtedness to Cuvillier & Co. on their contract for paving King street, but with this answer we have no con-

cern. Upon the filing of these answers an agreement was entered into by all parties to the several garnishee proceedings heard together, whereby all matters of law and fact, without the intervention of a jury, were submitted to the court for its determination as to who was entitled to be paid out of the funds due from the city council, and in what order of priority; and the court held, *inter alia*, that the lien of the *fi. fa.* sued out by William A. Smoot & Co. had priority over the claim of the Mack Manufacturing Company, by virtue of its assignment of October 15, 1902, prior in date to the *fi. fa.* in favor of W. A. Smoot & Co.

This judgment was suspended to the extent of \$1,500 for 60 days, to enable the Mack Manufacturing Company to apply for a writ of error thereto, and which writ was awarded by one of the judges of this court.

The controversy here, therefore, between the plaintiff in error, the Mack Manufacturing Company, and the defendant in error, William A. Smoot & Co., and the sole question that we deem it necessary to consider, is whether or not the order given by Cuvillier & Co. to plaintiff in error, above set out, constituted an assignment *pro tanto* of the funds due from the city of Alexandria to Cuvillier & Co. as the work done by the latter in paving King street progressed.

As has been remarked, Dunn, the city engineer, testified that he accepted the order, and it was acted upon in disbursing the funds applicable to the cost of paving King street until the garnishee proceedings by the creditors of Cuvillier & Co. were set on foot. Not only was the order acted upon as before stated, but notice of it was unquestionably brought home to every official of the city who had any connection with the execution of the work of paving King street, or the expenditure of the money expressly appropriated by the ordinance of the council to meet the cost of the improvement, and, while wholly unnecessary to the validity of the order as an assignment of the funds in question, notice of the order was brought home to defendant in error before they obtained the confession of judgment from Cuvillier & Co. The order was regarded, not only by plaintiff in error, but by Cuvillier & Co. and by Dunn, the city engineer, upon whose certificate, approved by the chairman of the committee on streets, alone, the funds could be withdrawn from the city's treasury, as a valid assignment of the funds *pro tanto* to plaintiff in error.

In *Hicks v. Roanoke Brick Co.*, 94 Va. 745, 27 S. E. 598, the opinion by Riely, J., says: "There can be no doubt as to the doctrine that when, for a valuable consideration from the payee, an order is drawn upon a third person, and made payable out of a particular fund, then due or to become due from him to the drawer, and is delivered to the payee, it operates as an equitable assignment *pro tanto* of the fund, and con-

stitutes a lien upon it in the hands of him who owes the debt, or has possession of the fund out of which the order is made payable." That case is relied on by defendant in error, because the order upon which the payee claimed an equitable assignment of the fund to become due from the city of Roanoke was held not to constitute an equitable lien in favor of payee on the fund; but that decision was based upon the fact that the paper relied on was but "a mere promise or agreement by the drawer of the order to pay, when and as it collected from the city of Roanoke the money the drawer would owe to the contractor, and the conditions upon which the drawer of the order agreed to pay had never been, and never could be, fulfilled."

And in *Clayton v. Fawcett*, 2 Leigh, 19, also relied on by defendant in error, the writing in question was held not to constitute an equitable assignment of the fund upon which it was drawn, for the reason that the payment of the amount named was to depend on the drawer being absent. See *Brooks v. Hatch*, 6 Leigh, 542.

In *Chesapeake Classified Bldg. Ass'n v. Coleman et al.*, 94 Va. 433, 26 S. E. 843, it was held "that, in order to constitute a valid assignment in equity, all that is necessary is an order from the person to whom the money is due or coming on the person in whose hands or under whose control it may be to pay to the payee; and where the drawee had notice of the order and thereafter paid the money to the drawer, the drawee was liable to the payee for the amount thereof." In that case the contractor gave an order on the building association in the following words: "Pay to Coleman & Sams, Trustees, for Balance and Jones five hundred and thirty-nine ⁸⁸/₁₀₀ dollars and charge same to balance due me on A. M. E. Church." Notice of this order was given to the secretary of the association, and the association was informed of the order by letter from the payees of the same date as the order, and the letter was received by the association, and read in a meeting of the board of directors. Afterwards the association, in disregard of the order, paid the money to the drawer thereof, and this payment was regarded not to be a valid payment, and the association was required to pay again the amount of the order to the payees named therein. See, also, *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Pom. Eq. Jur.* § 1283; *Merchants' & M. Nat. Bank v. Barnes*, 18 Mont. 335, 45 Pac. 218, 47 L. R. A. 737, 56 Am. St. Rep. 586; *Philadelphia v. Lockhart*, 73 Pa. 211; 2 Shinn on Attach. §§ 537, 540; *Dickerson v. City of Spokane (Wash.)* 66 Pac. 381; *Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; *Conway v. Cutting*, 51 N. H. 407; *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269.

In 2 Shinn on Attachments, *supra*, it is said: "Choses in action, other than negotia-

ble instruments, which, without fraud, have been equitably assigned, are no longer the property of the assignor, and therefore cannot be garnished at suit of assignor's creditors; and the fact that the assignee cannot, in many states, maintain an action at law, but must sue in the name of the assignor, does not affect the rule. The garnishing creditor can stand on no better footing than his debtor, and the assignor has lost control over it.

"When a debt, fund, or property has been assigned for a good and valuable consideration, and notice has been given to the debtor of that fact, the same is beyond the reach of the assignor's creditors by process of garnishment, no matter in what way the debtor was informed of the assignment. It is sufficient that he know that his creditor is divested of all his rights to the debt assigned."

In *Dickerson v. City of Spokane*, supra, an order addressed to the comptroller of the city directed payment to the payee of the order a sum of money out of any moneys belonging to the drawer that might thereafter become due him from the city "on the waterworks contract," which order was filed with the comptroller of the city, and it was held to constitute an equitable assignment of so much of the moneys owing to the contractor as would equal the amount of the order.

In *Bank v. Barnes*, supra, a contractor gave an order on a mining company to deliver to the payee named in the order a check to become due to the drawer, and the payee, the Merchants', etc., Bank, immediately presented the order to the mining company for acceptance, but it was not accepted at that time, as there was no money yet due the drawer. Afterwards the mining company, in disregard of the order, paid the money due to the drawer thereof to a garnishing creditor, and it was held that the order constituted a valid assignment of the fund, and that the payment made by the mining company did not discharge its liability to the payee of the order.

To the same effect is *Philadelphia v. Lockhart*, supra, where the order was addressed to the board of school controllers, and drawn by a contractor for the building of a schoolhouse in the city of Philadelphia. Notice of the order was given to the school controllers, and it was held a sufficient notice to the city of the rights of the payee in the order.

In the case at bar the city council of Alexandria, under its contract with Cuvillier & Co., required Dunn, its engineer, to take charge of the work of paving King street, and upon his certificate all payments were to be made on account of the work. This constituted Dunn the agent of the city, and, as was said in the opinion in *Philadelphia v. Lockhart*, supra, notice to an agent, bound, in the discharge of his duty, to act upon it and communicate it to his principal, is notice to the principal.

No question was raised by the city, or any one else, as to the right of plaintiff in error, by virtue of the order of October 15, 1902, to be paid for the brick it furnished for paving King street out of the money to become due from the city to Cuvillier & Co. as the work progressed, until the insolvency of the latter; and whether the office of city engineer was created by the charter of the city or by an ordinance of its council does not alter the case, and, if it were conceded that notice to the city was necessary in order to make the order in question a valid assignment in favor of the plaintiff in error, notice to Dunn, the engineer, was all-sufficient. The council of the city of Alexandria, as stakeholder, has in its hands a fund that one of two parties is entitled to, and it is immaterial what notice the city had of the order in question. Our statute (section 3801 of the Code of 1887) expressly excepts from the lien of a writ of *f. fa.* any estate of the debtor which has been assigned for a valuable consideration, unless the assignee had notice of the *f. fa.* at the time of the assignment, and it is not questioned here that the order held by plaintiff in error, prior in date to the *f. fa.* of defendant in error, was given for a valuable consideration.

It follows that we are of opinion that the judgment of the circuit court is erroneous, and should be reversed and annulled; and this court will enter such judgment as the circuit court should have entered, namely, that plaintiff in error recover of the city of Alexandria the sum of \$1,374.37, with interest from the 21st day of February, 1903, till paid, and also to recover of the defendant in error the costs incurred by plaintiff in error in this court and in the circuit court.

(162 Va. 710)

SOUTHERN RY. CO. v. OLIVER.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—INSTRUCTIONS—EVIDENCE — HARMLESS ERROR—SPECIAL JURY — VERDICT—EXCESSIVENESS.

1. Under Code 1887, § 3158, authorizing a special jury, the discretion of the trial court in refusing one cannot be interfered with on appeal, where there was no showing, in support of the request, that the facts alleged therein were true, and it is not made to appear on appeal that any prejudice resulted from the refusal.

2. In an action against a railroad company for injuries to a brakeman caused by the collision of an incoming train with the train under which plaintiff was working in a switchyard, the evidence showed that a fellow servant of plaintiff had been sent out by order of the yard conductor to flag an incoming train, and had done so, returning on the train. The rules of the railroad company required brakemen sent out under such circumstances to stay out until recalled by the yard whistle, and provided that the brakemen must be instructed in the rules, furnished with time-tables, and carry watches, but there was evidence that the brakeman who went out to flag the incoming train had not been instructed in the rules and

carried no watch, and that the rule as to remaining out until recalled did not apply to yard brakemen. When this brakeman returned he was seen by the yard conductor and put to work by him on the same train under which plaintiff was working at the time he was injured. *Held*, that there was sufficient basis in the evidence for an instruction that, if the yard conductor could have known by reasonable diligence that the brakeman had returned without flagging the train which injured plaintiff in time to have had that train flagged, they should find for plaintiff.

3. In reviewing the evidence to determine whether it affords sufficient basis for an instruction, it is not to be considered as upon a demurrer to the evidence, but the question is whether there is evidence upon which to rest the instruction, or to which it is referable.

4. When it clearly appears from a consideration of the instructions as a whole that the jury could not have been misled by them, the judgment should not be reversed, though as abstract propositions they may not accurately state the law.

5. Where it can be seen from the whole record that, even under instructions in all respects correct, a different verdict could not have been rightly found, the court will not reverse the judgment for error in instructions.

6. In an action against a railroad company for personal injuries, a juror is not disqualified by reason of the fact that he has a claim against the company for personal injuries, which he intends to prosecute.

7. A negro brakeman 24 years of age, strong, healthy, and industrious, in the line of promotion, having a wife and two children to support, and earning from \$1 to \$1.50 a day, was injured so as to necessitate the amputation of a foot. *Held*, that a verdict for \$5,000 was not excessive.

Error to Corporation Court of Danville.

Action by James Oliver against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Berkeley & Harrison, for plaintiff in error.
Cabell and Ouster, for defendant in error.

CARDWELL, J. James Oliver, plaintiff in the court below, received injuries while in the service of the Southern Railway Company on its yards in the city of Danville, Va., and brought this action in the corporation court of the said city to recover damages therefor, and upon the trial judgment was rendered on the verdict of the jury against the defendant company for \$5,000.

The circumstances under which the plaintiff was injured are as follows: There are three tracks of the defendant company in front of its passenger depot in the city of Danville, and at about 4 o'clock on the morning of March 10, 1903, passenger train No. 11, from Richmond, was standing on the outer track, heading south. Passenger train No. 34 had just come in from the south, and was standing on the middle track, heading north, while No. 39 was standing on the main track next to the depot, heading south. Just before train No. 39 from the north arrived in front of the depot, and while passenger train No. 40, from the south, was standing on the main track next to the depot, John Balze, yard flagman, was sent out by

John Willard, yard conductor, to flag train No. 34, then overdue and coming from the south, with instructions, as Balze, who was examined as a witness for defendant, swears, to flag No. 34 and come in on it. It was while Balze was out on his instructions from Willard that No. 40 proceeded north, passing No. 39 at North Danville, and the latter train came in and occupied the main track next to the depot. Balze did flag No. 34 and came in on it to the yard, and was at once, as he testifies, set to work by Willard to aid in taking cars from No. 11 and coupling them to train No. 39. When Balze returned from flagging train No. 34, Oliver was coupling cars to and under No. 39, under the immediate orders of Willard, the yard conductor. No. 32 was expected from the south, but trains about that time were running irregularly, and No. 40 had come in to the depot on No. 32's time, and no one seemed to know exactly when No. 32 would be in, as will be seen from the evidence. While Oliver was under one of the cars of No. 39, train No. 32 rushed swiftly into the depot yard and collided with train No. 39, under which Oliver was engaged, knocked the engine and train of No. 39 back some distance, throwing Oliver down, several car wheels passing over him, and so mashing and mangling his foot and ankle that they had to be amputated below the knee.

Oliver, Balze, and John Waddill were all brakemen, members of the yard crew, and Willard was the yard conductor in charge of these brakemen, and this crew worked under Yardmaster Pierce in the day, and his assistant, P. H. Gilliland, at night, the latter being in charge the night of the accident. It was the duty of this crew to make up the trains, taking cars from one train and putting same on to another, coupling hose, etc., and also to flag incoming trains, so as to protect trains standing at the station, when instructed so to do by Willard, the yard conductor, or either of the yardmasters. Oliver and Balze were of course in the same grade, and worked under the same conductor, with exactly the same duties; and the trial of this case proceeded upon the theory throughout that, if the injuries to Oliver were caused by the negligence of Balze, Oliver could not recover, as they were to be regarded as fellow servants; but if the proximate cause of the injuries was the negligence of Yard Conductor Willard, or any other officer or agent of a higher grade of employment with the defendant company than that of Oliver, the fellow servant doctrine did not apply. Constitution of Virginia, § 162; Acts 1901-02, p. 335, c. 322.

There is no controversy as to its being Willard's duty to control and direct the general and immediate work of Oliver, and also that of Balze, working in the same crew with Oliver.

We are asked to reverse the judgment of the lower court upon the following grounds,

viz.: (1) The refusal of the court to order, on the motion of the defendant company, a special jury; (2) the giving of plaintiff's instruction No. 2; (3) the refusal of the court to set aside the verdict because counsel for the defendant company made affidavit that they had heard that Crews, one of the jurors, had been in a collision on the defendant company's road, and intended to make claim or sue the company; (4) that the verdict was contrary to the law and the evidence; and (5) that the damages awarded by the jury are excessive.

The reason urged why a special jury should be allowed was that "a collision had taken place before daybreak between two passenger trains, two men had been killed and several wounded, and much feeling aroused adverse to the defendant, in addition to the unfortunate prejudice, especially in Danville, against this company."

There is nothing whatever in the record to sustain this contention, or to show that the corporation court did not exercise a sound discretion in refusing a special jury. It could not assume, in the absence of any proof to that effect, that the conditions existed that counsel suggested.

In *Atlantic & Danville R. Co. v. Peake*, 87 Va. 133, 12 S. E. 348, a motion was made for a special jury, on the ground that the case was one "involving questions in which a whole magisterial district was interested, and that it would be almost an impossibility to draw from the 'jury box' a jury that would not contain some name or names from that district, and that there was much prejudice in that district against the defendant company." But there being produced no evidence or affidavits to prove the grounds of the motion, it was overruled, and this court approved the action of the circuit court. The opinion by Lewis, P., in disposing of the question, virtually presented whether the allowance of a special jury is or is not a matter of right, and, after quoting the statute (section 3158 of the Code of 1887), and remarking that the statute left the question as to whether or not a special jury should be allowed, as at common law, to the discretion of the court—"a discretion, it is true, not arbitrary, but a sound judicial discretion, to be governed by settled principles, and reviewable, when exercised, by the appellate court"—says: "Each case, therefore, must stand on its own circumstances, and, where it appears from a survey of the record that injustice has not been done, the judgment of the trial court will not be reversed, although the appellate court may be of opinion that, upon the showing made, a special jury ought to have been allowed. In such a case the error is not to the prejudice of the party complaining." And in *Goodell's Ex'rs v. Gibbons*, 91 Va. 608, 22 S. E. 604, it is held that a motion for a special jury is addressed to the sound discretion of the court, and its judgment will not be reversed unless it plain-

ly appears that the discretion has been improperly exercised.

At the trial the three instructions asked by the defendant company were given, and no objection is urged as to Nos. 1 and 3 given at the instance of the plaintiff. The objection made to plaintiff's instruction No. 2 is that it nullified the instructions Nos. 1 and 2 given for the defendant company, and misled the jury. It is as follows:

"The court instructs the jury that if they believe from the evidence that the yard conductor, Willard, was an employé of the defendant company having the right or charged with the duty to control or direct the general services or the immediate work of the plaintiff, ordered John Balze, a co-employé of the plaintiff, to flag train No. 34 only, and did not order him to flag train No. 32, and that the injury to the plaintiff was caused by the failure to flag No. 32, or if they believe from the evidence that the said Willard ordered the said Balze to flag both trains No. 34 and 32, and that the said Willard knew, or could have known by reasonable diligence, that the said Balze had returned without flagging train No. 32 in time to have the said latter train flagged before the collision, they should find for the plaintiff."

The defendant company's instructions Nos. 1 and 2 told the jury that if Balze's neglect caused the accident the plaintiff could not recover, and it is argued that plaintiff's instruction No. 2 holds that Willard was bound to specify and name the trains to be flagged; that when he sent Balze out to flag, to protect the station filled with trains, and told him to look out for No. 34, but did not name No. 32, although Balze knew No. 32 was coming, and although the rules required he should stay out until called in, yet because Willard did not designate the train, and Balze forgot it, that makes Willard, and not Balze, the faulty party whereby defendant's instructions were nullified.

Had plaintiff's instruction No. 2 omitted the words "or could have known by reasonable diligence," so that it would have simply read that if Willard ordered Balze to flag train No. 34 only, and did not order him to flag train No. 32, and that the injury to the plaintiff was caused by the failure to flag No. 32, and that Willard knew that Balze had returned, without flagging train No. 32, in time to have had the latter train flagged before the collision, the jury should find for the plaintiff, there could be no doubt, we think, as to the correctness of the instruction. The words "or could have known by reasonable diligence" should not have been inserted in the instruction without evidence in the record tending to prove a state of facts or circumstances, brought home to Willard, sufficient to put him on inquiry as to whether or not train No. 32 had been flagged, and which inquiry, prosecuted with reasonable diligence, would have enabled him to have ascertained the fact that it had not

been flagged, and in time for him to have had it flagged, and thereby prevented the collision. In reviewing the evidence in connection with an instruction given or refused, the rule requiring that it shall be considered as upon a demurrer to evidence does not apply. The question is whether there is evidence upon which to rest the instruction, or to which it is referable. In this case, although the jury might have believed that Balze was told to flag No. 32, or that it was his duty to have done so under the rules of the company, yet with those words, "or could have known by reasonable diligence" that he had not done so—that is to say, that Willard could have known by reasonable diligence that fact—still they might have been misled by this expression in the instruction, even though there was no evidence to justify its insertion therein. But let us examine the evidence on this point.

Balze, the defendant company's witness, as will be remembered, says he, Waddill, and the plaintiff made up the yard crew, and worked directly under the orders of Willard, yard conductor, and that Willard was under Pierce, the yardmaster, in the day, and his assistant, Gilliland, at night; that it was the duty of the yard conductor and his crew to make up trains, taking cars from one train and putting them on another, and also to flag incoming trains, so as to protect those on the yard, if and when ordered by the yard conductor, and to do only as ordered, and that the yard conductor controls by oral and not written orders. Tunstall, the yard engineer on duty the night of the accident, and who was a witness for the plaintiff, corroborates Balze. Balze further testifies that the defendant company's rules 99 and 100, as to flagging trains, did not apply to the crew of the yard, and that they were governed by oral orders of the yardmaster, his assistant, or the yard conductor. He was asked the question whether the yard brakeman flagged by said rules, and his reply is, "We don't flag that way on the yard." He further states that he was told by Willard to go out and flag No. 34, and come in on it; that he carried out the instructions given him by Willard absolutely that night, as he had done before, and as was ordinarily done on the yard; and that both Gilliland and Willard knew that he had gone out to flag No. 34, and had returned upon that train, and that they united in putting him to work on the train No. 39, which plaintiff was coupling up after his (Balze's) return on No. 34. This latter statement is nowhere denied in the record, but is corroborated, we think, as will presently be seen, by Willard. Further, this witness says that there was plenty of time after he came in on No. 34, and after he was seen by Willard and put to work, to have had No. 32 flagged, thus preventing the collision with No. 39; and that he had neither watch nor time-table, and that the officers under whom he worked knew it. True, he says he knew No. 32 was a scheduled train, but he did not

know whether it was on time or not, and as a matter of fact it was behind time. It was sought to make the witness say that he forgot No. 32, but he emphatically denies that he did forget it, and insisted that he was not instructed to flag No. 32, and that he did as he was instructed. A rule of the company required that Balze, and other employes of the defendant company working in the grade that he was, should be instructed in the rules of the company, and be furnished with a time-table, and be required to have a watch; but it clearly appears that he had not been instructed in the rules, nor furnished with a time-table, nor had a watch, and that the officers of the defendant company under whom he worked knew these facts. Gilliland, called as a witness for the defendant company, testifies that Balze was not to his knowledge instructed in the rules of the company, and that he did not know whether any one performed this duty or not; he could not say whether he had been furnished with a time-table or had a watch, as the rules of the company required, or not, and while he says that the yard flagmen have their duties made out just as well as the yardmaster, he admitted that they go wholly by the instructions as to what they are to do by the yardmaster and the conductor. He further says that Willard was in charge of the shifting of cars from other trains to train No. 39 on the night of the accident, and that Balze told him that he forgot No. 32 after the accident occurred; but he in no way impairs the statement, made by Balze, that he and Willard both knew that Balze had come in on No. 34, and by both told to help in the work at which the plaintiff, Oliver, was engaged.

Willard, also examined as a witness for the defendant company, admits that he was excited at the time that he sent Balze out to flag, as was usual with him and others on the yard when a number of trains were standing in the yard and others expected, and he nowhere says that he instructed Balze to flag No. 32, nor does he deny that he saw Balze after he returned on No. 34 and before the collision. On the contrary, he says that he was superintending, or that he was looking after, the shifting being done by Oliver, and it clearly appears that Balze was assisting in doing this work, and that Balze cut the car loose that was being coupled up by the plaintiff. According to the statement of both Gilliland and Willard, the latter was directing the shifting of the cars from other trains to train No. 39, and, if this is true, the statement of Balze that these witnesses saw him and directed him to go at this work must also be true, as Balze was so engaged before the collision, and cut loose the car that plaintiff was coupling on to No. 39 at the time of the collision. Willard knew, as he admits, that "No. 32 was behind, but was expected to arrive in a short time, not over four or five minutes late." So that he must have known that Balze had not flagged No. 32, but had only

flagged No. 84 and come in on it. He falls back on the rules of the company, and says Balze should have stayed out until called in by the yard whistle—that is, the whistle of the engine on the yard—but he knew that he had not been so called in, and, while he says that Balze told him the first time he met him that he forgot No. 82 (meaning the first time he met him after the accident), it was sought to have him say, in effect, that Balze had admitted to him that he was instructed to flag No. 82 and forgot it, but he fails to so testify. This question was propounded to him: "Told you he forgot No. 82 and came in on No. 84? A. I don't know about this." And then on cross-examination the following questions were propounded to him, and the following answers given:

"Q. Did you not direct Balze to go out and flag No. 84 and say nothing about No. 82?"

"A. No, sir; I told him to go out and flag for me—watch No. 84; she was close on No. 40.

"Q. What No. 40 do you mean by that?"

"A. No. 84 was right on the block of No. 40.

"Q. Should he have stayed out there until blown in?"

"A. Under my instructions he should have done so.

"Q. You told him to go out and flag No. 84 without waiting to be called in?"

"A. Yes, sir."

It thus appears from Balze's statement that the yard flagmen were controlled by instructions from the yardmaster or conductor, and not by the printed rules of the company, and also that in giving his instructions to Balze, which were given while No. 40 was standing on the main track, Willard had in mind the protection of No. 40 by having No. 84 flagged. Under these and other circumstances pointed out above, the jury was well warranted in finding that Willard ought to have known by the exercise of reasonable diligence that No. 82 had not been flagged, and this although they might have believed that Balze was instructed to flag both No. 84 and No. 82, and forgot the latter.

We are therefore of opinion that plaintiff's instruction No. 2 could not have misled the jury to the prejudice of the defendant company.

But for another reason we are of opinion that the judgment of the lower court should not be reversed because of instruction No. 2 given for the plaintiff. When all the instructions are read and construed together in the light of the evidence, it clearly appears, we think, that the jury could not have been misled nor deceived by any of them. When this is the case a judgment should not be reversed, though, as abstract propositions, they may not accurately state the law. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Russell Creek Coal Co. v. Wells*, 96 Va. 418, 31 S. E. 614.

But if it could be said, in the light of the

evidence, that instruction No. 2, in the respect discussed, was erroneous, it is well settled that where it can be seen from the whole record that, even under instruction in all respects correct, a different verdict could not have been rightly found—which is the case here, as we view it—this court will not reverse it. *Richmond Ry., &c., Co. v. Garthright*, 92 Va. 627, 24 S. E. 287, 32 L. R. A. 220, 53 Am. St. Rep. 839.

The next question to be considered is, should the judgment be reversed because the lower court refused to set aside the verdict of the jury on account of the affidavits of counsel that they had heard that one of the jurors had been in a collision on the defendant company's road and intended to make claim or sue the company?

We think not. The affiants do not state as a fact that this juror was making a claim to damage or intended to sue the defendant company, but merely state that they heard, after the trial, that such was the case.

"A new trial will not be granted on account of the disqualification of a juror for matter that is a principal cause of challenge, which existed before he was elected and sworn as such juror, but which was unknown to the party until after the trial, and which could not have been discovered by the exercise of ordinary diligence, unless it appears, from the whole case before the court on motion for a new trial, that the party suffered injustice from the fact that such juror served in the trial of the case." *Reynolds v. Richmond & M. Ry. Co.*, 92 Va. 407, 23 S. E. 772, and authorities cited.

But was Crews disqualified as a juror, even if what the affiants heard was a fact? We do not think so. He may have had an honest claim against the defendant company and yet regarded his oath as a juror, and there is nothing whatever in this record to indicate that he did not.

In *Richardson v. Planters' Bank*, 94 Va. 130, 26 S. E. 413, Riely, J., in discussing the question whether the fact that one of the jurors was a debtor to the defendant disqualified him as a juror, says: "If the juror does not stand indifferent to the cause, he is not competent. If he has any interest in the cause, or is related to either party, or has expressed or formed any opinion, or is sensible of any bias or prejudice, he is excluded by the law. The last disqualification has been applied in numerous business relations. The partner, or the clerk or other employé, of either of the parties, has been held to be incompetent. But we have been cited to no case that has gone so far as to hold that a debtor of the defendant was incompetent. To hold, as a legal presumption, that such relationship would be likely to warp the judgment, would be, in our opinion, to estimate too cheaply integrity under the sanction of the law."

We can see no reason why what was said in that case as to the incompetency of a debtor to the party defendant does not apply

with equal force where the juror, as in this case, might have had a claim against the defendant company.

In considering whether the verdict in this case was contrary to the law and the evidence, we do not deem it necessary to review further the evidence, as we have very fully outlined it in considering the instructions to the jury, and we are of opinion that it very clearly appears thereby that this court could not say, either that the verdict was without evidence, or that the evidence was not sufficient to support it. Nor would we be justified in holding that the damages awarded by the jury are excessive. The suggestion that "the loss of a foot to a negro laborer would not, to a fair-minded jury, suggest a verdict of \$5,000," could not of itself have any weight in determining this question. As has been seen, the plaintiff sustained the loss of his foot, amputated between the ankle and the knee, and the evidence shows that he was 24 years old when hurt, was in the line of promotion, industrious, strong, and healthy; that he had a wife and two children to support, and contributed largely to the support of a mother and an invalid father; that he was always employed at from \$1 to \$1.50 per day, and was maimed and disabled while in the discharge of his duties under the immediate supervision of his superior as an employé of the defendant company, and without fault upon his part.

It was said by this court, in *Richmond Ry., etc., Co. v. Garthright*, that no method has yet been devised nor scales adjusted by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be, and that the verdict of the jury will not be disturbed unless the damages awarded be so great as to necessarily have been the result of prejudice or partiality. It must be clearly shown in the record that the jury was actuated by prejudice or partiality, otherwise, under the well-settled rules of the law, the verdict will not be disturbed. We do not think the record in this case would justify the reversal of the judgment on the ground that the damages awarded the plaintiff are excessive.

It follows, therefore, that the judgment of the corporation court of the city of Danville must be affirmed.

(102 Va. 778)

COMMONWEALTH v. WILLIAMS' EX'R.
(Supreme Court of Appeals of Virginia. June 18, 1904.)

TAXATION — PERSONAL PROPERTY — DEATH OF OWNER — SITUS FOR TAXATION.

1. Under Code 1887, § 491, providing for the assessment of all personalty not exempt from

taxation, and section 492, as amended by Acts 1897-98, p. 519, c. 490, providing that the property of a decedent shall be listed by the personal representative, and if it consists of bonds or stocks in any other county or city other than that of his residence, or in another state, it shall be taxed to the owner thereof, debts and shares of stock, for purposes of taxation, are located at the domicile of the creditor, though the evidence of the same be without the jurisdiction of the court.

2. On the death of a decedent, the legal title to debts due him passes to his executor, and should be taxed at the domicile of the executor.

3. Where testator devised certain property to a charitable institution, it is not exempt from taxation until the estate is administered, but is to be assessed in the name of the executor.

Error to Circuit Court, Amherst County.

Application of Indiana F. Williams' executor to be relieved from assessment of taxes against the estate. From the judgment granting the same, the commonwealth brings error. Reversed.

Wm. A. Anderson, Atty. Gen., and Otto L. Evans, for the Commonwealth. Daniel & Harper, A. E. Strode, and J. D. Horsley, for defendant in error.

KEITH, P. Mrs. Williams, a citizen and resident of Amherst county, died in that county on the 29th of October, 1900, and Stephen R. Harding qualified as executor of her will in the county court of Amherst on the 23d of November of that year. Mrs. Williams at the time of her death owned a large personal property, consisting in the main of stocks and bonds, a part of which were in the vaults of a safe-deposit company in the city of New York. Up to the time of her death all of her property had been assessed for taxation in the state of Virginia, and that it was properly so assessed is not controverted.

On January 19, 1901, Harding was granted ancillary administration upon the will of Mrs. Williams in the state of New York, and, before he was permitted to remove the certificates of stock and evidences of debt deposited in the city of New York, he was required to pay a succession tax, amounting to about \$19,000. This payment was made about March 20, 1901, and after that time the certificates of stock, bonds, and other evidences of indebtedness were delivered to him, and by him brought into the state of Virginia.

The executor named in the will having thus qualified in the courts of this state, and been granted ancillary administration in the courts of the state of New York, in the latter part of January, 1901, filed his bill in the circuit court of Amherst county, making all those interested in the estate parties defendant, asking a construction of the will, and submitting all questions arising under it to the determination of the court.

In May, 1902, the executor gave notice that

¶ 1. See *Taxation*, vol. 45, Cent. Dig. § 124.

he would, on the first day of the May term of the county court of Amherst county, "apply to the said court for relief against the assessment of taxes, county levies, and other local taxes assessed against me on personal property in my hands belonging to the estate of Indiana F. Williams, deceased, for the year beginning February 1, 1901, and so entered in the personal property book of the courthouse district of Amherst county, the grounds for my application being, among others, that the property so listed as being in my hands was held by me in trust:

"(1) A part, to wit, \$43,250 thereof, consisted of gas stock in a New York corporation, the same being a specific legacy given Chas. N. McCall, of New York City, under the will of Mrs. I. F. Williams.

"(2) The balance of said estate in my hands so listed went under the residuary clause of said will to Sweet Briar Institute, a charitable educational corporation whose property is exempt from taxation under the laws of the state of Virginia.

"Respectfully,

"[Signed] S. R. Harding,
"Ex'or of Indiana F. Williams, Dec'd."

The executor by this notice asked for relief from all taxation by the state, the county of Amherst, or any subdivision thereof, and in the county court all matters raised by the notice were disposed of in one order. The facts proved before the county court were substantially as we have stated, and that court was of opinion: First, "that the bulk of the property consisted of securities in foreign corporations, the evidences of which were at the time of the assessment deposited in the city of New York, and outside of the jurisdiction of the state, not under the control of the executor, and therefore exempt from taxation here." Secondly, "that at the date of assessment the executor had also qualified as administrator in New York, and there was pending in the circuit court of Amherst county a suit in chancery, instituted by him, having for its object the administration of the whole estate in his hands, or to come in his hands, under the guidance of the court, and the record shows that the whole estate at the time of assessment was under the control of the court; that, while in the beginning the foreign investments were beyond the state jurisdiction, the personal representative by his own act had brought them within the jurisdiction, and therefore they were proper subjects for assessment by the examiner of records under the act of 1895-6." And, thirdly, that "the whole personal estate being under the control of the court and unadministered as of February 1, 1901, constituted a fund in the suit liable to assessment for taxation, regardless of who became the recipients of the fund under future decrees of the court."

From this judgment of the county court an appeal was taken to the circuit court of Amherst county, and that court being of opin-

ion that "the New York property not in possession of the applicant in Virginia on the 1st day of February, 1901, was not liable to taxation in Virginia for that year, and that the shares of stock in the Lynchburg Cotton Mill & Improvement Company, and in the National Exchange Bank of Lynchburg, Virginia, had been improperly assessed for taxation against the applicant," reversed the judgment of the county court, and relieved the executor from county and district taxes, amounting to \$3,264.21, and from taxes upon the same property due to the state, amounting to \$2,007.90. To these judgments a writ of error was awarded by one of the judges of this court.

Mrs. Williams being at the time of her death a citizen of the state of Virginia, resident in the county of Amherst, was she taxable in this state and county upon intangible personal property, consisting of bonds and stocks, the evidences of ownership of which were in the vaults of a safe-deposit company in the city of New York, and held by it merely as a custodian?

Section 491 of the Code of Virginia of 1887 provides that: "The commissioner shall ascertain and assess all the personal property not exempt from taxation, and all subjects of taxation in his county, district, or city, on the said first day of February in each year.

* * * It shall be his duty to call on every person in his county, etc., to furnish a list of such property, money, credits, or other subject of taxation as required by law, and the value thereof." And under section 492, as amended by Acts 1897-98, p. 519, c. 490, it is provided, among other things, that: "If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possession, and taxed to the estate of such deceased person. * * * If the property consists of money, bonds, stock, or other evidences of public or private debts, in any county or city other than that of his residence, or state other than Virginia, it shall be listed by and taxed to the owner thereof." By Acts 1897-98, p. 756, c. 707, it is provided that it shall be the duty of the examiner of records, annually, "to examine all causes pending in the courts of his circuit and the records thereof, and ascertain and report all money, bonds, notes, stocks, shares of stocks, capital, capital stock, choses in action, other evidences of debt, and all and every other species of personal property and income subject to taxation, under the control of the courts in his circuit, or held by any person, bank or corporation subject to the order of such courts, or in the hands of or under the control of receivers, commissioners and fiduciaries appointed by any deed or will."

It was the evident purpose of the Legislature to subject to taxation the subjects enumerated, such as moneys, bonds, stocks, or other evidences of public or private debt, wherever the actual situs of the evidences of

such money, bonds, stocks, or other public or private debts might chance to be, if they were owned by a citizen and resident of Virginia, or in the hands of or under the control of receivers, commissioners, or fiduciaries appointed by any deed or will of record in Virginia and under the jurisdiction of its courts.

It is not questioned that during her lifetime Mrs. Williams was properly assessed for taxation upon these evidences of debt, which for convenience we shall hereafter designate as "the New York personalty." Let us consider for a moment upon what that right to tax in Virginia intangible personal property, the evidences of ownership of which were in the custody of a New York safe-deposit company, rests:

The bonds and certificates of stock were in New York City for safe-keeping. Of these bonds and stocks there were 50 shares of stock of the Consolidated Gas Company of New York, 6 \$1,000 bonds of the Long Island Railway Company, and 6 \$1,000 bonds of the Union Railway Company of New York City. The remainder of what we designate as "New York personalty," amounting to \$497,000 in value, were bonds and certificates of stock in companies incorporated by and having their legal domicile in states other than that of New York.

In 2 Thompson on Corporations, § 2348, the legal effect and character of a stock certificate is very clearly stated. He says: "First, it is to be observed that such a certificate is merely the paper representative of an incorporeal right, and that it stands on a similar footing to that of other muniments of title. It is not in itself property, but it is merely the symbol or paper evidence of property." The author is here speaking of a certificate of stock, but the quotation applies with equal force to bonds or promissory notes of individuals or of incorporated companies. They are all the mere symbols or paper evidences of property, while it is the intangible incorporeal right existing in the creditor to demand of his debtor performance of the obligation which constitutes property.

Upon this subject Cooley on Taxation (2d Ed.) at page 21, says: "The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state. It is a right that is personal to the creditor where he resides, and the residence or place of business of his debtor is immaterial."

Minor on Conflict of Laws, § 123, after stating that tangible personal property is taxable at the place of its actual situs, proceeds to discuss intangible personalty, with respect to which he says more difficulty is experienced in ascertaining the situs where it may be taxed. "The general practice is to treat debts as located, for purposes of taxation, at the creditor's domicile, and there is no doubt that they may have their situs there for that purpose." He gives, as an illustration, that

shares of stock in a corporation are usually taxable at the domicile of the owner and not of the corporation, and this, it is stated in the note, is true even though a tax has already been paid on the stock in the domicile of the corporation; citing in support of these several propositions numerous authorities.

The adjudged cases are to the same effect. We will cite a few of the more pertinent.

In *Hunter v. Board of Supervisors, etc.*, 33 Iowa, 378, 11 Am. Rep. 132, where a resident of Iowa had deposited for safe-keeping in Illinois promissory notes that had never been brought by him into Iowa, it was held that they were subject to taxation in the latter state. The notes in such case, says the court, are merely the evidence of the debts or rights represented, and these follow the person of the owner; that it seems a different rule might apply if the notes represented money loaned or invested through an agent in another state. And just here it may be well to repeat that in this case the New York personalty was in New York merely for safe-keeping. It was not there in the hands of an agent charged with any duty or clothed with any power or authority with respect to it, except as custodian. Those cases, therefore, such as *Oatlin v. Hull*, 21 Vt. 152, where notes were left by a resident of the state of New York in the state of Vermont, in the hands of an agent, for management, collection, and investment, in which it was held that the property was within the state of Vermont for the purposes of taxation, have no application here. As was said in *Hunter v. Board of Supervisors, supra*: "We may concede that money and credits under the control or management of an agent in another state, belonging to a resident of this state, with a view to be invested, loaned, or used for pecuniary profit by such agent, would not be the subject of taxation in this state."

In the case reported in 15 Wall. 300, 21 L. Ed. 179, as the "State Tax on Foreign-Held Bonds," Mr. Justice Field, delivering the unanimous judgment of the Supreme Court of the United States, says:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce,

in manufacture, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

Many cases are reviewed in this opinion, and the conclusions of the court are thus summed up in the syllabus: "Bonds issued by a railroad company are property in the hands of the holders, and, when held by non-residents of the state in which the company was incorporated, they are property beyond the jurisdiction of that state. A law of Pennsylvania, passed on the 1st of May, 1868, which requires the treasurer of the company incorporated and doing business in that state to retain 5 per cent. of the interest due on bonds of the company, made and payable out of the state to nonresidents of the state, citizens of other states, and held by them, is not, therefore, a legitimate exercise of the taxing power of the state. It is a law which interferes between the company and the bondholder, and, under the pretense of levying a tax, impairs the obligation of the contract between parties." See *Commonwealth v. O. & O. R. R. Co.*, 27 Grat. 344.

These authorities are sufficient to establish the right of the state to assess for taxation, against Mrs. Williams, during her lifetime, the New York personalty, although the evidences of her right to that property were not in her actual possession in Amherst county, because the incorporeal right was in her, and she was in the county of Amherst, though the symbols or paper evidences of the property were in the state of New York.

But it is said that her death changed all this. The property, real and personal, which had belonged to her during her lifetime, continued to be the subject of taxation after her death. It passed under her will, and therefore it comes within the terms of the statute. To the moment of the death of Mrs. Wil-

liams it was, as we have seen, properly taxable in Amherst county. By her will title to all her personalty passed to her executor. He was not in possession on the 1st of February, 1901, of the paper evidences of this New York personalty, nor was his testatrix in such possession at the moment of her death. That fact did not exempt it from taxation in this state during her lifetime; why should it operate to shield it from taxation after her death, when by her will the title to this property passed to the executor? It may be conceded that an executor has no extraterritorial power; that an executor appointed by, and who qualifies under, a will proved in Virginia, has no right to sue in the courts of New York, but that the will must be admitted to probate and letters of administration be granted by the courts of that state. But that does not militate against the proposition that the title to all personal property of decedent passed to her executor, and payment to him and an acquittance given by him would have been a complete discharge and satisfaction of any obligation due to the estate which he represented. The state of New York might rightfully hold any personal property, tangible or intangible, within its borders, or any evidences of debt, subject to the satisfaction of any claims for taxes upon its part, or the demands of its citizens, but, those claims and demands being satisfied, the estate of the decedent is to be delivered to the executor appointed by the state of the decedent's domicile at the time of her death, there to be administered. In this case there were no debts due in the state of New York, and it is earnestly contended by counsel for appellant that the transfer or succession tax which was assessed upon the New York personalty was not lawful, and that its collection could have been successfully resisted by the executor. But with that we have no concern. The sole question before us is, was the property rightfully assessed with taxes by the state of Virginia and the county of Amherst?

Speaking of the place at which personal property belonging to decedent estates is taxable, Cooley on Taxation (2d Ed.) at page 376, says: "To determine where the personal property belonging to the estates of decedent estates shall be taxed, it is necessary to consult statutes. It is sometimes taxable to the estate as such at the place of situs if the deceased was a nonresident, or at his last place of domicile if a resident; but sometimes also to the personal representative in his character as such, and at his place of domicile. And it will continue to be taxable to the estate or to the representative until actually distributed, but not afterwards."

Desty on Taxation, vol. 1, at page 333, says: "The personal estate of a testator accompanies him wherever he may reside and become domiciled, so that he acquires the right of disposing of and dealing with it according to the law of his domicile. Personal

property of deceased is not taxable after the appointment of the executor, and before distribution, when the property is not within the commonwealth, and neither the executor nor any person having an interest is a resident of the state." And further on the same author says: "The possession and control over property of an estate by an executor are those of the owner, for purposes of assessment and taxation. The legal title to personal property, consisting of money, stocks, and bonds of testator, is in the executor for purposes of administration."

It will be observed that this author states the law to be that the property of deceased is not taxable after the appointment of the executor, and before distribution, when it is not within the commonwealth, and neither the executor nor any person having interest in it is a resident of the state. The authority cited for this proposition is *Dallinger v. Rapallo* (O. C.) 14 Fed. 83, in which the opinion was delivered on the circuit by Mr. Justice Day of the Supreme Court, and the syllabus of the case is sufficient to explain what was there decided. "Personal property of a deceased inhabitant of Massachusetts is not taxable under Gen. St. 1860, c. 12, § 20, after the appointment of an executor and before distribution, when the property is not within the commonwealth, and neither the executor nor any person having an interest in or right to receive the property has a domicile or residence there." This is a proposition which does not admit of question, and the converse of which is authority in support of the right to tax in this case.

In *Mayor and Aldermen of Gallatin v. Alexander, Executor of S. Wallace*, 10 Lea, 475, it appears that Wallace died in Sumner county, Tenn., leaving a will by which he gave his personal estate to his nephews and nieces, some of whom were nonresidents of the state, and none of whom resided in the town of Gallatin; that Alexander, a resident of the town of Gallatin, was appointed executor of Wallace; that on his qualification he took charge of the personal estate, which consisted, among other things, of notes of individuals and of various foreign corporations, and bonds of several counties of the state of Kentucky. The court held that the legal title to this property was in the executor, and that its situs for the purpose of taxation was at the residence or domicile of the executor. *Bonaparte v. Baltimore*, 104 U. S. 592, 28 L. Ed. 845.

In *Burroughs on Taxation*, at page 224, it is said: "The personal property of decedents is taxed at the domicile of the decedent to the person having legal title, and not in the name of the deceased person. During the settlement of the estate it must have a situs somewhere, and none so appropriate as where the decedent lived."

We are of opinion that the New York personalty, for convenience so called, was properly assessed for taxation to the executor of

the will of Mrs. Indiana F. Williams, and, in support of that conclusion, refer to the following authorities in addition to those already cited: *Horne v. Green*, 52 Miss. 452; *Foresman v. Byrns*, 68 Ind. 247; *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475; *Goldgart v. The People*, 106 Ill. 25; *Boyd v. Selma*, 96 Ala. 144, 154, 11 South. 398, 16 L. R. A. 729; *Cameron v. Burlington*, 56 Iowa, 320, 9 N. W. 239; *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164.

We are of opinion that there is error in so much of the judgment of the circuit court as relieves the executor from state and county taxation upon the New York personalty.

With respect to the stock in the National Exchange Bank of Lynchburg and in the Lynchburg Cotton Mill & Improvement Company, we concur with the circuit court, and its judgment is, with respect to those items, affirmed.

The exemption from taxation claimed by the executor upon the ground that the property sought to be taxed belongs to the Sweet Briar Institute, a charitable institution, is without merit. Until the estate is administered, it is assessed for taxation in the name of the executor. Until the estate was administered, and the legacy paid to the Sweet Briar Institute in due course of administration, it could not be known that it would receive anything under this bequest. *McGregor's Ex'rs v. Vapel*, 24 Iowa, 436. With respect to this contention we merely decide that appellee was not entitled to the exemption as of the 1st day of February, 1901. Beyond that we intend to express no opinion.

For these reasons, the judgment of the circuit court must be reversed, and this court will enter such judgment as the circuit court should have rendered.

(102 Va. 631)

WILSON v. LANGHORNE et al.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

CONTINGENT REMAINDER—DEED—INSOLVENCY—JUDGMENT—TRUSTS—LOAN BY TRUSTEE TO REMAINDERMAN—CHARGE ON ESTATE—STATUTES—COMMON LAW.

1. In the absence of an estoppel, the deed of a debtor, conveying all of his property, real and personal, to a trustee, for the benefit of creditors, does not, at common law, pass the debtor's interest in a contingent remainder.

2. Under Code 1887, § 2418, providing that any interest in or claim to real estate may be disposed of by deed or will, that any estate may be made to vest in futuro by deed in like manner as by will, and that any estate which would be good as an executory devise shall be good if created by deed, the deed of a debtor, conveying all of his property, real and personal, to a trustee, for the benefit of creditors, passes the debtor's interest in a contingent remainder.

3. Where a testator devised real estate to his daughter in trust, with remainder to her children surviving her, but did not authorize

the trustee to make loans or advancements to the remaindermen, the fact that the trustee loaned money to a remainderman will not operate *ex proprio vigore* as a lien or charge on the interest of the remainderman in the estate.

4. Under Code 1887, § 3567, providing that every judgment for money rendered against any person shall be a lien on all the real estate of or to which such person is or becomes possessed at or after the date of the judgment, a judgment rendered against a debtor at a time when he was a contingent remainderman in certain real estate binds the interest of the remainderman in the estate when it thereafter vests by the happening of the contingency on which it depended.

Appeal from Corporation Court of Lynchburg.

Suit by H. S. Langhorne and others against William B. Wilson, Jr., and others. From the decree Wilson appeals, and the complainants file cross-error. Reversed on Wilson's appeal, and affirmed on cross-bill.

F. W. Whitaker and J. Singleton Diggs, for appellant. J. T. Coleman, Horsley & Blackford, Harrison & Long, John H. & L. D. Lewis, and Kirkpatrick & Howard, for appellees.

KEITH, P. H. S. Langhorne, George W. Langhorne, Jr., and Anna T. Curville presented their bill to the corporation court of the city of Lynchburg, in which they show that one Anderson H. Armistead devised to George W. Langhorne, Sr., as special trustee, certain real estate situated in the city of Lynchburg, and in the counties of Campbell and Appomattox, upon the following trusts:

"All the rents, profits and issues to be held by the said George W. Langhorne in special trust for the sole and separate use of my daughter, Nannie M. Langhorne, during her lifetime, and at her death the same shall be the property of her children surviving her or their descendants, if any have died before her leaving descendants, equally to be divided, the descendants of any such deceased child, however, to take only what the parent would if living; and in case my daughter shall survive all her children and their descendants then at her death I give the said property to my son J. A. Armistead for his life, and at his death to his children surviving him." Authority was given to the trustee, when Nannie M. Langhorne should so direct in writing, to sell all or any of the trust property on reasonable time and reinvest the proceeds in other property, "such other property to be held to the same use and purpose above set forth and no other."

It appears that Nannie M. Langhorne was twice married, that Anna T. Curville and A. A. Langhorne (who is named as a defendant) were the children of her first marriage, and H. S. Langhorne, George W. Langhorne, Jr., and Alice S. Langhorne were the children of her second marriage, George W. Langhorne, the trustee, being her second husband, and the brother of her first husband. George W.

Langhorne, the trustee, loaned to A. Armistead Langhorne a portion of the trust estate, as evidenced by bonds, the first of which bears date September 23, 1884, payable five years after date, with interest, for \$500; the second dated May 15, 1889, payable five years after date, with interest, for \$2,075; the third, dated July 15, 1891, payable three years after date, with interest, for \$2,135; and a fourth, dated November 14, 1894, payable twelve months after date, with interest, for \$150. These bonds are now in the possession of the trustee, and no part of them has been paid. Anna T. Curville is the surety in the bond dated May 15, 1889.

It further appears that on the 13th of June, 1892, A. A. Langhorne, together with one R. A. Dirom, then partners trading as A. A. Langhorne & Co., conveyed to certain creditors all of their social assets, and "also any and all other property of every description, to the said firm or either member thereof belonging."

Nannie M. Langhorne died in May, 1902. All necessary parties are made to the bill, which concludes with a prayer for the settlement of all proper accounts, and that the trust estate may be partitioned in kind, or by sale and division of the proceeds, among those entitled thereto, and that A. Armistead Langhorne may be charged with the bonds and interest due by him. William V. Wilson, Jr., trustee in the deed from Langhorne & Co., filed his answer at the October term, 1902, in which he insists that it was the intention of A. A. Langhorne to convey to him, for the benefit of his creditors, everything which he owned at the time the deed was executed. He therefore prays that the deed of assignment of June 13, 1892, "be decreed to be in full force and effect, and binding upon the interest of the said A. A. Langhorne in said estate, and that his said interest be subjected to the payment of the debts secured in said deed of assignment."

The controversy in this case arises over the disposition of the interest of A. A. Langhorne in the property bequeathed by A. H. Armistead to a trustee for Nannie M. Langhorne during her lifetime, and at her death to her children surviving her or their descendants. As it could not be known until her death which of her children would survive her, they took contingent remainders, which became vested, upon the death of Nannie M. Langhorne, in such of her children as were then living. *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. 683. Upon this point there is no dispute. A. A. Langhorne took a contingent interest by the will of his grandfather, which, upon the death of his mother, became a vested estate.

Upon the part of appellant it is contended that this interest is subject to the deed made by Langhorne & Co. in June, 1892, and which is filed as an exhibit with the bill. Upon the part of appellees it is claimed that the interest of A. A. Langhorne did not pass un-

¶ 4. See Judgment, vol. 30, Cent. Dig. § 1342.

der the deed, first, because it does not appear from the language of the deed that it was the intention of the parties to convey this interest to the trustee; second, that a contingent interest cannot pass save by estoppel, and, as there was no clause of general warranty in the deed, no estoppel was created; and, third, that the money loaned by the trustee at various times to A. A. Langhorne constituted advancements out of the trust fund which constitute charges upon his interest, for which he must account before he, or those claiming under him, as purchasers or as judgment creditors, can participate in the fund.

The corporation court was of opinion, and so decreed, that the deed in question "does not embrace, and was not intended to embrace, carry, or in any way affect, A. A. Langhorne's contingent remainder in the property devised under the will of Anderson H. Armistead, deceased," but held that it was bound by the judgments obtained by certain of his creditors, and that what remained of his share should be paid in equal parts to George W. Langhorne, Jr., Anna T. Curville, Alice S. Langhorne, and G. H. Wilkins. From this decree W. V. Wilson, trustee in the deed of June 13, 1892, and Maria Dirom, one of the beneficiaries under said deed, obtained an appeal, and certain of the appellees assign as cross-error the provisions of the decree which direct payments to be made out of the trust fund to certain judgment creditors of A. A. Langhorne.

In construing the deed of June 13, 1892, it is well to bear in mind that it was made by a debtor in failing circumstances, for the benefit of all his creditors, and undertakes to place at their disposition all of the debtor's property. The declarations of trust in the deed are, first, to secure the payment of all rent due by the firm, all clerk hire unpaid, and the cost of recording and executing the trust; second, "to secure the payment pro rata of so many of the following creditors, which are believed to be all the creditors of the parties of the first part, as shall, within sixty days from the date of this deed, file with the trustee a written acceptance of their pro rata share hereunder in full of their claims against the said firm of A. A. Langhorne & Co." Then follows a long list of debts, ranging in amount from one of less than \$5 to that secured to Mrs. Dirom of more than \$1,000. The third class, under the deed, was to consist of those of his creditors who declined to accept the provisions of the deed, and give a full discharge of all their claims as the price of participating in the benefits of the deed, and "any other debts due by the said parties of the first part, or either of them," which by chance might have been omitted from the careful enumeration of debts given in the deed.

A requisite of a deed from a failing debtor which requires a release from his creditors

is that it shall convey the whole of his property, and this deed should be construed in the light of that rule. Apart from this, however, the language of the deed is comprehensive in its terms. In the preceding part of the granting clause all the social assets had been conveyed, nothing of the slightest value seems to have been omitted, and then, doubtless having in view the intention to require their creditors to give a full acquittance of all their claims as the condition of sharing in the benefits of the assignment, the sentence under consideration was added—"also any and all other property of every description, to the said firm or either member thereof belonging." Language could not be more comprehensive, and it is a settled rule of construction, which does not need to be buttressed by authorities, that force and effect must be given, if possible, to every word in a written instrument.

In *Mundy v. Vawter*, 3 Grat. 518, similar language is construed, and it was held that, as between the parties, a conveyance of "all the estate, both real and personal, to which the grantor is entitled, in law or in equity, in possession, remainder, or reversion," is valid to pass the grantor's whole estate.

In *Vanmeter v. Vanmeter*, 3 Grat. 148, it was held that a conveyance of all of the lands of the grantor in the county of H. was sufficient.

In *Carrington v. Goddin*, 13 Grat. 609, both of these cases are cited with approval.

In *Feckheimer v. Nat. Bank*, 79 Va. 80, a conveyance by deed of all of grantor's "property, real and personal," was held to embrace shares of bank stock. See, also, *Bullard v. Bank*, 18 Wall. 589, 21 L. Ed. 923.

In *Lewis's Adm'r v. Glenn, Trustee*, 84 Va., at page 964, 6 S. E. 875, construing a trust deed to secure the payment of grantor's debts, the court said: "It is evident from the financially embarrassed condition of the company, and from the face of the deed itself, that its general and leading object in making the deed was to dedicate all of its assets and effects of every kind to the payment of its debts." Then follows an enumeration of the property conveyed, which concluded as follows: "But the omission of any property, money, or other thing from such schedule is not to prevent the same from being hereby granted or assigned;" and it was held that it manifested a clear intent of the grantor to convey all of its estate, rights, and credits of every kind, including its uncalled subscriptions, in trust for the payment of its debts. Such was unquestionably the company's intention in executing the deed. "The language employed in the deed is apt and sufficient to pass everything the company owned, and clearly embraced the uncalled and unpaid subscriptions in the hands of its stockholders"—citing *Mundy v. Vawter*, supra, and other cases.

The intention of the grantor must be gathered from the language he has seen fit to em-

ploy. If there be a doubt upon the construction of the deed, it is to be construed most strongly against the grantor—another rule of construction which is well established. Looking, therefore, to the language employed, in the light of the authorities cited, and we reach the conclusion that A. A. Langborne must be considered as having intended to convey all that the language which he employed was capable of passing to his grantee.

We are here called upon to consider, it may be well to observe, the effect of the language only as between the grantor and the grantee. Counsel for Mrs. Curville, it is true, endeavor to place her in the position of a purchaser for value and without notice; but the deed under which she claims bears date the 19th of January, 1903, while the bill in which she is named as a party plaintiff was filed some months before that date, and the answer of Wilson, trustee, which specifically states his claim, was filed at the October term, 1902.

At common law "a vested remainder lying in grant passes by deed without livery. But a contingent remainder is a mere right, and cannot be transferred before the contingency otherwise than by estoppel." Lomax's Dig. vol. 1, p. 602.

In Preston on Estates, at pages 75, 76, it is said: "A contingent interest does not give any certain nor any immediate right, or any estate, in the land. It gives a mere possibility—a possibility which is coupled with an interest when the person is fixed and ascertained; and such possibility, coupled with an interest, is devisable by will, may be released, may pass by the bargain and sale of commissioners of bankrupt, may be bound or extinguished by estoppel, but it cannot be granted or transferred by the ordinary rules of the common law, though it may be bound in equity by contract."

In Doe v. Oliver, 10 Barn. & Cress. 181, 21 Eng. Com. Law Rep. 50, testator devised lands to his wife for life, remainder to all the children of his brother that should be living at the time of his wife's decease. His brother left one daughter, who married, and afterwards, with her husband, during the life of the testator's widow, levied a fine come ceo of the lands, and declared the use to A. B. After the death of the widow, A. B. brought ejectment against the tenant in possession. Held, that it was maintainable; for that although the brother's daughter had only a contingent remainder during the life of the widow, and the fine could operate only by estoppel until the contingency happened, yet afterwards it operated on the estate.

It would seem from these authorities that at common law a contingent remainder, especially where the contingency depended upon uncertainty as to the person, passed only by estoppel, and here it is conceded there was no estoppel.

This brings us to the consideration of section 2418 of the Code of Virginia of 1887:

"Any interest in or claim to real estate may be disposed of by deed or will. Any estate may be made to commence in futuro, by deed, in like manner as by will; and any estate which would be good as an executory devise or bequest, shall be good if created by deed."

This section stands now as it appears in the Code of 1849, and treating of it in Carrington v. Goddin, supra, Judge Moncure, speaking for the court, says: "It is very clear that before the Code took effect a bargainee of a party not in possession, actual or constructive, at the time of the execution of the deed, could not maintain ejectment in his own name, at least against the party at that time in the adverse possession of the land. His disability to maintain the action proceeded, not from the act against conveying or taking pretended titles (1 Rev. Code, 375), but from the common law, whose maxim it was that nothing in action or entry could be granted over. A feoffment was void without livery of seisin, and without possession there could be no livery of seisin. 4 Kent, Com. 448; 2 Lom. Dig. 8, 9. The statute of uses (1 Rev. Code, p. 370, c. 99, § 29) did not remove the disability, because it only operated on a possession existing in the bargainor at the time of the execution of the deed, and transferred that possession to the use created or declared in favor of the bargainee. If no possession existed in the bargainor, of course none could be transferred to the bargainee. But the Code has changed the common-law rule by declaring that 'an interest in or claim to real estate may be disposed of by deed or will.' Code 1849, p. 500, c. 118, § 5. That such a change was contemplated by the revisors is manifest from their report, p. 602, § 5, and note. They recommended the adoption of a section similar to 8 & 9 Vict. c. 106, § 6, in which 'a right of entry' is expressly named. Instead of adopting that section, which is complicated in its details, the Legislature enacted the provision before quoted. Their object was to use brief and plain terms, which would be at least as extensive in their meaning as the terms used in the statute of Victoria. They could not have used more comprehensive terms than they did. A right of entry is certainly 'an interest in or claim to real estate,' and may therefore 'be disposed of by deed or will.'"

The court in that case indulges in no refinement of construction. It is content to give to plain words their usual and everyday meaning, and the interpretation there placed upon the statute did away forever with the niceties by which the devolution of property had theretofore been embarrassed and hindered, and made capable of disposition by deed or will any interest in or claim to real estate.

Minor's Institutes (3d Ed.) vol. 2, p. 416, states the law as follows: "As to conveyances inter vivos, while vested remainders, lying in grant, as they do, pass by deed with-

out livery, a contingent remainder is a mere right, and, except in equity, cannot at common law be transferred before the contingency, otherwise than by estoppel, as by matter of record or of deed indented. This matter, however, is assisted in Virginia by statute, which provides that any interest in or claim to real estate may be disposed of by deed or will."

Young v. Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642, is to the same effect. It was there held that a contingent remainder, being a mere possibility, was not the subject of attachment, but that, being an interest in or claim to real estate, may be conveyed under section 2418.

In *Nutter v. Russell*, 8 Metc. (Ky.) 163, dealing with the power of court to sell a contingent remainder, the following language is used: "In the case cited, of *Jackson v. Waldron*, 13 Wend. 178, a majority of the court decided that an interest, such as we have been considering, created by will, was a 'naked' possibility, as it is called, and not assignable or releasable.

"It is sufficient to say, in reply to the argument founded on this decision, that we are inclined to concur with the chancellor in the reasoning as well as in the conclusion announced in his dissenting opinion. But it is unnecessary to decide the point upon the general principles discussed by the court in the several opinions delivered in that case; for, according to our own statutes, 'any interest in, or claim to, real estate, may be disposed of by deed or will in writing. Any estate may be made to commence in futuro, by deed in like manner as by will, and any estate which would be good as an executory devise or bequest shall be good if created by deed.'"

It will be observed that the statute there construed is in substance identical with section 2418 of our Code.

It will be remembered that when the bill was filed in this case the life tenant was dead, and A. A. Langhorne, having survived her, had a vested estate. We are of opinion that it passed under the deed to Wilson, trustee in the deed of June 13, 1892. It may be well to remark that *Howbert v. Cauthorn*, supra, did not decide that a contingent remainder would not pass by deed or will, but that a court of chancery, in its discretion, would not sell so unsubstantial and shadowy an interest.

We come now to the last contention made by the appellees, which is that the money loaned by the trustee at various times to A. A. Langhorne constituted advancements out of the trust fund, which constitute charges upon his interest, for which he must account before he, or those claiming under him as purchasers or as judgment creditors, can participate in the fund.

The will which creates the fund in this case did not authorize the trustee to make loans or "advancements" to the remainder-

men, and if the trustee saw fit to do so the mere lending of the money created no charge upon the fund. The trustee seems to have understood and acted upon this view in the first instance. He knew, of course, that if A. A. Langhorne died before his mother his interest perished, and, to guard against this contingency, policies of insurance were taken out upon the life of A. A. Langhorne; but these policies were permitted to lapse. Had advancements been authorized by the will, they must have been brought into hotchpot; or, if a lien had been taken to secure the loan, it would have brought the case within the influence of *Grove v. Grove*, 100 Va. 556, 42 S. E. 312, in which Judge Whittle delivered the opinion, holding that one tenant who discharges a lien on the common property, or pays more than his share of the purchase price, is entitled to ratable contribution from the cotenants. But it cannot be contended that a mere loan of money to A. A. Langhorne, where the trustee acted under a will which did not authorize him to make advancements, could operate *ex proprio vigore* as a lien or charge upon the particular interest.

The cross-error assigned by the appellees is, in view of the conclusion reached upon the other questions considered, of little moment. There was, however, in this respect, no error in the decree to the prejudice of appellees. Without determining whether or not a judgment binds a contingent remainder while the contingency continues, the judgment in this case became effective to bind the interest of A. A. Langhorne as soon as that interest vested; for section 3567 declares that "every judgment for money rendered in this state, heretofore or hereafter, against any person, shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled, at or after the date of such judgment."

Upon the whole case we are of opinion that the debt secured by the deed from A. A. Langhorne to Wilson, trustee, constituted the first lien upon the interest of A. A. Langhorne, under the will of A. H. Armistead. The decree of the corporation court must therefore be reversed.

(102 Va. 759)

TAYLOR v. COMMONWEALTH et al.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

NAVIGABLE WATERS—LAND BELOW LOW-WATER MARK—OWNERSHIP—RIGHTS OF RIPARIAN PROPRIETOR.

1. Code 1887, § 1338, declaring that all the beds of the bays, rivers, creeks, and shores of the sea not conveyed by special grant shall continue and remain the property of the commonwealth, and may be used as a common by all the people of the state for the purpose of fishing, fowling, and catching oysters, etc., is not an arbitrary assumption of title on the part of the state, but is declaratory of the common law.

2. The title to the bed of a navigable river between low-water mark and the line of navigability is not in the adjacent riparian proprietor, but in the state for the benefit of its citizens, and the riparian owner merely has certain rights beyond low-water mark, such as the right to build wharves, of access to the water, and the right of way over it.

3. Acts 1899-1900, p. 797, c. 757, leasing a tract of land lying under the waters of the York river below low-water mark, including an artesian well thereon, is not objectionable as interfering with any of the rights of the adjacent riparian proprietor.

4. Code 1887, § 2137, authorizing the assignment to riparian owners for their exclusive use of a tract of land fronting on the stream, not exceeding one-half acre, for use as oyster-planting ground, does not permit the right to receive such land to be exercised in a capricious and arbitrary manner so as to injure others, but requires the right to be exercised in the manner least injurious to others, if that can be accomplished without wrong to the riparian owner.

Appeal from Circuit Court of City of Richmond.

Action by one Taylor against the commonwealth and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McGuire & Riely and Robert Stiles, for appellant. William A. Anderson, Atty. Gen., and Isaac Diggs, for appellees.

KEITH, P. Appellant filed her bill in the circuit court of the city of Richmond, in which she states that she is the owner in fee simple of a tract of land in Gloucester county known as "Rosewell," containing 250 acres, fronting on York river, being a portion of a tract which was the property of her father, now deceased, allotted to her by a decree of the circuit court of Gloucester county. That as riparian proprietor her rights in the soil under the waters of York river extend to the channel or navigable portion of the river; and that from the original grant from the English crown of this land, down to and including the lifetime of complainant's father, the proprietors of Rosewell had been in the habit of leasing the oyster lands upon their water front. That the last person who held such a lease from the proprietor of Rosewell, while still occupying the relation of tenant to complainant, accepted from the commonwealth a subsequent lease of the flats, or oyster-planting grounds, in front of Rosewell. That about the year 1892, while said lessee was occupying the Rosewell flats, under the circumstances above set out, an artesian well was sunk between low-water mark and the channel or navigable portion of York river, and on the land of which complainant claims she is the owner and riparian proprietor. That the water from this well has mineral properties of great value, and that the lessee and others united in the formation of a company for the purpose of selling the water, which company was grant-

ed a charter by the circuit court of the city of Richmond in March, 1893, under the style of the "Colonial Water Company," since which time it has sold great quantities of water without the consent of complainant. That the Colonial Water Company occupies and claims to hold the ground on which the well is located by virtue of the oyster lease above set forth, but that said lease conveys to the water company no title to the ground. The bill further shows that at the session of 1899-1900 the General Assembly passed "An act to lease for a term of years ten acres of land lying under the waters of York river, below low water mark, in the county of Gloucester, including an artesian well thereon, and to provide for a survey of same and for fixing the price to be paid therefor per annum; and to permit said company to erect buildings and make improvements thereon, and to provide for the determination of all proper questions which may arise between the parties to any suit brought under this act." Acts 1899-1900, p. 797, c. 757. That, acting under the provisions of this statute, the Colonial Water Company has caused a survey and plat to be made by the county surveyor of Gloucester county of 10 acres of the land of complainant, including the well—that is to say, the land of which complainant is the owner and riparian proprietor—and that the company has caused that survey and plat to be returned to the clerk's office of Gloucester county, and posted a notice at the front door of the courthouse on the 4th of May, 1900, to the effect that said survey and plat had been filed in compliance with the provisions of the act of Assembly aforesaid; but that in fact the survey, plat, and notice are erroneous, and do not comply with the requirements of said act. That complainant is advised that the act aforesaid authorizes the lease of 10 acres of land, including the artesian well, only on the condition that it shall be determined by the court that the commonwealth is the owner of the land, and that the private rights of no person shall be infringed upon. That it in plain terms declares it to be the purpose of the sovereign power of the state that the private rights of complainant shall not be interfered with or infringed upon, whether the commonwealth be or be not the owner of said land. That, even though the commonwealth be the owner, it by no means follows from the act that a lease may be made to the Colonial Water Company, because it is expressly provided by its terms: First, that no natural oyster-bed rock or shoal shall be included in said 10 acres of land; second, that the private rights of no person shall be infringed upon; and, third, that navigation in York river shall in no manner be obstructed or impeded. That it further declares that complainant's rights of every character, existing at the time of its passage, whether as owner of the land, riparian proprietor, or otherwise, shall be respected, and shall be paramount and superior

¶ 2. See *Navigable Waters*, vol. 37, Cent. Dig. § 341.

to any rights which can by any possibility be acquired by the Colonial Water Company by virtue of said act. That the commonwealth is not the owner of the land in controversy, but that, on the contrary, complainant is its sole owner, including said artesian well; and, further, that, even though the commonwealth were such owner, the private rights of complainant would be grossly interfered with and infringed upon by any lease made under said act of March 5, 1900. That, without waiving any of her said rights, attention is called to the fact that at the time of the passage of the act of March 5, 1900, and for a long time previous thereto, complainant had, and still has, the statutory right to select any portion of the oyster-planting ground fronting on Rosewell, whether occupied by another person or not, and have same assigned to her exclusive use, provided only that said assignment does not exceed half an acre. See section 2187, Code 1887, as amended by Acts 1898-94, p. 842, c. 743. That complainant has never relinquished, and now claims, the right to have assigned to her, under said statute, one-half an acre of said ground, including the Colonial well; and further claims that the lease of 10 acres of land, as provided by the act of March 5, 1900, cannot be granted without infringing upon this and other rights of complainant, none of which she relinquishes, but all of which she claims and insists upon.

The prayer of the bill is that the well and the water therefrom be declared the property of complainant; that it be decreed that no lease can be made under the provisions of the act of March 5, 1900; that the lease under which the Colonial Water Company claims to hold said well conveys no title to it whatsoever; and that said company may be compelled to surrender the possession thereof to complainant; and for general relief.

To this bill the commonwealth of Virginia and the Colonial Water Company were made parties defendant, and filed their demurrer upon the following grounds:

First. The bill alleges that the plaintiff is the owner in fee simple of the soil of the bed of York river, between low-water mark and the channel or navigable part of said stream, while the "demurrants insist that the right of plaintiff extends only to low-water mark, and that she has no interest in the soil of the bed of said river, but that the soil of said bed is the property of the state of Virginia, so declared by statute, and the state, through the Legislature, has the authority to rent portions of the said bed to the demurrant or any one else."

Second. That, if plaintiff has any right whatever in the soil of said river between low-water mark and the channel or navigable portion of said river, it is only the right to pass over the surface of the water in boats, vessels, or river craft, or to erect wharves, piers, or bulkheads opposite her said land; provided the navigation be not obstructed,

nor the private rights of any person be otherwise injured thereby; and that, should the plaintiff undertake to construct or build any such wharf, pier, or bulkhead from her shore to a point of navigability, she would be required to so construct them as not to interfere with the said well or the demurrant."

Third. That "the bill alleges that the plat, notice, and proceedings under the act of March 5, 1900, are erroneous, and do not comply with the requirements of the law; that these acts were performed by the county surveyor, and are presumed to be correct, and the bill should point out wherein that officer failed in the discharge of his duties.

Fourth. That "plaintiff claims one-half acre of land for oyster-planting purposes, but this right does not give her the ownership of the well, and she would be required to use said land for oyster purposes, so as not to interfere with the well, and she would not thereby acquire ownership or control of the well, nor the fee simple to the soil of the bed of the river."

The Colonial Water Company also filed a cross-bill, but it is not at present necessary to consider the questions which it presents.

When the case came on to be heard, the judge of the circuit court filed a learned and able opinion, and entered a decree sustaining the demurrer and dismissing complainant's bill, but reserving for further consideration questions between the Colonial Water Company and the commonwealth of Virginia arising upon the cross-bill. That decree is before us for review.

By section 1338 of the Code of 1887 it is declared that: "All the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking or catching oysters and other shell fish, subject to the provisions of chapters ninety-five, ninety-six and ninety-seven, and any future laws that may be passed by the General Assembly; and no grant shall hereafter be issued by the register of the land office to pass any estate or interest of the commonwealth in any natural oyster bed, rock, or shoal, whether the said bed, rock, or shoal shall ebb bare or not." And section 1339, subject to the provisions of the section just quoted, extends "the limits or bounds of the several tracts of land lying on the said bays, rivers, creeks, and shores, and the rights and privileges of the owners of such lands * * * to low water mark, but no farther."

Is section 1338 a mere self-servient declaration of title, an arbitrary assumption of right upon the part of the state, or is it in accordance with the law of the land as commonly received and understood? The discussion of the subject invited us to explore the past,

and to investigate the power and authority, the interest and the title, of the English crown in the soil under the tidal waters of that realm; and to discriminate between the power of the crown before the adoption of the Magna Charta, and as limited by that instrument. The difficulty of the task, and the consciousness that at this day we could throw no light upon a subject which has been so often considered by the ablest jurists, dispose us to follow the example of Chief Justice Taney, who, in the case of *Martin v. Waddell*, 16 Pet. 407, 10 L. Ed. 997, wisely said: "We do not propose to meddle with the point as to the power of the King, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom. * * * For when the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore, manifestly, be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation."

In *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269, Justice Curtis, delivering the opinion of the court, says: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights."

The case of *McCready v. Commonwealth of Virginia*, 94 U. S. 891, 24 L. Ed. 248, and *Id.*, 27 Gratt. 985, is one of peculiar interest in the consideration of this case. It originated in the county of Gloucester, in this state, and involved the constitutionality of an act of Assembly which forbade the planting of oysters in the waters of the state by any person not a resident of the state. The case came to this court, which held, Judge Anderson delivering the opinion, that the navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by it within its discretion for the benefit of its people, the only limitation upon that power being that it could not interfere with the authority of the government of the United States in regulating commerce and navigation. Upon a writ of error from the Supreme Court of the United States to the judgment of this court Justice Waite, after reviewing numerous cases upon the subject, declares

that the principle has been long settled "that each state owns the beds of all the tide waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide waters, and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

Illinois Cent. Ry. Co. v. The People of the State of Illinois, 146 U. S. 387, 18 Sup. Ct. 110, 36 L. Ed. 1018, contains an interesting discussion of this whole subject. The opinion of the majority was delivered by Mr. Justice Field, and in it he states it to be "the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties." He then shows that the same doctrine is held applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations, and which possess all the general characteristics of open seas, except with respect to the freshness of their waters and the absence of the ebb and flow of the tide. "In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of

these lakes." As to the character of the title held by the state, he concludes that it is different from that which states hold in lands intended for sale. "It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction and interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purposes, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundations for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power, consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the benefit of the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." He further declares in this opinion that the state can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of the peace. "In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So, with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

This opinion was concurred in by three of

the members of the court, while a dissenting opinion was delivered by Justice Shiras, concurred in by two of the Justices, and the Chief Justice and Mr. Justice Blatchford did not sit.

The dissenting opinion maintains to the fullest extent the right of the state over the soil under tide waters within its limits, with the consequent right to dispose of the title to any part of the soil in such manner as it may deem proper, subject only to the paramount right of navigation.

The position of the majority of the court is fairly summed up in the first syllabus of the report: "The ownership of and dominion and sovereignty over lands covered by tide waters, and the fresh waters of the Great Lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters, subject to the right of Congress to control their navigation for the regulation of commerce;" while, in the view of the minority, the right of a state is absolute and its control without limit.

In *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, this subject was further discussed by Mr. Justice Gray, who delivered the opinion, in which many authorities are considered, and the conclusion reached that the lands under tide waters are vested in the states for the benefit of the whole people, within their respective borders, subject to the rights surrendered by the Constitution to the United States. See, also, *Commonwealth v. Alger*, 7 Cush. 53; *Florida v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Gough v. Bell*, 21 N. J. Law, 156; *Langdon v. New York*, 93 N. Y. 129; *Pollard v. Hagan*, 8 How. 212, 11 L. Ed. 565.

The authorities which we have cited abundantly establish the proposition asserted by the court in *McCready v. Commonwealth*, supra, that the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state, and demonstrate that section 1388 of the Code is a declaration of right in the state, sanctioned and supported by the common law. See, also, *French v. Bankhead*, 11 Gratt. 186.

Let us look at the case from another point of view. The claim of appellant rests upon her right as riparian owner, by virtue of which she asserts title to the bed of the river between low-water mark and the line of navigability, and to its exclusive use and enjoyment, subject only to the paramount right of the United States and the right of fishery, which she concedes to the commonwealth as trustee for its citizens. It is for the plaintiff to maintain her right. The possession of the

defendant is sufficient, except as against the claim of one having a better right to the possession.

At common law the title of the owner of land bounded by a tidal stream extended to high-water mark and no farther. By an act of the Legislative Assembly of Virginia, passed in 1679 (2 Hen. St. p. 456), it was declared that "every man's right by virtue of his patent extends into the rivers or creeks so far as low-water mark," and our present statute upon the subject is found in section 1339, of the Code of 1887, which is set out in the beginning of this opinion. See *Garrison v. Hall*, 75 Va. 159; 1 Lomax's Dig. 661; 1 Rev. Code 1819, p. 341, c. 87. The effect of this legislation is to extend the limits or boundaries of land "by operation of law down to ordinary low-water mark, and the right to the soil between ordinary high and low water mark annexed as incident or appurtenant to the adjacent land." *French v. Bankhead*, supra; *Groner v. Foster*, 24 Va. 650, 27 S. El. 493.

The fee-simple title, therefore, of a riparian owner ends with low-water mark. Between that point and the line of navigability the riparian owner has a qualified right, of which *Justice Miller*, in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, speaks as follows: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier, for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good upon due compensation."

This court said, with respect to this subject, in *Norfolk City v. Cooke*, 27 Grat., at page 435: "This right of the riparian owner is not a mere license or privilege, but is property, property in the soil, up to the line of navigability, though covered by water; for the wharf, pier, or bulkhead can only be built on the soil. It is not a mere easement to pass over the water, or a privilege to use the surface, but property in the soil under the water, on which to fasten and build such structures; and for this purpose, and subject to the restriction that navigation shall not be obstructed, is as much property as the land above the margin of a navigable stream." This is a broad statement of

the law, which we are not called upon in this case either to criticise or approve, further than to remark that we think it well established that the right to build wharves is one which is subject to state regulation, and, while it involves a certain use of the soil under the water for the specific purposes designated, is not exclusive ownership.

Lewis on Eminent Domain, § 78, after stating the opinion of those writers and judges who maintain that the riparian owner has no private rights which are appurtenant to his land other than those of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land which the public has not, says: "There are cases which hold that the riparian owners, upon waters the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. This seems to us the better and sounder rule. The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the state or the public. It is assumed that this title gives the state the same absolute and exclusive control of the waters and their bed as an individual possesses over his private property. But there is really no analogy between the relations of a riparian owner to the waters upon which he abuts and the relations between the proprietors of adjoining lands. The state holds the title to public waters as a trustee merely, for the use of all the public in common. The very object in declaring the title in the public is the better to secure this common use and benefit. * * * It is more reasonable, more logical, and more just to say that these privileges are in fact rights, as inviolable as the soil itself. The public loses nothing, for it is conceded that all these rights are subject to the paramount right of the state to use and improve the waters as shall best subserve the common rights of all."

We have reached the conclusion that the title to the bed of the river in question is held by the commonwealth for the benefit of all of its citizens, and that the riparian owner has certain rights with respect to it. These rights are enumerated in section 83 of the second Edition of *Lewis on Eminent Domain*, as follows:

"First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.

"Second. The right of access to the water, including a right of way to and from the navigable part.

"Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the state.

"Fourth. The right to accretions or alluvium.

"Fifth. The right to make a reasonable use of the water as it flows past or laves the land."

These rights of the riparian owner and the commonwealth must be exercised, if possible, so that the one shall not unnecessarily disturb or impair the enjoyment of the other. Appellant has built no wharf or pier, nor any like structure, upon her premises, nor does it appear that she contemplates doing so. When she does exercise that right, it must be in accordance with such rules and regulations as the commonwealth imposes for the protection of the rights of the public. Nor does it appear that the right in the plaintiff of access to the water from her land, or of a right of way to and from her shore to the navigable part of the stream, has been interrupted or threatened, and the other enumerated rights are not called in question in this record.

When the riparian owner complains of an injury done to him in respect to these rights, the question to be considered is, does he present a case in which there has been any substantial interruption or impairment of his rights? Were he the owner in fee simple of the soil, any entry upon it without his consent would constitute a trespass; but, having mere easements in the river, the riparian owner has no cause of complaint so long as he is permitted the full and undiminished enjoyment of those rights.

Two cases in the House of Lords illustrate this position. The Duke of Buccleuch was the occupier, under a lease from the crown, of a house, the garden of which ran down to the Thames, where a wall protected it from the river, which flowed up to it at high water. There was a door in this wall, which was locked or opened at the pleasure of the plaintiff, and afforded him the means, at high water, of landing persons and goods, while at low water he was afforded the same privilege by a paved causeway, which ran from the door to the river. The river was embanked under authority of an act of Parliament, and a large strip of dry land was formed where the river had formerly flowed up to the garden, and a public road was made between this strip of land and the river, and the plaintiff claimed compensation under the act. It was held that the loss of the use of the river frontage, and the consequent loss of privacy, and the increase of dust and noise by the creation of the embankment and road, were subjects to be considered as occasioning deterioration in the value of the property. *Duke of Buccleuch v. Metropolitan Bd. of Wks.*, 5 Eng. & Irish App. 418.

In *North Shore Ry. Co. v. Plon*, 14 App. Cas. 612, an appeal from the Supreme Court of Canada, it appears that Plon had a large manufacturing establishment upon the foreshore of the river St. Charles, a navigable stream, and upon which appellants construct-

ed an embankment, whereby access to the river was cut off. The embankment extended along the whole length of respondent's river front, and cut off access to the river except at two openings one in front of and the other adjoining respondent's premises, through which the river was accessible at certain high tides.

In both these cases damages were awarded, it appearing that the right of access was in one case destroyed, and in the other case so far interrupted as to be rendered of little value.

In the case before us the property of the plaintiff is used merely for farming purposes. There has not been erected, and as far as the record discloses there is no purpose to erect, any pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised, or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive. Is it reasonable that the commonwealth, holding title to the soil, is to be wholly subordinated in the use of it to the use with which another is clothed merely by virtue of being an owner of the adjoining shore, when the rights of each and all can be fully protected without diminution and without hindrance. If the time should come when the river front of the plaintiff shall be divided into lots whose owners find it necessary to their profitable enjoyment to erect piers and wharves upon them, if they engage in business which shall require exclusive access to the channel of the stream, it may be that a case could then be presented more meritorious than that which we have under consideration, and in the light of changed conditions the court may be again called upon to consider the respective rights of the riparian owner and those remaining in the commonwealth, or which have been granted by her to others. The property in dispute was originally leased by the state as an oyster planting ground. By chance, in the prosecution of that industry, mineral water was discovered far beneath the soil, which has proved of great value. There may be other and more valuable substances hidden in the soil; as to that, conjecture would be idle. But whatever that soil contains belongs to the state, and the state, and it alone, has the right to develop those hidden sources of wealth, if such there be, for the common benefit of all of its citizens.

With respect to plaintiff's claim to have the half acre of land assigned to her under the statute, as an oyster planting ground, it may be observed, first, that this is no part of her common-law right, but is the creature of statute, of which she has not availed her-

self, and as to which she has no cause of action, if before availing herself of the right a subsequent statute defeats it. But, if this be not so, she ought not to be permitted, capriciously and arbitrarily, to exercise that right, and to locate the half acre in a manner most injurious to others and not more beneficial to herself, so far as the facts in this case disclose. She should be required to exercise that right in the manner least injurious to others, if that end can be accomplished without a wrong to her.

The views which we have expressed are not in conflict with any case heretofore decided by this court. Where the nature of the title of the commonwealth has been considered, it has generally been in cases which involved the power of the state over the waters within it, with respect to the right of fishery, and language is used which implies absolute ownership and dominion. Of this class of cases *McCready v. Commonwealth*, supra, is a fitting illustration. We shall not prolong this opinion by discussing each case in detail, but content ourselves with observing that the opinions are to be read and interpreted in the light of the facts under consideration. *Groner v. Foster*, supra, and *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534, 45 L. R. A. 227, did not require a decision as to the nature of the commonwealth's title. She was no party to those suits, which involved the rights of riparian owners inter se, and the manner in which those rights should be apportioned, and the boundary lines between coterminous owners determined and established. In this case, for the first time, this court has been called upon to deal with the conflicting rights of the riparian proprietor and the commonwealth, and we have endeavored in the solution of the questions presented to apply that beneficent maxim of the civil law, "*Sic utere tuo ut alienum non laedas*," believing that, exercised in obedience to that benignant principle, every right of the parties to this controversy may be preserved and enjoyed.

In conclusion we are of opinion that the plaintiff has no title as riparian owner to the water between low-water mark and the channel of the river, nor to the soil beneath it; that as riparian proprietor she has certain rights beyond low-water mark, as the right to build wharves and of access to the water, and a right of way over it to the channel, and others perhaps which need not now be considered, including a right to locate a half acre of land as an oyster planting ground; but that all these rights may be enjoyed by her to their fullest extent without let or hindrance, diminution or impairment, by reason of any right or privilege granted to and exercised by the Colonial Water Company, under the facts as disclosed in the record. We are therefore of opinion that there was no error in dismissing the plaintiff's bill, and the decree of the circuit court is affirmed.

(55 W. Va. 571)

ANGLE v. MARSHALL et al.*

(Supreme Court of Appeals of West Virginia.
April 22, 1904.)

TRUST DEED—CONSTRUCTION—REVOCATION.

I. B., the owner of a life estate in six farms in Maryland, and one farm in Berkeley county, W. Va., containing 191 acres, by reason of physical disability (more particularly the loss of speech, brought on by paralysis) having become incapacitated for managing his said farms, both in the interest of himself, as life tenant, and of his children, as remaindermen, conveyed his said life estate to A., as trustee, with full power and authority to manage and control the same as landlord to the same extent as B. could do if acting in person, but such management was to be under the advice of B.; the conveyance making no disposition of any of the property of said B. in the present or future to any third party; no provision for the accumulation of any fund in the hands of the trustee; and provided for the expenditure of all necessary sums from the moneys collected by the trustee for the benefit of B., which expenditures were only limited by the necessities of said B., for his comfort and maintenance, "without stint." The remaindermen afterwards, for valuable consideration, conveyed their interests in said 191 acres (the Berkeley county farm) to L., and L. conveyed the same to M. B. then conveyed for \$1,700, cash consideration, his life estate in the last-named farm to L., and L., for a like consideration, conveyed the same to M. Held, that the conveyance of the life estate by B. revoked the powers and authority of A., and terminated the trust as to the farm so conveyed; and, further, held that, although the instrument made and executed by B. to A. was in form a trust deed, it could only operate as to said Berkeley farm as a power of attorney to manage and control the farm in the interest of B., and incidentally in the interest of the remaindermen, and, not being coupled with an interest, was revocable, notwithstanding it contained a provision of irrevocability.

(Syllabus by the Court.)

Appeal from Circuit Court, Berkeley County; E. Boyd Faulkner, Judge.

Action by Samuel P. Angle against Mary L. Marshall and others. Decree for defendants, and plaintiff appeals. Affirmed.

Flick, Westenhaver & Noll, for appellant. Faulkner, Walker & Woods, for appellees.

McWHORTER, J. J. W. Brillhart had a life estate or was tenant by the curtesy in six farms in Washington county, Md., and one farm in Berkeley county, W. Va., of which his wife had died seised in fee. On the 18th day of November, 1899, said Brillhart executed to Samuel P. Angle, of Washington county, Md., a deed of trust conveying to him the life estate in said farms, together with all crops then growing, garnered, or in process of being garnered, together with all choses in action, all cash in bank, and all moneys owing to him from any source whatever, as well as every nature and description of estate, asset, chattel, or any other kind of property or interest whatever belonging to said Brillhart; assigning in said deed that "by reason of bodily infirmities, in particu-

*Rehearing denied.

lar the loss of speech brought on by paralysis, and by reason of other bodily infirmities has become incapable of managing his large financial interests as they should be managed both in the interest of himself as life tenant and of his children as remaindermen," and reposing great confidence in Samuel P. Angle, as a man of integrity, and knowledge of the management of farms and business affairs in general, and that they might be more properly managed under the direction and supervision of the court of chancery of Washington county, in Maryland. Said conveyance was in trust and confidence, authorizing the trustee to manage his farms, to make leases, collect rents, and do all things as fully as the said Brillhart could do, acting for himself; requiring him to settle his accounts on the 1st day of January in each year, or at least within 15 days thereafter, in the circuit court of Washington county; such settlement to be under oath, and subject to exceptions as other accounts formally stated by the auditor of the said court in chancery cases; provided that the trustee should pay to Brillhart such sums during the year as might be necessary for his own comfortable maintenance, and expend for the personal benefit and comfort of said Brillhart such other sums for medicine, medical advice, clothing, traveling expenses, etc., as Brillhart might require, said expenditure not to exceed, on the average, \$30 per month; but, if a greater sum should be needed for the purposes stated, the trustee should allow it, but should not be called upon to pay the same until the end of the year, and until he had made his annual settlement, "it being the intent of this paragraph that all expenditures necessary for the comfortable maintenance and health of the said John W. Brillhart shall be made in reason and without stint"; providing that the trustee give bond, and fixing his compensation at 5 per cent. upon his receipts and 5 per cent. upon his expenditures; and providing also that the deed of trust should be irrevocable, and that it should supersede all powers of attorney theretofore executed by him; and revoked all such powers of attorney; and requiring all attorneys in fact under such authority so revoked to settle with the trustee. The said trustee to give the affairs of said Brillhart his personal attention; to look after his comfort and well-being; to consult with the said Brillhart and receive his advice about the management of the farms, and endeavor to the fullest extent possible to adopt the views of the said Brillhart, and have him co-operate with the said trustee; but that the judgment of the said Samuel P. Angle should always be paramount.

At the August rules, 1902, Samuel P. Angle, trustee, filed his bill in equity in the clerk's office of the circuit court of Berkeley county against Mary L. Marshall, P. R. Hoffman, and John W. Brillhart, defendant, exhibiting the deed of trust hereinbefore described;

alleging that at the time of making of said deed of trust said Brillhart was, and had been continuously since that time, by reason of bodily infirmities (more particularly, loss of speech brought on by paralysis), incapable of managing his financial interests, both in the interests of himself, as life tenant, and his children, as remaindermen, and which condition, instead of improving, had grown very much worse; that the deed was recorded in the proper office in Washington county, Md., on the 24th of November, 1899, and afterwards, on the — day of February, 1901, in the clerk's office of the county court of Berkeley county; that said Brillhart filed his petition in the circuit court of Washington county, Md., praying the court to assume jurisdiction according to the terms of the deed of trust, and supervise the actions of Angle, the trustee, according to the interests and meaning of said deed, and according to the law and practice applicable in such cases. A suit in equity in the matter of the trust estate of John W. Brillhart was docketed in the said court, and was known as No. 5,616, in equity. That said court made an order assuming jurisdiction of the said trust. Copies of said trust deed and order were filed as exhibits with the bill. That plaintiff executed bond as required by the trust, and assumed charge of the property conveyed to him, and had continued from that time forward until the present to discharge his duty as such trustee. That he had not been discharged or removed by any order of the court, or in any other manner, as trustee, and that said suit was still pending. That said trust estate had been administered by the court of equity from that time forward until the present. That plaintiff had stated and settled his accounts annually, and had received and acted from time to time on the directions and orders made by the said court in said cause. That the farm referred to in the deed of trust, situated in Falling Waters district, Berkeley county, contained 191 acres. That during the year 1901 the same was occupied by the defendant P. R. Hoffman under a lease made and entered into between him and the trustee. That when the lease expired, on the 1st of April, 1902, the lessee held over, by consent and acquiescence of plaintiff, on the same terms. That plaintiff had recently learned that Hoffman had been interfered with in his farming operations and in his occupancy by the defendant Mary L. Marshall. That she had represented to Hoffman that she was the sole owner of the farm, and plaintiff had nothing further to do with the farm; had no right to the control and management thereof. That she had directed and required said tenant to change and alter the condition of said farm, by making lanes through the same from places different from where the same formerly had been, and at places not desired by plaintiff; had required tenant to put up new fences and to make other repairs

to the farm, and by these means had prevailed on the tenant recently to take a lease from her, and to recognize her as the landlord, and rendered him unwilling to comply with the directions of plaintiff. That said Marshall bases her right to the ownership and control of said farm upon the following facts: That on the 29th of March, 1901, George William Brillhart, one of the two remaindermen in said tract of 191 acres, executed a deed conveying all his right, title, and interest therein to Samuel A. La Fevre, and that on the 23d day of March, 1901, Mary C. Resh and Franklin D. Resh, her husband, the other of said remaindermen, conveyed all their right, title, and interest in said land to said La Fevre, and that afterwards, on the 23d day of April, 1901, La Fevre conveyed all his right, title, and interest which he had acquired by virtue of said two deeds in said tract of land to the defendant Mary L. Marshall; exhibiting a copy of each of said deeds. That, in addition to the deed of trust made by said Brillhart to plaintiff, the order of the circuit court of Washington county, sitting as a court of equity, assuming jurisdiction of the said trust estate, said La Fevre prevailed upon the said Brillhart to execute a paper writing bearing date the 17th day of July, 1901, whereby he attempted to convey to the said La Fevre all his right, title, and interest at law and in equity in and to the said 191 acres of land, and that afterwards, on the 18th day of December, 1901, the said La Fevre made a deed purporting to convey all his right, title, and interest thus acquired from said John W. Brillhart in said land to the said Mary L. Marshall; exhibiting a copy of said deed with his bill.

Plaintiff alleged that the deed of trust made by Brillhart to plaintiff was irrevocable; that, after making the same, and especially after the order of the circuit court of Washington county assuming jurisdiction of said property as a tract, to be managed by it, the said John W. Brillhart had no power or authority to execute the paper writing aforesaid, or in any manner to transfer the title to, or the control and management of, the life estate to said Marshall, and the act of said Brillhart, even if made voluntarily and without any undue influence, and had been the act of a person capable of managing his financial affairs, would confer no power upon the grantees, nor any right upon it to the ownership and control of the said estate; that the conveyance from Brillhart to La Fevre was made without any order of the court authorizing or permitting the same to be made; that it was made without the consent or authority of plaintiff, and was accepted by the said La Fevre and Marshall with full knowledge of the deed of trust to the plaintiff; that the trust vested in him, and of which the court had assumed jurisdiction, was of such a nature that the plaintiff, as trustee, under his obligation, was required to continue in the actual management and control

of the life estate of Brillhart in said real estate, and that he was not authorized or permitted, under the law, to allow the said Brillhart, or any grantee of his, to assume any control over said estate, or to receive the rents and profits therefrom, but that the plaintiff himself continue in the actual and exclusive control of the same so long as said Brillhart should continue to live, or until he should be discharged by order of the court, or the said deed of trust appointing the plaintiff should have been canceled in some suit instituted for that purpose, and that he may ask for advice and direction from the court; and praying that an injunction be awarded, enjoining and restraining the said Hoffman from attorning to the said Marshall as the owner of the life estate of Brillhart in said 191 acres of land, and from delivering to her the landlord's share of wheat, hay, and corn, or other crops grown thereon, or from paying to her the proceeds in such crops, and that the said Marshall be enjoined from interfering in any manner with plaintiff's control and management of said farm, and with the tenant in possession thereof, and that he be advised and directed as to his duties in the premises and in the performance and execution of the trust; and for general relief.

The bill was presented to Hon. R. W. Dailley, Jr., judge of the Twelfth Judicial Circuit, who granted an injunction as prayed for in the bill, enjoining the defendant P. R. Hoffman from attorning to the defendant Mary L. Marshall as the owner of the life estate of John W. Brillhart in the 191 acres of land, and from delivering to her the landlord's share of wheat, hay, corn, and other crops grown on said tract, and from paying to her the proceeds of such crops, and the defendant Marshall from interfering in any manner with plaintiff's control and management of said farm, and with the tenant in possession. On the 1st day of August, 1902, the defendant Marshall, by her counsel, moved the court to dissolve the injunction, to which motion plaintiff appeared; and, after same was argued, the court took time to consider thereof, and on the 23d of September, 1902, the cause was heard by the court upon the demurrer filed by defendant Marshall to plaintiff's bill, and upon her motion to dissolve the injunction, upon which hearing the court dissolved the injunction and sustained the demurrer to the bill. At the November rules, 1902, the plaintiff filed his amended bill, making Samuel A. La Fevre a party thereto; and otherwise it is substantially the same as the original bill, but alleges that the deeds from Brillhart to La Fevre and from La Fevre to Marshall, conveying the life estate of Brillhart, are invalid, and alleging that it has the effect of creating a cloud on plaintiff's title, disturbing his possession and estate, and should be removed; and, in addition to the prayer in the original bill, prays that a receiver for said tract of land be appointed, if necessary, to preserve the same,

and the rents and profits therefrom, pending this litigation, and that the cloud on plaintiff's title to said land created by the deed from John W. Brillhart to La Fevre and from La Fevre to Marshall be canceled and removed by the court, and that plaintiff be advised and directed as to his duties in the premises, and in the performance and execution of the trust set forth in the bill.

It does not appear from the record that any further injunction was granted upon the amended bill, but on the 5th day of May, 1903, the cause came on to be heard upon plaintiff's amended bill and exhibits, process duly served upon all the defendants, rules duly taken, and cause set for hearing, and the demurrer to said amended bill of Mary L. Marshall, and the plaintiff's joinder therein, "and, the court being of opinion that the demurrer filed by the defendant to the amended bill of complaint in this cause shows that the defendant is not entitled to relief prayed for in his bill, it is therefore considered by the court that the said demurrer be, and the same is, sustained, and the plaintiff's bill is dismissed at his costs." From which decree, plaintiff appealed.

The question is, what estate was vested in the trustee, if any, and the extent of his powers under the deed of trust? The deed is in the form of a conveyance in trust to the said Angle by which the equitable estate of the said Brillhart in the farm is conveyed to the trustee, not coupled with any interest, but solely for the purpose of managing the farm and transacting the business of the said Brillhart in the same manner as the said Brillhart might do if acting for himself; and the instrument confers no greater rights or powers upon the said Angle than could have been conferred by the ordinary power of attorney. It makes no disposition of the grantor's property in the present or future to any third party. It provides no accumulation of any fund in the hands of the trustee. It simply authorizes the trustee to manage the property and affairs of the said Brillhart. By its terms, the partial disbursement, and, it may be, the entire disbursement, of the fund is provided for. Under the fifth clause of the deed, provision is made for the expenditure of the fund by the payment to the grantor of such sums as may be necessary for his own comfortable maintenance, and shall expend for the personal benefit and comfort of the grantor such other sums for medicine, medical advice, clothing, traveling expenses, etc., as the said grantor may require. The expenditure for the last-mentioned purpose being limited, however, to \$30 per month, but, if more than that should be needed, the trustee was required to allow it, but should not be called upon to pay such excess until the end of the year, and until he had made his annual settlement, "it being the intent of this paragraph that all expenditures necessary for the comfortable maintenance and health of the said John W. Brillhart shall be made in reason and without stint." Thus

opening the door for the expenditure of an indefinite portion or all of the funds that might come into the hands of the trustee. The trustee had no power over the property, except to manage it. He had no discretion as to the specific expenditures provided for, and under none of its provisions does it contemplate the accumulation of income from the properties in the hands of the trustee, or prohibit the use of any part of the property; and there is nothing contained in the trust deed to show any intention of the grantor that he had at the time of its execution in contemplation of the interest of any person other than himself, except that, in the preamble expressing his reason for making the deed, he says, by reason of bodily infirmities (more particularly, the loss of speech, brought on by paralysis, and other bodily infirmities), he had become incapable of managing his large financial interests as they should be managed, "both in the interest of himself, as life tenant, and of his children, as remaindermen." In this he clearly had reference to the management of the farms, and the condition in which they should be kept and left for the benefit of the remaindermen. He makes no reference to his heirs, or as to anything that should be vested in him, and go to his children at the time of his death. He refers to them simply as remaindermen taking from their mother at the termination of his life estate therein.

It is insisted by counsel for appellant that the deed is irrevocable; that Brillhart had no right or power to revoke it. It is true, the deed, upon its face, says that it is irrevocable. In 1 A. & E. E. L. (2d Ed.) 1217: "The power of revocation exists, even though it be expressly stipulated that the agency is irrevocable or exclusive." Citing *Blackstone v. Buttermore*, 53 Pa. 266, where it is held: "(1) It is only when a power of attorney constituting a mere agency is coupled with an interest in the thing itself, or the estate which is its subject, that it is irrevocable. (2) A mere power is in its nature revocable, when it concerns the interest of the principal alone, even if there be an express declaration of irrevocability. (3) An interest in the proceeds to arise as compensation for executing the power will not make it irrevocable. (4) To make an agreement for irrevocability in a power to transact business binding, there must be a consideration independent of the compensation to be rendered for the services to be performed." Also *Renan v. Hull* (W. Va.) 47 S. E. 92, decided at this term. And in *MacGregor v. Gardner*, 14 Iowa, 826, it is held: "A power of attorney may be revoked by the principal, notwithstanding it is in terms irrevocable, unless it is coupled with an interest in the agent, or is supported by a consideration; and the use of the word 'irrevocable' in a power, when not thus coupled or supported, confers no greater authority upon the agent than an ordinary power of attorney." And in *Walker v. Denison*, 86 Ill. 142; "The principal may revoke the

authority of his agent at his mere pleasure, although, in its terms, the authority may be expressly declared to be irrevocable. There are exceptions to the rule when the authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security. In these cases it is irrevocable, whether so expressed or not. A power coupled with an interest is when the power or authority is coupled with an interest in the thing itself actually vested in the agent. It must not be merely an interest in that which is produced by the exercise of the power. The former is irrevocable, while the latter is revocable, though expressed to be irrevocable." It is there further held: "When the principal, who has given a power of attorney to sell, himself sells and disposes of the thing before a sale by the agent, this will be a revocation of the power by operation of law." In 27 A. & E. L. 113, it is said: "It matters little what form of words has been employed to create the trust, particularly in instruments of a testamentary character, the doctrine just stated being universal; that is to say, that, despite the language of the instrument, whatever estate is necessary for the full execution of the trust vests in the trustee, and no more. 'The court is always reluctant,' says a standard author, 'to enlarge an estate in trustees beyond the terms of the gift, and it will not be done unless it is necessary for the execution of the trust.' * * * In point of duration, likewise, the trustee's estate is measured by the terms of the trust. It will stand so long as any legitimate purpose contemplated by the settlor remains unfulfilled. But so soon as the objects for which the trust was created shall have been accomplished, or the need for their attainment shall have failed, the trust estate ceases, and the estate vests in the beneficiary, without the formality of a conveyance; the statute of uses conveying the title by an arbitrary presumption of a conveyance, or by a deed formally executed." And in *Bryan v. Weems*, 29 Ala. 423, 65 Am. Dec. 407, it is held: "The estate of the trustee will not be enlarged beyond the actual demands of the trust, even though the language employed might justify it. The purpose is to give no greater powers than it was the evident intent of the settlor to create." See, also, *Greenwood v. Coleman*, 34 Ala. 150; *West v. Fitz*, 109 Ill. 425; *McElroy v. McElroy*, 113 Mass. 509; *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Coulter v. Robertson*, 24 Miss. 273, 57 Am. Dec. 168. In *Doe, Lessee of Poor, v. Condsline*, 6 Wall. 453, 18 L. Ed. 869, Justice Swayne, in delivering the opinion of the court, at page 471, 6 Wall., and page 873, 18 L. Ed., says it is "well settled that, where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and

his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation." This is quoted with approval in *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044. It clearly appears from the deed itself, in case at bar, that the sole object of Brillhart was to confer upon Angle authority to manage and direct his business, and especially to control and manage the farms, and to collect and pay the rents to Brillhart, because of his physical inability to move about and personally supervise their management; and, whenever he sold and disposed of his life estate in said farm, the object and purpose of the execution of the deed of trust was satisfied, as far as that particular farm was concerned, and the title of the trustee became extinct, there being no further active trust as to said farm, unless it would be to take charge of the proceeds of the sale of the life estate therein, and there would be no responsibility on that account, unless it was passed to the hands of the trustee by the said Brillhart.

The authorities cited by the appellant are based, for the most part, on spendthrift trusts and trusts created for the benefit of third parties. It is clear that Brillhart was intending to empower Angle to manage his farms and attend to his business generally because of his own physical disability, and solely for his own benefit. It is not alleged there was any mental incapacity, nor that he was overreached in any manner by La Fevre in making the purchase from him of his life estate in the farm.

There is no error in the decree of the circuit court, and it is therefore affirmed.

(55 W. Va. 656)

MATHENY et al. v. FERGUSON.

(Supreme Court of Appeals of West Virginia.
April 22, 1904.)

DEED — CONSTRUCTION—LIABILITIES OF GRANTEE—CHARGE ON LAND—CLAIMS DUE ESTATE.

1. F. and his wife, I., conveyed 211 acres of land to W., their son, in consideration of love and affection, and the further consideration that he pay to R. J. M. \$300, to A. M. \$100, and to I. M. \$100, and that he pay off and discharge all debts remaining against the grantors at the time of their death, or either of them, which deed W. accepted, and took possession of, and held the land thereunder. Held:

First, W. is personally liable for the debts of the grantors, and, second, the land so conveyed to W. whilst held by him will be subjected by a court of equity to pay the debts of the grantors.

2. While claims due an estate should ordinarily be prosecuted by the personal representative thereof, yet it may be done by the beneficiaries thereof in a special case, as where it appears that the personal representative cannot or will not act.

(Syllabus by the Court.)

Error to Circuit Court, Mason County; Warren Miller, Judge.

Bill by Anna Matheny and others against W. V. Ferguson. Decree for plaintiffs, and defendant brings error. Affirmed.

Chas. E. Hogg and J. E. Beller, for plaintiff in error. H. R. Howard, for defendants in error.

McWHORTER, J. William Ferguson and Isabella, his wife, by deed dated October 1, 1901, conveyed to William V. Ferguson a tract of 211 acres of land in consideration of love and affection, and the further consideration that he pay to Rebecca Jane McDermott, wife of John McDermott, \$300, to Anna Matheny, wife of Henry Matheny, \$100, to Isabella Matheny \$100, and that he pay off and discharge all debts remaining against the parties of the first part at the time of their death, or either of them. Anna Matheny, in her own right, and as next friend of the infant children and heirs at law of W. H. Matheny, brought their suit in chancery to enforce the collection of a note for \$140 against William V. Ferguson. The note was made by William Ferguson, the father of the defendant, and who had died intestate, and no one had qualified as his personal representative. Said note was dated the 8th of February, 1892, and payable 12 months after date. The bill alleged that plaintiffs had a right to charge said note as a lien upon the land conveyed to the defendant. The demurrer to said bill being sustained by the court, plaintiffs had leave of the court to file amendments to the bill, which they did, making J. W. McDermott, who qualified as administrator of W. H. Matheny, a party defendant, and alleged that said administrator refused to take charge of said note and to collect the same from the defendant William V. Ferguson, and alleging also that said McDermott and Ferguson, who were brothers-in-law, colluded and conspired together to prevent the collection of said note, and that the amount due on said note, after deducting charges against the estate of Matheny coming to said administrator for his official fees and costs, was payable to the plaintiffs, and further alleged that William V. Ferguson was sole surety on the bond of said McDermott as administrator. Ferguson demurred to the amended bill, which demurrer was overruled, and process awarded against McDermott, administrator. Ferguson answered the bill as amended, denying that the debts of the deceased, W. H. Matheny, had been paid, and averring that at the time of his death Matheny owed respondent on account \$150, which still remained due and wholly unpaid, and that at the time of his death said Matheny owed divers other debts, which still remained unpaid, and denying that his father had made the note sued upon, and denying the signature to the note, or that his father owed the debt at the time of his death, but admitted that the deed to him required him to discharge all debts remaining against his father at the time of his death. The defendant William V. Ferguson also filed a plea verified by his affidavit, denying that William Ferguson, his father, had made or signed said note, and averring that the signature to

said note was not in the handwriting of said William Ferguson. The said William V. Ferguson further made an affidavit "that the said William Ferguson did not in his lifetime make or sign the said note, and that the said note is not in the handwriting of the said William Ferguson, and that the said signature of the said note is not written in the handwriting of the said William Ferguson." Depositions were taken and filed in the cause by plaintiffs and defendant William V. Ferguson. The cause was heard on the 19th of November, 1901, on the bill and amendments thereto, the exhibits, the answer, and plea with replications thereto, and the amount of the note sued upon, with its interest, amounting at date of decree to \$213.78, and costs of the suit, decreed to be a valid and subsisting lien upon the 211 acres of land so conveyed by William Ferguson to William V. Ferguson, prior to any and all liens suffered, made, or incurred by the said defendant William V. Ferguson since he became the owner of said land under the said deed of October 1, 1890, and referred the cause to a commissioner of the court to take, state, and report an account showing what indebtedness, their priorities and amounts, and to whom due, was owing by the said William Ferguson at the time of his death, and that in his report the commissioner should hold and take the said sum of \$213.78, with interest from November 19, 1901, together with the costs of the suit, to be a valid lien on said land prior to any lien put on said land by the defendant, William V. Ferguson; from which decree the defendant, William V. Ferguson, appealed, assigning as error the overruling of the demurrer to the bill and amended bill, and in not dismissing the plaintiffs' bill upon the proofs, and in not finding for the defendants upon the defendant Ferguson's verified plea that the note sued upon is not the note of William Ferguson, claiming that the preponderance of the evidence was in favor of the defendants, and also in not finding for the defendants upon the defendant Ferguson's answer and averment that the note was without consideration. The court having sustained the demurrer to the original bill, plaintiffs filed amendments thereto. In addition to the allegations of the original bill, the amendments allege that W. H. Matheny left no debts of any consequence at his death, and that what he did leave had long since been settled and paid; that J. W. McDermott had qualified as administrator of said W. H. Matheny, and that said McDermott, as such administrator, refused to take charge of the \$140 note sued upon or to collect the same, and refused to proceed against the defendant William V. Ferguson to compel him to pay the note, and averred that said McDermott and William V. Ferguson colluded together in regard to the said note against the rights of the plaintiffs; that said McDermott and Ferguson were brothers-in-law, and that Ferguson was surety on the administration bond of said McDermott, and also his only surety

on said bond; and prayed that said McDermott, administrator, be made a party defendant to said suit. The amendments to the bill were filed by order of the court, and process awarded against the said administrator, who failed to answer the bill and amendments thereto.

It is contended by appellant that the right to maintain this suit belongs solely to the personal representative of Matheny. Ordinarily this is true. In *Morgan v. Woods*, 69 Ga. 599, it is held: "To allow creditors or heirs to sue third persons otherwise than through the representative of the estate, there must be collusion, insolvency, unwillingness to collect the assets, or some other like special circumstance." And in *Tabb's Curator v. Cabell*, 17 Grat. 160 (Syl., point 6), it is held: "If, upon the death of the life tenant of slaves, the executor declines or neglects to recover the slaves, and sell them for division, as the will authorized him to do, the remainderman may sue in equity to recover and divide them among the parties entitled." And in *Burroughs v. Elton*, 11 Ves. 29: "Suit by a creditor against persons accountable to the estate allowed in a special case, as when the representative cannot or will not act." So in the case of *Richardson v. Donehoo*, 16 W. Va. 685 (Syl., point 10), where it is said: "The executor or administrator is the proper representative of the personal estate, and, generally, all suits should be brought by and against him in relation thereto. In some special cases this rule seems to have been relaxed." The rule was so relaxed in case of *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758. So in the case of *Foling v. Huffman*, 39 W. Va. 320, 19 S. E. 421, where the plaintiffs, creditors of the decedent, filed their bill against Anthony Huffman, the sole heir, and James A. Williamson, administrator, it was held that the bill was not demurrable because filed within six months of the date of the appointment of the personal representative of the estate. J. W. McDermott, the administrator, was examined as a witness in the case, and testified that he would not sue upon the note if he had had the same in his possession, for the reason that he was related to both parties and did not want to make any trouble. The allegations of the bill in the case at bar were sufficient to give the court equity jurisdiction in the case, and the demurrer was properly overruled. There can be no question about the liability of the defendant William V. Ferguson to the creditors of his father, William Ferguson, for the debts remaining unpaid at his death, said defendant having accepted the deed from his father with its conditions to pay such debts. It is insisted by appellant that, no lien having been reserved by the elder Ferguson to secure the debts to be paid as a condition of the conveyance, the land could not be held subject to the payment thereof. The debt sued upon, while not, strictly speaking, a lien upon the land, was a charge thereon which a

court of equity should enforce; that it was called a lien by the court is immaterial. In *Vanmeter's Ex'rs v. Vanmeter*, 3 Grat. 148, V. had by deed conveyed to A. & I. his lands, in consideration that they should pay his debts and pay him \$500 a year during his life. A. & I. did not execute the deed, but they took possession and held the lands, and it is there held that they were personally liable for the debts of V., and it is further held that the land so conveyed to them whilst held by A. & I. would be subjected by a court of equity to pay the debts of V.

The evidence is conflicting as to the making of the note by the decedent, William Ferguson, but is sufficient to sustain the court's finding, and is of such a character that different judges might reasonably disagree as to the facts proved or the conclusion to be deduced from them, and there is certainly not a preponderance of evidence against the execution of the note by the decedent. In such case this court has many times held that it will not disturb a decree based upon such testimony. *Smith v. Yoke*, 27 W. Va. 639; *Doonan v. Glynn*, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Frederick v. Frederick*, 31 W. Va. 556, 8 S. E. 295, and many others later. The decree complained of simply settled the status of the claim sued upon as a debt against the estate, but gave it no priority over other debts against the estate of the decedent, Ferguson, and provided for convening the creditors by referring the cause to a commissioner for that purpose, who was to ascertain and report the indebtedness of the estate, to whom due, the amounts and priorities of the debts, and to show what was due, if anything, to the parties named in the deed, to be paid by the grantee, William V. Ferguson.

There is no reversible error in the decree, and it must be affirmed, and the cause remanded to the circuit court for further proceedings to be therein had.

BRANNON, J. (concurring). Counsel for the defense would defend this case by saying that there is no lien on the land under the deed from William Ferguson to William V. Ferguson, because section 1, c. 75, of the Code of 1899, says that if any person convey land, and the purchase money remain unpaid, there is no lien therefor, unless it is expressly reserved on the face of the conveyance. I hold that that statute has no application to this case. It is true that the purchase money was not paid, and was thereafter to be paid, and at first thought it occurred to me that the point stated was plausible, but on further thought I have come to the conclusion stated. The statute referred to had an obvious purpose. Prior to its enactment, where the legal title was conveyed and the purchase money remained unpaid, there was what was called the vendor's implied lien. It existed by implication for the purchase money, though no lien or charge was spoken in the conveyance. It was very

dangerous to creditors and purchasers, because it was a hidden, secret lien that might arise at any moment, by oral evidence, to afflict the purchaser or creditor. The statute was intended to abolish that particular lien. It was made to defend creditors and purchasers. *Lough v. Michael*, 37 W. Va. 686, 17 S. E. 181, 470. But in this case William Ferguson conveyed the land and created a trust spoken on the very face of the deed, which gave notice to purchasers and creditors of its existence. It is only the case, known long before that statute, in equity law, of a man conveying land to another in trust to hold it for the benefit of some one else or pay him money. It is simply a trust, not secret, but open, not tested by that statute. The only question is whether the words of the deed do create a trust. They certainly do plainly manifest an intent by the grantor to devote the land to answer certain ends, and that is the trust. Very much authority could be cited to support this position. *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *Willard v. Worsham*, 76 Va. 392; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Story's Eq. § 1246*; *Plondexter's Ex'rs v. Green's Ex'rs*, 6 Leigh, 504; *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754.

On the question of the execution of the note the evidence is oral and circumstantial, and so conflicting that different men could readily differ in opinion as to its effect, and on principle well established, unless we feel convinced of error in the circuit court, we cannot reverse it. *Fitzgerald v. Phelps*, 42 W. Va. 570, 26 S. E. 315; *Shaffer v. Shaffer*, 51 W. Va. 126, 41 S. E. 166.

Recurring to the question of lien, I find a case [*Roanoke Brick & Lime Co. v. Simmons*, 20 S. E. 955] reported in 2 Va. Dec. 70, a book of decisions in Virginia not officially reported, holding in just such a case as this the very opposite of our holding; but I think it unsound. Why was the case not officially reported? It holds that "all vendors' liens for the purchase of property, unless reserved on the face of the instrument, are abolished by Code 1849, c. 119, § 1."

Vanmeter's Ex'rs v. Vanmeter, 3 Grat. 148, cited by Judge McWHORTER, was before the statute requiring a vendor's lien to be reserved in the deed, and, if that statute applied to this case, the Vanmeter Case would have no force in our decision; but, as the statute does not enter into the case, the Vanmeter Case is good authority. The deed created a trust to pay debts, and is a clear charge on the land. The trust could not be enforced otherwise than by holding the debts a charge.

(55 W. Va. 681)

BUCK v. NEWBERRY.

(Supreme Court of Appeals of West Virginia.
April 22, 1904.)

TRESPASS — EVIDENCE — LIMITATIONS — APPEAL
— REVIEW — WEIGHT OF EVIDENCE.

1. In an action of trespass for cutting trees, and the deed of the plaintiff excepts certain

tracts within the outside boundary of the land, the plaintiff must show that the trees cut were not on the excepted land.

2. In an action of trespass for cutting trees, under a plea of the statute of limitations, the defendant must show the date of such trespass, and, where part of the cutting of trees was more, and part less, than five years before suit, he must show what part is barred by the statute.

3. Rarely can the Supreme Court set aside a verdict dependent on weight of evidence, and approved by the circuit judge. The Code of 1899, c. 131, § 9, does not, even if it could do so, under the Constitution, direct the courts as to what effect they shall give evidence upon a motion for a new trial.

(Syllabus by the Court.)

Error to Circuit Court, Wyoming County; J. M. Sanders, Judge.

Action by Frank Buck against Harman Newberry. Judgment for defendant, and plaintiff brings error. Affirmed.

Campbell, Holt & Campbell, H. K. Shumate, and J. W. McCreery, for plaintiff in error. Douglas & McGrath, for defendant in error.

BRANNON, J. Frank Buck brought an action of trespass *quare clausum fregit* against Harman Newberry, in the circuit court of Wyoming county, for breaking and entering and cutting trees upon a close of Buck containing 63,000 acres, part of a tract of 480,000 acres of land granted by Virginia to Robert Morris, 23d March, 1795. A deed from Phillip A. Trimble to Buck, under which Buck claimed, reserves from the 63,000-acre boundary four different tracts, which had been previously conveyed to other persons, aggregating 14,000 acres. Newberry pleaded the general issue of not guilty and the statute of limitations. A jury having found for the defendant, the court overruled a motion of Buck for a new trial based on the claim that the finding was contrary to the evidence, and gave judgment for the defendant, and Buck brought the case here.

The case involves only questions of fact, under a large amount of oral evidence. Is the place where the trees were cut within the Morris grant? Is that place within or without the four tracts excepted in the deed from Trimble to Buck? Did the defendant cut the timber? Was the cutting within five years before the suit? These are the questions. No actual possession being shown, it is admitted that, to recover, Buck had to show title to the ground on which the timber was cut, and, to do this, he had to show that the Morris grant covered it. This was a jury question. It depended on oral evidence of surveys, corner trees, and other corners, water courses, ridges, and other circumstances. The evidence to locate the survey, and especially as to a certain line on which the controversy hinged, was not clear, but easily admitted of two opinions. We cannot overrule the jury and the circuit court under this head.

There was no adequate evidence to show that the timber cut was not upon the land excepted in the deed from Trimble to Buck.

The burden was on Buck to show that the cutting was on his land, and, as thousands of acres within the bounds of his deed were never conveyed to him, he must show that the timber was not on those excepted lands. *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531. The cases given on the two hearings of that case will sustain this position.

As to limitation: The evidence shows that some of the cutting was barred, some not. The burden was on the defendant to prove the time of the trespass under this plea, and it was on him to show what part was barred. But this, except as a legal proposition arising on the record, is immaterial, as the verdict is beyond our reach for reasons above stated. We cannot act as a jury. Again and again has this court said that where the case turns on questions of fact, on oral evidence, the jury being the judges, almost uncontrollably, of its weight and effect, we should scarcely ever reverse a verdict. In *State v. Sullivan*, 47 S. E. 267, decided at this term, this subject is discussed; and it is held that where there is some evidence—evidence worthy to be considered—fairly bearing with some weight upon the matter involved, appreciably operative to sustain a verdict, so as to make the case turn on its weight and effect, the verdict rightly ought to stand. Why does the Constitution give the jury trial, if this be not so? It gives it to both sides. When the Supreme Court interferes simply because its judges, if of the jury, would have found the fact otherwise, it is only an act of arbitrary power against the plain meaning of the Constitution. I insist that when there has been a fair trial of fact by a jury, and the verdict is approved by the judge presiding, the opinion of that judge, who witnesses the trial, ought to be highly regarded, is almost conclusive and final, and rarely can be reversed. *Smith v. Parkersburg Association*, 48 W. Va. 232, 37 S. E. 645; *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76. As stated in *Johnson v. Burns*, 39 W. Va. 669, 20 S. E. 686, Code 1899, c. 131, § 9, only causes the evidence, not the ultimate facts, merely, to be certified, so that the appellate court may see the evidence, and that its effect to prove facts shall not be left finally to the trial judge; but the Legislature did not design a subversion and revolution as to the time-honored rules upon the treatment of verdicts and evidence in appellate courts; did not design to give the evidence a new force or effect; did not design to overthrow the weight of verdicts. As is said in the *Johnson Case*, the Legislature could not add new force to evidence, or affect verdicts under it, for that would be the exercise of judicial function, militating against the Constitution, which vests that function in the judiciary. The Legislature cannot trench upon the effect of a verdict. We must not give the statute such a construction. Before it came, the rule was that the trial court certified only the facts which it thought were proven by the

evidence, and not the evidence in detail; but the statute was intended to dispense with the absoluteness of the judge's opinion, and bring before the appellate court the whole evidence, not merely the facts proven by the evidence according to the circuit judge's opinion, and thus present the whole evidence for the consideration of the appellate court.

For these reasons, we affirm the judgment.

(55 W. Va. 663)

McCREERY v. FIRST NAT. BANK OF BLUEFIELD.

(Supreme Court of Appeals of West Virginia.
April 22, 1904.)

**PRESUMPTIONS — FIDUCIARIES — EXECUTORS—
NOTE—COLLATERAL.**

1. Fiduciaries are presumed to have acted in good faith and performed their duty, and not to have committed breaches of trust.

2. Certificates of bank stock in the name of P., taken up by the bank, and reissued to B. P., executor of P., and by B. P. pledged as collateral security for notes made by B. P., the executor, in due course of the administration of the estate of P., cannot be recovered from the bank so holding such certificates by an administrator de bonis non, with the will annexed, of P.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Bill by J. W. McCreery, administrator, against the First National Bank of Bluefield. Decree for defendant, and plaintiff appeals. Affirmed.

R. C. & B. McLaugherty, for appellant.
A. W. Reynolds, for appellee.

McWHORTER, J. Edwin Prince died testate in the year 1894. His will was admitted to probate on the 10th day of December of that year. By his will he appointed his wife, Lockey F. Prince, Burke Prince, his son, and James H. McGinnis, as executors. Burke Prince alone qualified as executor. The others declined to serve as such. Among the assets of the estate which came to the hands of the said executor were \$10,000, par value, of Bank of Hinton stock. Burke Prince, the executor, had the bank take up said stock, and issue certificates thereof to him as executor of Edwin Prince. On the 21st day of November, 1896, Burke Prince made a negotiable note to his brother Ash M. Prince, which was indorsed by the said Ash M. Prince and J. O. Darst & Co., which he had discounted at the First National Bank of Bluefield, and deposited with the bank as collateral security for the note certificates of the said Bank of Hinton stock—15 shares, of the par value of \$100 per share. He also made three other notes to said bank, aggregating the sum of \$619.69, and delivered 10 shares of the said Bank of Hinton stock, amounting to \$1,000, as collateral therefor. Burke Prince, the executor, died in February or March, 1899, and John W. McCreery was appointed on the 28th of March, 1899, as administrator de bonis non with

the will annexed of the estate of said Edwin Prince. Said McCreery filed his bill in the circuit court of Mercer county against the First National Bank of Bluefield to recover from said bank the said Bank of Hinton stock, as belonging to the estate of said Edwin Prince; claiming that Burke Prince, who had possession of them as executor of the will of said Edwin Prince, had disposed of them for his own purposes and individual benefit, and that the same was an illegal and unwarranted use and conversion of said stocks, and an abuse of the trust confided to him by the will of his testator, and, being such, was ineffectual to transfer any interest therein or title thereto to the defendant, and that the said defendant bank had knowledge that said Burke was not the true owner of said stocks, and that he was using and pledging them and obtaining money thereon from the defendant for his own personal individual use and purposes, and to secure the payment of loans of money made to him personally by said defendant bank, and that the said bank occupied no other or higher grounds than said Burke Prince, and that the said bank held said certificates of stock as trustee for the estate of Edwin Prince, deceased, and that a court of equity would compel it to deliver the same to plaintiff, to be disposed of in due course of administration by him as administrator de bonis non with the will annexed of said estate; and prayed that said bank be held to be a trustee of said stock for the use of said estate, and that it be compelled to deliver up the same to plaintiff, and for general relief.

The defendant bank filed its demurrer and answer, averring that the title to the Bank of Hinton stock was not in plaintiff as administrator de bonis non of said Edwin Prince, and that he was not entitled to the possession thereof, and that the said stocks were administered by said Burke Prince, executor of Edwin Prince, and converted, changed, and reduced to possession by him in due course of administration of said estate, so as to completely invest him with the title thereto, and that the title thereto was now invested in the personal representative of said Burke Prince; subject to the pledge thereof as collateral security to the defendant, and subject to all defendant's rights and interest therein, admitting that the said Burke Prince had caused the original certificates to be taken up and to be issued to him in his name as executor of Edwin Prince, deceased, and that, as executor, the said Edwin Prince had made his negotiable note to said Ash M. Prince, payable at said bank, which note was made for the purpose of obtaining money from said bank by Burke Prince, executor, indorsed by said Ash M. Prince, and delivered to the bank, together with 15 shares of the said stock as collateral, contemporaneous with the loan and payment to said Burke Prince of said

\$1,000; that the bank still held the said shares of stock as collateral security, which \$1,000 note was renewed from time to time, the said loan being made on the 21st of November, 1896. Respondent denied that said note was executed and stocks deposited as collateral for the purpose of obtaining said \$1,000, or any part thereof, for the individual and personal use and benefit of said Burke Prince, and, if there was any intention on said Burke's part to use said money for his own purposes in any manner inconsistent with his duties as executor, respondent had no knowledge or notice of it; that respondent's understanding was that Burke Prince was acting in perfect good faith and in lawful manner with said stocks, and it had no notice whatever that said Prince was diverting the effects of said estate from the proper course of administration, and denied that he was doing so; and that it held two other negotiable notes made by said Burke Prince, as "B. Prince," payable at the said bank, one dated February 2, 1899, for \$250, and the other dated February 11, 1899, for \$219.69, both of which were due and unpaid, and for each of which said bank was holding five shares of the said Bank of Hinton stock transferred and pledged to said bank as collateral security for the respective amounts of said notes by said Burke Prince, executor, according to the terms and conditions stipulated in said notes; and denied that said Burke Prince was making any improper use of said stocks, and denied that he obtained said money for his own private benefit, and denied that he did not have the right to so deposit them as such collateral security; that it had no notice when it received the assignment of said original note, and the accompanying transfer of said stock as collateral security therewith, that said Prince obtained said money for his own private use and benefit, or that he was making an improper use of said stocks when he deposited and transferred them as collateral security; and averred that said stocks had been administered upon by said Burke Prince as executor; that their nature had been changed in due course of administration, and that they no longer stood in the name of Edwin Prince, but that they had been transferred, and were then in the name of Burke Prince as executor; and denied that the stocks belonged to the estate of Edwin Prince at the time they were transferred as collateral security, and denied that the transfer by said Burke Prince was improper, and denied all allegations charging it with notice of any and all improper use of said stocks, and the money for which they were deposited as security, and denied that it stood on no higher ground than Burke Prince, or that it held said stock as trustee for the estate of Edwin Prince, deceased, and denied the right of plaintiff to any relief prayed for in his bill.

Depositions were taken and filed in the cause, and the cause heard on the 11th of

February, 1903, on the bill and exhibits, the defendant's demurrer and answer, and exhibits therewith, and general replication, and the depositions of witnesses, and exhibits filed with the same, and upon the copy of the bond of Burke Prince as executor of Edwin Prince, deceased, filed in the cause; and, upon argument of counsel, the court was of opinion that the plaintiff was not entitled to the relief prayed for in the cause, and entered a decree dismissing his bill, and with costs to the defendant.

It is insisted by appellant that the defendant bank could not make loans to the executor, and receive the stocks as collateral, unless it had been made to appear affirmatively that it was for the benefit of the estate. In 7 A. & E. E. L. (1st Ed.) 288, the law is thus stated: "The executor or administrator, having absolute power of disposition over the personal effects, may sell, pledge, or mortgage the assets; and, in the absence of collusion, they cannot be followed by creditors or legatees, either general or specific, into the hands of the alienee, nor is it incumbent upon the purchaser or mortgagee to see the money obtained properly applied, although he may know that he is dealing with an executor. To establish collusion, it must appear that the purchaser or mortgagee participated in the devastavit, or that the sale or mortgage was made by the personal representative as security for, or in payment of, his individual debt. In the latter case the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the devastavit." Citing *McCloud v. Drummond*, 17 Ves. 154. And in *Scott v. Tyler*, 2 Dickens, 712, at page 725, Lord Thurlow says: "It is of great consequence that no rule should be laid down here which may impede executors in their administration, or render their disposition of their testator's effects unsafe or uncertain to the purchaser. His title is complete by sale and delivery. What becomes of the price is no concern to the purchaser. This observation applies equally to mortgages and pledges, and even to the present instance, where assignable bonds were merely pledged without assignment. It applies also where the transaction is with one of many executors, for each is competent." The only evidence tending to bring to the knowledge of the officers of the bank that the money, or any part of it, was to be used by Burke Prince for his individual purposes and benefit, is that of Ash M. Prince, and his testimony is excepted to as being incompetent. It is sought to prove by said Ash M. Prince that the loans of the \$1,000 and the \$219.69 were borrowed for Burke's individual benefit, and that the bank knew it. This was a transaction with Burke Prince. Although Ash M. Prince claims to have negotiated the loans, Burke signed the notes, received the loans, and deposited the Bank of Hinton stock as collateral security

therefor. He was a party to the transactions, and since deceased. In *Fouse v. Gillilan*, 45 W. Va. 213, 32 S. E. 178 (Syl., point 7), it is held: "In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was?" *Owens v. Owens*, 14 W. Va. 88; *Strong v. Dean*, 55 Barb. 337; *Stanley v. Whitney*, 47 Barb. 586; *Anderson v. Jarrett*, 43 W. Va. 246, 27 S. E. 348. Even if the testimony of Ash M. Prince were admissible, his testimony on cross-examination shows that at the time of the negotiation of the \$1,000 note, which was in November, 1896, Burke Prince was in condition to rightfully appropriate to his own use, as one of the heirs of Edwin Prince, more of the assets of the estate than the amounts involved in the transaction in question. When he was asked: "Do you mean to say that, in the transaction in which the \$1,000 was borrowed from the First National Bank, B. Prince and yourself, acting in that transaction for him, were knowingly diverting these Bank of Hinton stocks from the due course of administration of the estate of Edwin Prince?" he answered: "I do not. At that time I supposed that B. Prince had a sufficient interest in the estate, as one of the heirs, to make good the stock that he put up as collateral." And the exhibit filed with the deposition of plaintiff as a witness shows this supposition to be true. Ash M. Prince and Burke Prince were brothers and heirs at law of Edwin Prince, deceased. With the deposition of plaintiff himself, he filed copies of settlements of the executorial accounts of the said Burke Prince, from which it appears that at the beginning of the second settlement, marked "Exhibit No. 3," with said deposition of plaintiff, the account starts out with a balance due, June 2, 1896, from executor, "on last settlement, \$1,192.15"; and, starting with this as a basis, the debits and credits up to the 26th of November, 1896, the date of the negotiation of the \$1,000 note, show there was a difference of between \$5,000 and \$6,000 in favor of the executor, from which it would appear that Ash was right in supposing that his brother had a sufficient interest in the estate, as one of the heirs, to make good the stock he put up as collateral. If the brother, who must have been familiar with the affairs of the estate of his father, being himself an heir, and also one of the sureties on the executor's large bond, of \$100,000, was satisfied with the administration of the estate, knowing that it was at that time largely indebted to the executor, surely the circumstances were not sufficiently suspicious to cause the bank to institute an inquiry into the official conduct of the executor. The presumption is that his acts are legal and all done in good faith. "Administrators and trustees are presumed to have performed their duty, and not to have committed breaches of trust." *Jones on Evidence*, § 12. All knowledge or notice is denied on his part by the testimony of Edwin

Mann, president of the defendant bank; and W. C. Pollock, cashier of the same, who states that he was the officer in charge (Mr. Mann, the president, being away at the time) who received the 15 shares of Bank of Hinton stock as collateral, denied positively all knowledge or notice that the money was being received by said Burke Prince for his individual benefit. "Executors and administrators have authority, unless restricted by statute, to mortgage or pledge the personal property of their decedents for the purpose of raising money or securing debts; and this authority rests on the same principles, is governed by the same rules, and is subject to the same limitations, in general, as apply to sales." 11 A. & E. E. L. (2d Ed.) 1031. And *Id.* 1325: "At common law an administrator de bonis non, as the phrase designating his office implies, succeeds only to such of the assets of the estate as have not been administered by the executor or administrator who preceded him at the time of his death, or are capable of being identified as the property of the decedent, and such of the debts due to the decedent as remain unpaid. With respect to such assets, his powers, duties, and liabilities are the same as those of his predecessor, and he may recover them from the original executor or administrator, or from any one in whose possession they may be found, but he cannot require a settlement of the accounts of the former executor or administrator." In *Gottberg v. Bank*, 28 Abb. N. C. 50, 13 N. Y. Supp. 841, it is said: "There must be direct evidence that the executor or administrator was acting for a purpose not in connection with the administration of the estate, and such evidence is not furnished by the fact that the transaction was in the executor's individual name, and that the pledgee could have ascertained by inquiry that the securities pledged were held by the executor as such." In *Jones v. Clark*, 25 Grat. 642, in speaking for the court, Judge Moncure says: "There can be no doubt but that an executor is invested with the legal title to the assets of his testator which come to his hands for administration, whether they arise from personal estate, or from real estate directed by the will to be sold for the payment of debts and legacies, and sold accordingly by the executor. Nor can there be any doubt but that a bona fide purchaser, for value, and without notice of a portion of such assets, either directly or indirectly, from the executor, will acquire a good title thereto, even though the executor commit a devastavit by making the sale for the purpose of converting the proceeds to his own use, and by actually so converting them." *Fleld v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441. In *U. S.*, for *Wilson v. Walker*, 109 U. S. 258, 8 Sup. Ct. 277, 27 L. Ed. 927, it is held that an administrator de bonis non, appointed in place of an administrator removed, is not entitled to demand of the administrator so removed the proceeds of a claim

against the United States due the intestate, and collected by the former administrator, nor can he maintain suit against the surety of the former administrator to recover damages for failure by the former administrator to pay such sum to the administrator de bonis non; and it was further held that a decree directing such former administrator to pay over to the administrator de bonis non appointed in his place a sum collected by the former from the United States for a claim due to the intestate was void for want of jurisdiction. *Wilson v. Arrick*, 112 U. S. 83, 5 Sup. Ct. 75, 28 L. Ed. 617. In *Sibbs v. Philadelphia Savings Fund Society (Pa.)* 25 Atl. 1119, it is held: "An administrator having reduced a deposit of intestate in a bank to his possession, by having it transferred to his credit as administrator, his personal representatives are, on his death, entitled to receive it from the bank, so that, it having been paid them, the bank cannot be held liable by intestate's administrator de bonis non." *Hartson v. Elden (N. J., Ch.)* 44 Atl. 156.

There is no error in the decree, and the same is affirmed.

(135 N. C. 410)

SMATHERS et al. v. WESTERN CAROLINA BANK et al.

(Supreme Court of North Carolina. May 17, 1904.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—STATUTORY LIABILITY—ENFORCEMENT—ACTIONS BY RECEIVER—CREDITORS' BILLS—TIME OF ENFORCEMENT—COMPLAINT—NECESSARY ALLEGATIONS—STATUTES IMPOSING LIABILITY—CONSTRUCTION.

1. Under Code, § 688, providing that, when a corporation is insolvent, the judge of the superior court having jurisdiction may appoint a receiver to take charge of the estate and effects thereof, and to prosecute all necessary actions either in his own name or in the name of the corporation, and extending the life of the corporation for three years after dissolution for the purpose of winding up its affairs, the receiver of an insolvent corporation may, either in his own name or in that of the corporation, sue to collect the assets of the corporation, and have adjudicated in such suit all legal and equitable matters touching the rights of the corporation, its creditors and debtors.

2. The capital stock of a corporation constitutes a trust fund for the payment of its debts.

3. Unpaid subscriptions to stock in a corporation constitute a part of its assets, and are to be sued for and recovered in the same manner as other assets—at least to the extent that they are necessary for the payment of its debts.

4. The double liability imposed on stockholders in banks by Pub. Laws 1897, p. 473, c. 298, is an obligation to the corporation in trust for the security of its creditors; and while unpaid subscriptions on stock should be first resorted to, before enforcing the double liability, which is a secondary one, such liability cannot, as against creditors or other stockholders, be released by the corporation, and in case of its insolvency it may be enforced by the receiver of the corporation for the benefit of creditors.

5. While there is no necessity for joining creditors of a bank as parties plaintiff in a suit brought by the receiver to enforce the stockholders' double liability imposed by Pub. Laws 1897, p. 473, c. 298, such joinder is not prejudicial to defendants.

6. The usual and better practice to enforce the double liability imposed on stockholders in banks by Pub. Laws 1897, p. 473, c. 298, where a creditors' bill has been previously brought and a receiver appointed, is to seek such relief in the creditors' bill, instead of instituting a separate and subsequent action by the receiver; and in such creditors' bill the court, on the report of the receiver, may ascertain the amount for which each stockholder should be held liable, and assess him accordingly, and issue a notice to each stockholder to show cause why the assessment should not be enforced.

7. In an action by the receiver to enforce the double liability imposed on bank stockholders by Pub. Laws 1897, p. 473, c. 298, the complaint should state the time when the several defendants became stockholders, and the dates when the debts were contracted.

8. The double statutory liability imposed on stockholders in banks by Pub. Laws 1897, p. 473, c. 298, may be enforced by the receiver whenever it appears that the other assets of the bank will be insufficient, and he need not wait until other assets are completely exhausted.

9. Statutes such as Pub. Laws 1897, p. 473, c. 298, imposing on stockholders in banks a double liability, are in derogation of the common law, and should be strictly construed.

10. Pub. Laws 1897, p. 473, c. 298, which imposes on bank stockholders an additional personal liability to the extent of the amount of their stock, and repeals all exemptions from personal liability contained in charters, should be construed to effect only a prospective charge in charters, and not so as to fix such liability on stockholders for debts contracted prior to the enactment of the statute, and, when so construed, is not constitutionally objectionable.

Appeal from Superior Court. Buncombe County; Long, Judge.

Action by George H. Smathers, receiver, and others, against the Western Carolina Bank and others. From a judgment overruling a demurrer to the complaint, defendants appeal. Affirmed.

Merrimon & Merrimon and Moore & Rollins, for appellants. Jones & Jones, for appellees.

CONNOR, J. This action, in the nature of bill in equity, was brought by Geo. H. Smathers, receiver of the Western Carolina Bank, in which a number of creditors, in behalf of themselves and all other creditors of said bank, joined, against the bank and certain stockholders thereof, for the purpose of enforcing the statutory liability imposed upon the stockholders for the indebtedness of the bank by chapter 298, p. 473, Pub. Laws 1897. The complaint sets forth the incorporation and organization of the bank, the names and number of shares held by each stockholder, and date of becoming such stockholder, and the failure of the bank. It further sets forth the institution in the superior court of an action by certain creditors in the nature of a creditors' bill, and the appointment of the plaintiff as receiver. The order of the court is attached to, and made a part of, the complaint. It is in the usual form, and contains the following provision: "It is further ordered that the said receivers take into their charge all the property and assets of the said defendant corporation, and that they shall proceed at once to the collection of

all debts due to the said corporation defendant, and take all such necessary and legal steps for the purpose of such collection; hereby giving to the said receivers full power and authority, in their names as such, to institute and prosecute to final judgment all such suits and actions at law and equity as may be necessary for the purpose of reducing the choses in action and other evidences of debt into possession, and collecting the same," etc. The original order appointed two receivers. One of them resigned, leaving said Smathers sole receiver. Thereafter an order was made in said cause substituting W. W. Jones, Esq., receiver in place of said Smathers. He was made party plaintiff, and an amended complaint was filed, setting forth the order of substitution and adopting the original complaint. It is alleged that the total assets of the bank will not pay to exceed 50 per cent. of its indebtedness. The defendants demurred to the complaint, and assigned as grounds of demurrer (1) that the action should have been brought by the creditors of the bank in their own right, and that the receiver has no cause of action, etc.; (2) that the action should have been brought by the creditors against each individual stockholder; (3) that there is a misjoinder of plaintiffs and defendants; (4) that relief should have been sought in the original action; (5) that it does not appear upon the face of the complaint whether the defendants became stockholders before or after the passage of the act of 1897, p. 473, c. 298, nor when the alleged debts were created or contracted; (6) that it does not appear that the assets of the bank have been exhausted, or that any liability has arisen against the defendants under said act of 1897; (7) that the act is unconstitutional, for that it is *ex post facto* and retroactive, impairs the obligation of contracts, etc.; (8) that no power is conferred upon the receiver to bring the action. His honor overruled the demurrer, and allowed the defendants time to answer. Defendants appealed.

The act of 1897, by which it is sought to attach the liability of the defendants, was ratified March 6, 1897. It provides that the stockholders of every bank or banking association now operating by virtue of any charter or law of this state, or that may hereafter operate, "shall be held individually responsible equally and ratably and not one for another, for all contracts, debts and agreements of such association to the extent of the amounts of their stock therein at the par value thereof in addition to the amount invested in such share." By section 2, any exemption from personal liability contained in any charter is repealed. The Code (section 668) provides that, when any corporation is insolvent, the judge of the superior court having jurisdiction as fixed by the Code (chapter 10) may appoint a receiver to take charge of the estate and effects thereof, and to prosecute all such actions, either in his own name or

the name of the corporation, as may be necessary or proper, etc. Whatever may have been the law in respect to the right of the receiver to prosecute actions for the recovery of the assets, debts, and property of the corporation prior to the change in our judicial system, blending the legal and equitable jurisdiction and power into one tribunal and form of action, it is well settled now, as said by Burwell, J., in *Davis v. Mfg. Co.*, 114 N. C. 321, 19 S. E. 871, 23 L. R. A. 322: "In *Gray v. Lewis*, 94 N. C. 392, it was decided that, as well because of the change in the system of our courts as because of the Statute, the receiver might sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. * * * In it may be adjudicated all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings; and such judgment may be entered as will enforce the rights of the general creditors, and also protect any equities that the defendant may be entitled to," etc. The statute (Code, § 668) expressly extends the life of the corporation for three years after dissolution for the purpose of winding up its affairs. The doctrine that the capital stock of a corporation constitutes a trust fund has been accepted and acted upon by this court. *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539; *Cotton Mills v. Cotton Mills*, 115 N. C. 475, 20 S. E. 770; *Bank v. Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

"It is a favorite doctrine of the American courts that the capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation," etc. 10 Cyc. 553. The same authorities conclusively settle the doctrine that unpaid subscriptions to stock constitute a part of the assets of the corporations, and are to be sued for and recovered in the same manner as other assets—certainly to the extent that they are necessary for the payment of its debts. Judge Thompson, in his very able and exhaustive article on "Corporations," vol. 10, Cyc., says that the remedy for the recovery of such unpaid subscriptions is, in the absence of any statutory provision, in equity; that when, for any reason, it becomes necessary to afford an effective remedy, a court of equity will direct suit to be brought by the directors or by "its own proper officers." Pages 655, 656. Does the liability of the stockholders imposed by the act of 1897 come within the same principle as unpaid subscriptions? It certainly does in respect to the purpose for which it is imposed, and to give the securities to creditors which it designs. It simply incorporates into the contract of subscription the additional obligation that, if necessary to pay

the debts of the corporation, the subscriber will pay an amount in addition to his subscription equal to the par value of his stock. This obligation is to the corporation in trust for the security of its creditors. It is difficult to see in what respect it differs from the promise to pay the amount of his stock, so far as the right of the creditor is concerned, except in the order of liability. The corporation may not, as against creditors or other stockholders, relieve him from the obligation. *Marshall Foundry Co. v. Killian*, supra. The corporation, or those representing or succeeding to its rights and remedies, should collect all unpaid subscriptions before resorting to the additional statutory liability which is secondary to the right to demand payment of the subscription. The receiver represents, and, in a certain sense, succeeds to the rights of, the corporation. We can see no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets or rights of action which it or its creditors could have brought. The exact question raised by the demurrer is presented and decided in *Wilson v. Book*, 13 Wash. 676, 43 Pac. 839. The constitutional provision in that state is the same as the act of 1897. The opinion by Hoyt, C. J., discusses and settles the question. We have no hesitation, after careful examination, in adopting his reasoning and conclusion. He says: "But if this fund is secondary, and for the benefit of all the creditors of the corporation, it can be reached only by a proceeding in equity for the benefit of such creditors; and since, under our statute, the receiver of an insolvent corporation represents its creditors as well as the corporation itself, and can reach all the assets of the corporation for the purpose of satisfying the claims of creditors, there is no reason why the additional liability of stockholders should not, under the direction of the court, be enforced by such receiver for the benefit of such creditors, and the expense and annoyance incident to the prosecution of another action avoided. All the other property of an insolvent corporation is a trust fund for the same purpose, and there is no reason why trust funds for a single purpose, though derived from different sources, should not be collected and administered in the same proceeding. * * * The receiver, when appointed, takes possession of all the property of the corporation for the benefit of all its creditors; and it should be held that he has the right, under the direction of the court, to enforce every liability, of whatever nature, which the court may find it necessary to fully protect the rights of creditors. In this way all creditors share alike, and the entire affairs of the corporation, including the adjustment of the liabilities of its stockholders, will be subject to the control of the court in a single action, and unnecessary delay and expense prevented." The case was

approved in *Watterson v. Masterson*, 15 Wash. 511, 48 Pac. 1041, in which it was held that, after the appointment of a receiver of an insolvent corporation, an action could not be maintained by the creditors to enforce the statutory liability of the stockholders. While there is some divergence of opinion in the different courts in respect to the right of creditors to maintain separate actions upon the statutory liability, we are of the opinion that it is more consonant with principle and convenience of procedure to recognize the right of the receiver to bring the suit wherein all parties in interest are represented, and complete relief afforded.

This view disposes of the first and second grounds of demurrer. In respect to the third ground of demurrer, while we see no necessity for joining the creditors as parties plaintiff, no harm can come to the defendants therefrom.

The fourth ground of demurrer is based upon the suggestion that relief should have been sought in the original action or creditors' bill. There is much force in the contention, and we can see no good reason why, upon motion, the cause should not be consolidated with the original action. In winding up the affairs of an insolvent corporation, it is best that, as nearly as may be, the court having original jurisdiction bring all parties interested in the final decree before it, to the end that their rights and equities be adjusted and administered. The usual and better practice is to have an assessment upon the stockholders made by the court, upon an ascertainment from the report of the receiver, and notice issued to each stockholder to show cause why such assessment should not be enforced. The act of 1891, p. 141, c. 155, in regard to winding up the affairs of insolvent banks, as amended by the Laws of 1899, p. 291, c. 164, transferring to the Corporation Commission the power and duties conferred upon the Treasurer, contemplates this procedure. While, as we have seen, the receiver may recover the amount due from the stockholder, he should be permitted to do so only upon its appearing that there is a deficit in the other assets of the bank, and he should recover only such amount as may be necessary to cover such deficit. It is within the power of the court to make such assessment. *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184. It may be that it would be wise to confer upon the Corporation Commission, having charge of the management of banks, the power to make such assessments after the manner provided in the national banking act, by which the Comptroller does so. The plaintiff will probably encounter practical difficulties in working out a final judgment in this case, many of which would be avoided if the action is consolidated with the original action, wherein he may make his report to the court, showing the amount necessary to collect from the stockholders, and have an assessment

based thereupon. *Von Glahn v. Harris*, 73 N. C. 323.

The fifth ground of demurrer should be sustained. The complaint should be so amended that the defendants will be advised in respect to the time when the several defendants became stockholders, if the list attached to the complaint does not do so, and the dates when the debts were contracted.

The sixth ground of demurrer cannot be sustained. The act of 1897 expressly fixes the liability, unless, for the reasons herein-after stated, the name of the defendants comes within the provisions of the statute. The sixth ground is based upon the theory that no action against the stockholders can be maintained until the assets are "completely exhausted." This cannot be sustained. Whenever it appears that the assets will be insufficient, we see no reason why the receiver may not proceed to enforce the liability. The extent of it cannot be absolutely fixed until the status of the assets and debts has been ascertained.

The seventh ground of demurrer presents the question, for the first time in this court, whether, under the power reserved by article 8, § 1, of the Constitution, to amend or repeal charters, the stockholder can be made individually liable for the debts of a corporation by an amendment to the charter, or a general statute passed subsequent to the charter and subscription to the stock. This is a question of very great importance to the holders of stock in banking and other business corporations in this state. The facts stated in the complaint in respect to the status of the defendant stockholders and date of the contraction of the debts are so meager that we prefer to decide the question only to the extent clearly presented. While the Legislature has not seen fit to attach such personal liability to stockholders in other than banking corporations, the power conferred by the Constitution is not confined to them. It is well settled that statutes attaching such liability are in derogation of the common law, and should be strictly construed. 10 Cyc. 665, citing *Gray v. Coffin*, 9 Cush. 192; *Brunswick Ter. Co. v. Bank*, 192 U. S. 396, 24 Sup. Ct. 314, 48 L. Ed. —. We hold that the statute should not be so construed as to fix such liability upon stockholders for debts or contract, contracted or made prior to the amendment to the charter or the statute. The subscription of stockholders constitutes the contract, and the extent of the liability as to debts already incurred is fixed by the terms of the charter as they then exist. Any change in the charter in this respect must be construed to operate prospectively only. It is well settled that such liability as the stockholder assumes is contractual. *Whitman v. Oxford Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. Thus construed, we find no constitutional objection to the act of 1897.

His honor's ruling upon the demurrer, as modified and limited herein, is affirmed.

(120 Ga. 472)

HILL v. GEORGIA STATE BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. June 10, 1904.)

TAXATION—COLLECTION—TRANSFER OF EXECUTION—APPEAL—CROSS-BILL OF EXCEPTIONS.

1. An execution issued by a tax collector for state and county taxes cannot be lawfully transferred by the tax collector in a county having a population of less than 75,000.

2. When a cross-bill of exceptions presents a question which is controlling upon the case as a whole, the Supreme Court will first consider and dispose of that question; and, if the judgment of the trial court with respect thereto is reversed, the main bill of exceptions will be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by the Georgia State Building & Loan Association against H. D. Hill. Judgment for plaintiff. Defendant brings error. Judgment on cross-bill of exceptions reversed. Writ of error on main bill of exceptions dismissed.

Denny & Harris, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

COBB, J. Prior to 1872 there was no law authorizing any officer to transfer a tax execution. *Smith v. Mason*, 48 Ga. 177; *State v. Wingfield*, 59 Ga. 202. In that year an act was passed which authorized "the officer whose duty it is to enforce" such an execution to transfer it to the party paying the same, and giving such transferee all the rights as to enforcing the execution and priority of payment as might have been exercised before the transfer. This act, with its various amendments, is now embraced in Pol. Code 1895, § 888. Upon what officer is imposed the duty of enforcing a tax execution? Is it upon the officer who issues the execution, or upon the officer who levies it? Executions are enforced by levy, and it would seem that the officer upon whom the duty devolved of enforcing an execution would be the officer who is authorized and required to levy the same. As a general rule, the tax collector has no authority to levy a tax execution. The exception is in counties which contain a population of 75,000 or more. Pol. Code 1895, § 958. Therefore, except in those counties, the authority to transfer a tax execution rests, not with the tax collector, but with the sheriff or other officer who may be authorized by law to levy the same. In 1879, in the case of *Johnson v. Christie*, 64 Ga. 117, it was held by two justices that the Comptroller General had no authority to transfer a tax execution issued by him against wild land. In 1890, in *Scott v. Stewart*, 84 Ga. 772, 11 S. E. 897, the decision in *John-*

son v. Christie was declared to be unsound by two of the justices, but was nevertheless followed in a decision concurred in by the three justices, upon the ground that the decision had been made nearly 11 years before; the bench, the bar, and the people had acted upon it during all that time; property rights had been acquired; and it was not deemed wise to overrule the decision, and bring about the confusion and litigation incident to a change in the decision. The later decision was followed in *Horn v. Johnson*, 87 Ga. 448, 13 S. E. 633. These decisions are controlling in principle where the right of the tax collector to transfer a tax execution is involved. We have not been able to find any direct ruling by this court to the effect that a tax collector cannot transfer a tax execution, but this seems to have been tacitly recognized as the law since the ruling was made that the Comptroller General did not have this authority. See, in this connection, *Freeman v. Holcombe*, 67 Ga. 337; *Fuller v. Dowdell*, 85 Ga. 463, 11 S. E. 773; *Willson v. Herrington*, 86 Ga. 777, 13 S. E. 129; *Blalock v. Buchanan*, 114 Ga. 564, 40 S. E. 717. The prevailing opinion among the bar and the people since the decision in *Johnson v. Christie*, which was rendered nearly 25 years ago, has been that no officer is authorized to transfer a tax execution except the officer who is clothed with the power to levy it. And even if the reasoning at the beginning of this opinion may not be to every legal mind altogether satisfactory, the reason for allowing the principle of the decision in *Johnson v. Christie* to now be operative bears upon us at this time with greater force than it did upon the court as constituted in 1890, when the decision in *Scott v. Stewart* was rendered. In the case now before us—an action for the recovery of land—the evidence demanded a finding in favor of the plaintiff on the question of title, unless the defendant had succeeded in establishing a title derived through a tax sale. The validity of the tax sale depended upon the question of whether a tax execution could be lawfully transferred by the tax collector of Floyd county—a county having a population of less than 75,000. Having reached the conclusion that this cannot be done, the only legal result that could have been reached was a verdict for the plaintiff on the question of title. While the court directed a verdict for the plaintiff on another theory of the case, and the defendant complains that the court erred in so doing, the plaintiff also by cross-bill complains that the court erred in admitting in evidence the sheriff's deed and the tax execution under which the levy was made, upon the ground that the tax execution had been illegally transferred; and in this ruling we think the court erred. The execution and the deed should have been excluded from evidence. As the point thus raised in the cross-bill is controlling upon the

¶ 1. See *Taxation*, vol. 45, Cent. Dig. § 1168.

case, we have decided the question in the cross-bill first. *Monroe v. Lippman*, 115 Ga. 164, 41 S. E. 717, and citations. When a case is absolutely controlled by the decision of the assignments of error in the cross-bill, as will be seen from the case just cited, the usual practice has been to dismiss the writ of error on the main bill; the effect of the dismissal being to allow the judgment complained of in that bill to stand affirmed. We see no reason for departing from this practice in the present case.

All of the assignments of error except one refer to matters which are entirely immaterial, under the view we have taken of the case. In the one assignment of error just referred to, the defendant complains that the court, after having directed the jury to find in favor of the plaintiff on the question of title and mesne profits at the lowest proved amount, instructed them to find, in addition, that the defendant be subrogated to the rights of the transferee under the tax execution; the complaint being that there were no pleadings to authorize such a direction, nor were there proper parties before the court. This direction, as is apparent, was in favor of the defendant. The plaintiff is not complaining, and, if the pleadings are not sufficient, and the court did not have before it proper parties to authorize the direction, we would not reverse the judgment for this reason at the instance of the defendant. If this part of the verdict confers upon the defendant no rights, no harm has been done. If it has the effect to confer upon him any rights of which he does not desire to avail himself, he is at liberty to enter upon the records of the court a written renunciation of all rights under the verdict.

Judgment on the cross-bill of exceptions reversed. Writ of error on the main bill of exceptions dismissed. All the Justices concurring.

(120 Ga. 358)

GRIER v. NORTH & SOUTH MACON ST. RY. CO.

(Supreme Court of Georgia. June 9, 1904.)

TROVER—NONSUIT—EVIDENCE OF TITLE.

1. This being an action of trover, and the evidence introduced in behalf of the plaintiff showing that title to the property sued for was not in the plaintiff at the time the suit was filed, there was no error in granting a nonsuit, or in refusing to strike the defendant's answer, which set forth substantially the facts disclosed by the evidence for the plaintiff.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Clark Grier against the North & South Macon Street Railway Company. Judgment for defendant, and plaintiff brings error.

This was an action of trover to recover 30 electric railway poles. In 1901 Sparks, the president of the defendant company, wrote to plaintiff a letter, stating that: "You can ship me 125 poles at the prices named in your favor of the 25th. I want black cypress. Get me good ones." What these prices were does not distinctly appear. 125 poles were shipped by plaintiff to defendant in compliance with this order. On March 4, 1902, Sparks wrote plaintiff, inclosing a check for \$100, and stating that he would use as many of the poles as possible, and the balance of the purchase price would be sent later. The defendant afterwards declined to pay for 30 of the poles on the ground that they were not of the character ordered. The present action is brought to recover these poles. On September 20th plaintiff wrote to Sparks inquiring as to the number of poles used, and asking for a statement, and for payment of any balance which might be due him. Sparks answered this letter, stating that there was no balance due plaintiff. On November 27th Sparks wrote plaintiff, inclosing a statement showing a balance in favor of plaintiff of \$19.25, a check for which amount was inclosed. This statement charged plaintiff with the \$100 previously paid; freight, \$33; "30 poles condemned at \$1.50, \$45"; draft inclosed, \$19.25. Nothing further was done by plaintiff until in December, 1902, when he employed counsel to recover the 30 poles for which the defendant had not paid him. His counsel wrote to Sparks, making demand on him for the 30 poles. Sparks replied to this letter, stating that he could not return the poles because he had used them for fence posts, and that he was willing to pay whatever they were worth for that purpose. On the trial the plaintiff testified that the 125 poles were shipped defendant "on approval." The court overruled a demurrer to defendant's answer, and granted a nonsuit. To both of these judgments the plaintiff excepted.

Akerman & Akerman, for plaintiff in error. W. C. Nottingham and Bacon, Miller & Brunson, for defendant in error.

COBB, J. (after stating the foregoing facts). The theory of the plaintiff's case was that the contract between the parties was one of bailment; that the 125 poles were shipped to the defendant under an understanding that it was to accept such as were satisfactory, and reject those which were unsuited to the purpose for which they were ordered; that those rejected remained the property of the plaintiff, no title having passed until after acceptance; and that, the 30 poles having been rejected, defendant never acquired title to them, and its use of them for fence posts was a conversion. The defendant's theory was that the contract was a sale with a warranty of fitness, that title passed to all of the poles, and that there had

¶ 1. See *Trover and Conversion*, vol. 47, Cent. Dig. §§ 119, 121.

been a breach of the warranty as to 30 of the poles. If the defendant's theory was correct, it had a perfect right to keep all of the poles, notwithstanding there might have been a breach of the warranty as to some of them, and claim a deduction from the purchase price for whatever amount was represented by the difference in value between the poles as contracted for and as actually furnished. See *Cook v. Finch*, 117 Ga. 541, 44 S. E. 95. When the evidence is taken as a whole, this seems to be the truth of the case. The plaintiff testified that the poles were shipped to the defendant "on approval," and the correspondence seems to indicate an ordinary sale with a warranty as to fitness. If there is any conflict between the oral testimony and the correspondence, the latter ought to control. Taking this correspondence in its entirety, we think the trial judge reached the right conclusion, and that there was no error in granting a nonsuit or in refusing to strike the defendant's answer, which set forth substantially the facts as they appeared in evidence.

Judgment affirmed. All the Justices concurring.

(120 Ga. 418)

JOLLY et al. v. MATTHEWS.

(Supreme Court of Georgia. June 9, 1904.)

APPEAL—REVIEW.

1. The errors assigned were that the verdict was contrary to law and without evidence to support it, and contrary to a designated portion of the charge of the court. The evidence, though conflicting, was sufficient to authorize the verdict, and the judgment overruling the motion for new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between T. F. Jolly and others and S. A. Matthews. From the judgment, Jolly and others bring error. Affirmed.

Starr & Erwin, for plaintiffs in error. Cantrell & Ramsaur, for defendant in error.

EVANS, J. Affirmed. All the Justices concurring.

(120 Ga. 379)

HARPER v. RICHARDS.

(Supreme Court of Georgia. June 9, 1904.)

TROVER—PETITION—DESCRIPTION OF PROPERTY.

1. Where, in an action of trover and bail, the property sought to be recovered is described as "a certain watermelon, imperial species, dark colored, faint white striped, weight 67 pounds, of the value of fifty cents," the description is sufficient to identify the property, and the petition is not demurrable for insufficiency of the description of the property alleged to have been converted. *Farmers' Alliance Warehouse Co. v. McElhannon*, 25 S. E. 558, 98 Ga. 394; 6 Enc. Pl. & Pr. 658, and cases cited in note 1.

(Syllabus by the Court.)

Error from City Court of Washington; W. H. Toomba, Judge.

Action by W. P. Harper against Reginald Richards. Judgment for defendant, and plaintiff brings error. Reversed.

James M. Pitner, for plaintiff in error. W. A. Slaton, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concurring.

(120 Ga. 312)

NELSON v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

CRIMINAL LAW—CERTIORARI.

1. There being no complaint that any error of law was committed by the trial court, and the evidence, though circumstantial, being sufficient to authorize the verdict, the judge of the superior court did not err in overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Judge.

Bob Nelson was convicted of crime. From an order refusing a certiorari, he brings error. Affirmed.

C. E. Brunson, for plaintiff in error. Wm. Brunson, Sol. Gen., for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 418)

KIMSEY et al. v. ALLISON.

(Supreme Court of Georgia. June 9, 1904.)

WILLS—REVOCATION—EVIDENCE.

1. Where to the probate of a will a caveat is filed upon the ground that the testator had revoked it, declarations accompanying an act of revocation or attempted revocation are admissible in evidence (*Patterson v. Hickey*, 32 Ga. 156; *Cobb v. Battle*, 34 Ga. 458); but declarations of a testator that his will had been lost or stolen, and that it was no longer his will, these declarations not accompanying any act which could be construed as an act of revocation or attempted revocation, are inadmissible (*Mallery v. Young*, 22 S. E. 142, 94 Ga. 804; *Jones v. Grogan*, 25 S. E. 590, 98 Ga. 552; 1 Gr. Ev. [16th Ed.] § 108).

2. The evidence authorized the verdict, and there was no abuse of discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; B. D. Evans, Judge.

Action between J. J. Kimsey and others and W. T. Allison. From the judgment Kimsey and others bring error. Affirmed.

J. C. Edwards and J. B. Jones, for plaintiffs in error. Howard Thompson and H. F. Perry, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring, except EVANS, J., disqualified.

(120 Ga. 319)

ALLEN v. KESSLER.

(Supreme Court of Georgia. June 8, 1904.)

NEW TRIAL—EXCLUSION OF EVIDENCE.

1. The general rule is that, in order for the exclusion of oral evidence to be considered as a ground for a new trial, it must appear that a pertinent question was asked, that the court refused to allow the answer, and that a statement was made to the court at the time showing what the answer would be, and that such testimony was material and would have benefited the complaining party. *Griffin v. Henderson*, 43 S. E. 712, 117 Ga. 382, and citations. In view of this rule, neither of the grounds of the amended motion for a new trial properly presents any question for determination.

2. The verdict was warranted by the evidence. (Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action between Amy Allen and Henry Kessler. From the judgment, Allen brings error. Affirmed.

Daley, Moore & Cochran, for plaintiff in error. M. R. Freeman and Hardeman, Davis, Turner & Jones, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 305)

GRAY v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

CRIMINAL LAW—NEW TRIAL—GROUNDS.

1. The motion for a new trial, the overruling of which is the only ground of complaint in the bill of exceptions, does not attack any ruling of the trial judge as being erroneous in law, but complains merely that the verdict was contrary to law and the evidence. The evidence for the state made out a clear case of murder. This was met only by the statement of the accused. The verdict finding the accused guilty as charged was fully warranted, and the judgment overruling the motion for a new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Elton Gray was convicted of crime, and brings error. Affirmed.

Crum & Jones and W. H. Dorris, for plaintiff in error. F. A. Hooper, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

CANDLER, J. Affirmed. All the Justices concur.

(120 Ga. 388)

DOTSON v. HAWES.

(Supreme Court of Georgia. June 9, 1904.)

CERTIORARI TO JUSTICE—DISMISSAL.

1. No disputed issue of fact was raised by the petition for certiorari, and its dismissal on the ground stated in the record was therefore erroneous.

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. G. Lewis, Judge.

Action by W. M. Hawes against Austin Dotson. Judgment of justice court for plaintiff. From an order dismissing the petition for certiorari, defendant brings error. Reversed.

L. D. McGregor and S. H. Sibley, for plaintiff in error. Wm. M. Hawes, for defendant in error.

CANDLER, J. The plaintiff in error excepts to the dismissal by the superior court of his petition for certiorari from the judgment of a justice of the peace. It appears from the record that the sole ground for dismissing the petition was that it sought to review questions of both law and fact, and that therefore certiorari was not available as a remedy. Our consideration of the case will therefore not include a decision of the points sought to be raised by the petition, for they have not yet been passed upon by the lower court; but will be confined to a determination of whether, under the petition, disputed issues of fact were brought up for review.

The case in the justice's court arose on an affidavit of illegality filed to arrest the foreclosure of a bill of sale. The defendant in that court was the plaintiff in certiorari, and is the plaintiff in error in this court. In his petition for certiorari he recites the introduction by the plaintiff in *fi. fa.* of numerous documents to which objection was made for alleged defects apparent on the face of the record, and upon the admission of which in evidence he assigns error. He also recites the introduction of certain documentary evidence in his own behalf, and the rulings of the magistrate as to the probative value thereof, to which he likewise excepted. We are unable to find anything in the petition for certiorari which raises what could properly be termed a disputed issue of fact. The nearest approach to such an issue is the point made as to the effect of certain of the papers introduced in evidence, and, as nothing more than a construction of those papers is involved, it cannot be said that an issue of fact is raised. The case falls squarely within the test prescribed by Mr. Justice Cobb in *Toole v. Edmondson*, 104 Ga. 784, 31 S. E. 29, to determine whether a case involves a question of law or one of fact: "If, upon considering the entire evidence, whether it be derived from an agreed statement of facts, oral testimony, documents, or other source, it would be proper, if the case were on trial in the superior court, for the judge to direct a verdict, a question of law only would be involved." Such a case is presented by the present record, and it was therefore error for the court below to dismiss the petition for certiorari.

Judgment reversed. All the Justices concur.

(120 Ga. 343)

SHARP v. JONES.

(Supreme Court of Georgia. June 8, 1904.)

APPEAL—REVIEW—NEW TRIAL.

1. The sole issue was the location of a line between coterminous landowners deriving title from a common grantor. There was evidence tending to support the contentions of both parties. The verdict was approved by the trial judge, and, as no error of law is complained of, the judgment overruling the motion for new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action between M. E. Sharp and L. P. Jones. From the judgment, Sharp brings error. Affirmed.

W. R. Hutcheson, for plaintiff in error.
E. S. Griffith and James Beall, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 311)

FROST v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

GAMING—EVIDENCE.

1. The defendant was indicted for the offense of playing and betting at cards. The evidence disclosed that in a certain house one of the persons named in the indictment was lying on the floor, supported on his elbows, with his head from under the bed, shuffling a deck of cards. The others were arranged around in a circle, in the center of which was 30 or 40 cents in nickels. The defendant was included among those who were in the circle, and was on his knees. This was the tableau which met the gaze of the police officer and another person who was with him, when, without warning, they entered the house. The jury could infer from this evidence the defendant's guilt, and their finding, approved by the trial judge, will not be disturbed.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

George Frost was convicted of gambling, and brings error. Affirmed.

A. H. Thompson, for plaintiff in error.
Henry Reeves, for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 465)

SOUTHERN RY. CO. v. CLARIDAY.

(Supreme Court of Georgia. June 10, 1904.)

NEW TRIAL—INSTRUCTIONS—ISSUES.

1. Where, on the trial of an action for damages for personal injuries, counsel for the plaintiff announced to the court and jury that he claimed nothing for permanent injuries, a charge of the court, which, fairly construed, authorized a recovery for permanent injuries, was erroneous, and, when the verdict for the plaintiff was, under the evidence, extremely liberal, cause for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by Henry Clariday against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Shumate & Maddox and Harkins & Dodd, for plaintiff in error. W. R. Rankin, for defendant in error.

FISH, P. J. Clariday sued the Southern Railway Company for damages for personal injuries. There was a verdict for the plaintiff. To the overruling of its motion for a new trial the defendant excepted. On the trial plaintiff's counsel announced to the court and jury that the plaintiff claimed nothing for permanent injuries. The court instructed the jury as follows: "In the event you should find that he [the plaintiff] has not entirely recovered, and is still unable to do as much manual labor as he would had he not been injured, you would allow him something for that, from now up to the time he would entirely recover, and would get the present value of that at seven per cent." Error is assigned upon this charge in the motion for a new trial, one of the grounds of alleged error being that it in effect authorized a recovery of damages for permanent injuries in the face of the fact that plaintiff's counsel had announced to the court and jury that none were claimed. We think the point well taken. While the words "permanent injuries" were not in the charge excepted to, the language used plainly authorized a recovery for the plaintiff's diminished physical capacity to work from the time of the trial to some indefinite period in the future when he might entirely recover. Such a recovery would certainly be for future disability to labor, and might possibly cover permanent disability. The amount of the verdict was extremely liberal, and the error in the charge requires the grant of a new trial.

Judgment reversed. All the Justices concurring.

(120 Ga. 385)

HIXON v. ASBURY et al.

(Supreme Court of Georgia. June 9, 1904.)

OBJECTION TO EVIDENCE.

1. "An objection made generally to the introduction of specified evidence as a whole is not well taken when some of it is admissible." Ray v. Camp, 36 S. E. 242, 110 Ga. 818.

(Syllabus by the Court.)

Error from Superior Court, Taliaferro County; B. D. Evans, Judge.

Action between J. W. Hixon and Robert Asbury and others. From the judgment, Hixon brings error. Affirmed.

Colley & Sims, for plaintiff in error. Saml. H. Sibley, for defendants in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring, except **EVANS, J.**, disqualified.

(120 Ga. 451)

KNOWLES et ux. v. STEGALL.

(Supreme Court of Georgia. June 10, 1904.)

TROVER—FORECLOSURE OF LANDLORD'S LIEN—INSTRUCTIONS.

1. Where a tenant brought trover for a portion of a crop made by him and levied on under execution against him in favor of his landlord, issued upon proceedings to foreclose a landlord's lien for supplies furnished to make the crop, which, after the levy, was sold at private sale by the landlord, it was erroneous to give in charge to the jury an instruction which could be fairly construed to mean that the failure of the tenant to file a counter affidavit in the foreclosure proceedings would prevent a recovery by him in the trover suit.

(Syllabus by the Court.)

Error from City Court of Cartersville; **A. M. Foute, Judge.**

Action by **James Knowles** and wife against **J. P. Stegall**. Judgment for defendant, and plaintiffs bring error. Reversed.

J. B. Conyers, for plaintiffs in error. **G. H. Aubrey** and **T. O. Milner**, for defendant in error.

FISH, P. J. Knowles and wife brought trover against Stegall for certain corn. There was a verdict for defendant. Plaintiffs moved for a new trial, which was refused, and they excepted.

On the trial it appeared that the corn had been levied on under an execution issued upon proceedings, brought by Stegall against Knowles, to foreclose a lien which the former claimed, as landlord, for supplies furnished to the latter, as his tenant, to make the crop of which the corn was a part. After the levy, Stegall sold the corn at private sale, and the case turned largely upon his right to so dispose of it. He contended that he had express authority from Knowles to do so. Knowles denied this, and he and his wife contended that the corn was not subject to the execution. In the motion for a new trial, complaint was made, in general terms, of several excerpts from the charge of the court to the jury. These instructions, with one exception, we think, state correct abstract principles of law; so they require no further consideration. *Anderson v. Southern Railway Co.*, 107 Ga. 500, 33 S. E. 644. The court charged the jury as follows: "I charge you further that where a lien *fi. fa.*, such as the one in evidence here, is levied upon property of the defendant in *fi. fa.*, that a counter affidavit is the proper remedy for the defendant. You look to the evidence and see if any counter affidavit was filed by the defendant in this case." While the assignment of error upon this charge was general, we think it meritorious, as the charge was not a correct or accurate statement of

the law, and an examination of the record discloses that the complaining parties were injured thereby. *Anderson v. Southern Railway Co.*, supra. The jury might well have understood from this charge that the only proper remedy Knowles had, when his crop was levied on, was to file a counter affidavit, and, if he had failed to do this, he and his wife could not recover in trover, though the corn sued for had been illegally seized under the execution, and subsequently sold by Stegall without authority. It did not appear that a counter affidavit had been filed. A new trial should have been granted.

Judgment reversed. All the Justices concurring.

(120 Ga. 414)

BLACKSTOCK v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 9, 1904.)

NUISANCE—ACTION FOR DAMAGES—PLEADING—EVIDENCE.

1. In an action for damages alleged to have been sustained by reason of the erection and maintenance of a nuisance by the defendant, it is not erroneous to refuse to allow the plaintiff to amend his petition by striking therefrom the allegation as to the erection of the nuisance, and by alleging that prior to the time the damages sued for are alleged to have accrued he gave notice to the defendant of the existence of the nuisance, and requested an abatement of the same, and that the defendant failed to comply with such request.

2. Where, in such an action, the defendant denies the allegations as to the erection and maintenance of the nuisance, and the evidence for the plaintiff fails to show that the nuisance was erected by the defendant, a nonsuit is proper.

(Syllabus by the Court.)

Error from Superior Court, Hall County; **J. J. Kimsey, Judge.**

Action by **J. R. Blackstock** against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. H. Dean, for plaintiff in error. **John J. Strickland**, for defendant in error.

FISH, P. J. The plaintiff brought his action for damages against the Southern Railway Company. The petition alleges that the track of the defendant company runs through and over the lands of the plaintiff and over Mud creek on such lands; "that the culvert or opening constructed by said Southern Railway Company over said Mud creek" where the creek "runs over said road of said defendant company is too small to allow the free passage of water in times of rain, and is improperly constructed, and has been allowed by the Southern Railway Company to remain partially filled with mud, sand, and debris, and for the past four years has backed the water of said Mud creek over and upon petitioner's land, and caused said land to sour, and become unfit for cultivation"; that "some twenty-five or thirty acres of said land

has been injured by the backwater from said embankment of said Southern Railway Company; and by reason of the defective culvert, and by reason of said culvert being too small to allow the free passage of water, and by reason of said culvert being allowed to fill up with said mud, sand, and debris," he has been unable to make his usual crop on the land, and the land has been too wet for cultivation; and that he has, in consequence thereof, been damaged in a stated amount. The trial resulted in a nonsuit. In the bill of exceptions error is assigned upon the grant of the nonsuit, and also upon the refusal of the court, pending the argument upon the motion for a nonsuit, to allow the plaintiff to amend his petition by striking therefrom the allegation as to the construction of the culvert by the defendant company, and the further refusal to allow him to amend the petition by alleging that he gave notice to the defendant company, before suit was brought, for some six or eight years continuously, of the existence of the nuisance, and requested the abatement of the same. Another assignment of error is that the court erred in overruling the plaintiff's motion to rule out certain testimony of one of his witnesses, brought out on cross-examination, tending to show that at the time the culvert was constructed a different railroad company was operating the road.

1. It is very clear that the cause of action set forth in the petition was the erection of a nuisance by the defendant company, from which the plaintiff suffered damage. In setting forth such a cause of action it was not necessary to allege notice to the defendant company to abate the nuisance. Consequently, if the purpose of the proposed amendments was not to change the action from one for the erection and maintenance of a nuisance to one for continuing a nuisance erected by another, after notice to abate the same, the disallowance of the amendments worked no injury to the plaintiff. But if, as it appears to us was evidently the case, the purpose of the amendments was to so change the action, the court very properly refused to allow them. That this was the purpose of these offered amendments appears clear from the fact that one of them proposed to strike the allegation as to the erection of the nuisance by the defendant, and the other to lay the foundation for an action for continuing the nuisance after notice to abate it. Such being the apparent purpose of the amendments, if they had been allowed a new cause of action would have been set up. Where a person has purchased land upon which a nuisance, erected by a former owner, exists, no cause of action in favor of one injured by the nuisance arises against such alienee until he has received and disregarded a notice to abate it. Although the courts are not harmonious in holding that notice to abate is necessary in order to lay the foundation for an action

against the alienee of the erector of a nuisance for a continuance of the same, there is an abundance of authority to this effect, following *Penruddock's Case*, 5 Coke, 100, 101. So far as this state is concerned, our Civil Code of 1895 is conclusive of the matter. Section 8862 provides: "The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate, before action is brought." If, before an action can be brought against the alienee of the property causing the nuisance, there must be a request to abate the nuisance, then it is evident that no cause of action arises against such alienee until such request is made. The cause of action against him is continuing a nuisance after having been notified of its existence and requested to abate it. The remarks of Mr. Justice Cobb in *Southern Railway Company v. Cook*, 106 Ga. 453, 32 S. E. 585, are very appropriate here, as showing the difference between the cause of action set forth in the original petition in the present case and the cause of action which would have been set forth if the amendments had been allowed. He said: "One who erects a nuisance and also maintains the same is liable to any one who is injured thereby, and no notice of the harmful effects resulting from the nuisance or request to abate the same is necessary to maintain an action against such person. If, however, a person come into possession of property upon which there is an existing nuisance, before an action can be maintained against such person for continuing the nuisance it is essential that there should be a request to abate it before any liability for maintaining the same would arise"—citing *Bonner v. Welborn*, 7 Ga. 296, 314; *W. & A. R. Co. v. Cox*, 93 Ga. 561, 20 S. E. 68; *Middlebrooks v. Mayne*, 96 Ga. 449, 452, 23 S. E. 398. It follows that the ruling of the court in refusing to allow these amendments must be sustained.

2. As the plaintiff's cause of action was for damages alleged to have been sustained by him in consequence of the erection and maintenance of a nuisance by the defendant, he could not recover without showing that the nuisance was erected by the defendant, unless the defendant admitted this. The defendant expressly denied the whole of the paragraph of the petition wherein the erection and maintenance of the nuisance was alleged. This put the burden upon the plaintiff of proving his allegation that the nuisance was erected by the defendant. He failed to carry this burden, for, at most, his evidence merely showed that the nuisance was on the right of way of the defendant company. A nuisance caused by the improper construction of a railroad over a creek, whereby the waters of the creek are backed over the land of the plaintiff, may well exist on the right

of way of a particular railroad company, without showing that such railroad company erected the nuisance. The railroad company may have acquired the road after its construction and the erection of the nuisance. Because a railroad company may own and operate a particular railroad, there is no presumption that it built the road, or constructed an old embankment and culvert forming a part of the same. Certainly there can be no such presumption when it expressly denies that it constructed the embankment and the culvert. The plaintiff having alleged that the defendant erected the nuisance, the defendant having denied this allegation, there being no evidence to sustain it, and the evidence showing that whatever damages the plaintiff suffered were caused by the defective construction of the culvert, a verdict for the plaintiff, if rendered, would have been without evidence to support it. Consequently the grant of a nonsuit was eminently proper. As will have been seen, we have reached this conclusion without considering the testimony tending to show that the nuisance was erected by a predecessor of the defendant company. So it matters not whether this testimony was rightly or wrongly admitted by the court.

Judgment affirmed. All the Justices concurring.

(120 Ga. 338)

AKRIDGE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. June 8, 1904.)

DIRECTING NONSUIT.

1. While the evidence in behalf of the plaintiff was not sufficient to have required a verdict in his behalf, it was sufficient to have supported such a verdict if rendered, and it was therefore erroneous to grant a nonsuit.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by A. D. Akridge against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

M. W. Harris and M. F. Hatcher, for plaintiff in error. Hall & Wimberly and J. E. Hall, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concurring.

(120 Ga. 334)

GEORGIA SOUTHERN & F. RY. CO. v. PEARSON.

(Supreme Court of Georgia. June 10, 1904.)

VENUE—ACTION AGAINST RAILROAD COMPANY—EJECTION OF PASSENGER.

1. An action against a railway company for a tort may be brought in the county of the residence of the company, when it has no agent in the county where the cause of action arose.

2. Where a passenger purchased a ticket for his transportation over several connecting railroads, and, after using the same for his passage over the initial road, was ejected from a train on a connecting road because of the failure of the agent of the company from which he purchased the ticket to properly stamp the same, his alleged cause of action against the company that sold him the ticket, for such wrongful ejection, originated in the county where the ejection occurred, and not in the one where the ticket was purchased.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by B. H. Pearson against the Georgia Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Hall & Wimberly and E. O. Jordan, for plaintiff in error. Ross & Grace and R. L. Anderson, for defendant in error.

FISH, P. J. B. H. Pearson sued the Georgia Southern & Florida Railway Company in the city court of Macon. The allegations of his petition, so far as material to the question presented for our decision, were as follows: The defendant "is a corporation operating its business in the state of Georgia, and having its principal office and residence in said county of Bibb." On May 24, 1902, plaintiff purchased a ticket from the agent of the defendant at Cordele, Ga., for transportation from that point to Charleston, S. C., and return, via the Georgia Southern & Florida Railway, the Georgia Railroad, and the Southern Railway. He used the ticket to Macon, and there boarded a train on the Georgia Railroad for Augusta; and, when he tendered his ticket to the conductor on that train, it was refused because the selling agent of the defendant at Cordele had failed to properly stamp it. At Milledgeville he was ejected from the train of the Georgia Railroad Company, and had to purchase a ticket to Augusta, and at Augusta had to purchase one to Charleston, and at Charleston had to purchase one back to Cordele. He paid out for such tickets \$3.97. He was ejected from the Georgia Railroad train because of the negligence of the defendant's agent at Cordele in failing to properly stamp his ticket. The ejection caused him great mortification and humiliation, and by reason thereof, and the additional expense to which he was put, he was injured and damaged in the sum of \$1,000. It was further alleged "that defendant company has no agent in the county of Baldwin, where said cause of action originated." The petition was demurred to upon three grounds, the first of which was met by an appropriate amendment. The second was: "This defendant demurs generally to said petition because there are two separate and distinct actions therein contained—one action for breach of contract, and the other an action for damages in tort." The third ground of demurrer was that the petition "shows on

its face that the county of Bibb, in which said suit is instituted, has not jurisdiction of the cause of action set out in said petition, as neither the contract was made in the county of Bibb, nor was the plaintiff ejected from the train in the county of Bibb, or ejected in any county through which the line of this defendant's road extends." The demurrer was overruled, and the case is here upon a bill of exceptions sued out by the defendant company assigning error upon such ruling.

Counsel for the plaintiff in error, both in their brief and in oral argument, stated that the second ground of demurrer was not relied on, but was abandoned. The sole question for our decision, therefore, is one of jurisdiction; that is, whether the suit could be properly brought in the county of Bibb. The action was not for a breach of contract, but was for a tort by breach of duty. In the language of Chief Justice Bleckley in *Head v. Georgia Pacific Railway Co.*, 79 Ga. 360, 7 S. E. 218, 11 Am. St. Rep. 434: "It was an action upon the case for a wrong, not an action of assumpsit for a breach of the contract. It went upon the theory that the contract established the relation of carrier and passenger—a relation attended with a duty from the former to the latter—and that the duty was wrongfully violated. Where the plaintiff has a contract with the defendant which generates a relation attended with a public duty, he has his option to bring assumpsit for breach of the contract, or case for breach of the duty. Here the plaintiff brought a proper action; the contract being set out merely as inducement, with a view to raise the relation; the stress of the action being put upon his expulsion from the train, which, if wrongful, was not only a breach of the contract, but a violation of a public duty by a common carrier." In such a case, as was there held, "punitive as well as actual damages are recoverable if the circumstances of the particular case warrant such recovery." To the same effect, see *City & Suburban Railway v. Brauss*, 70 Ga. 368; *Central Railroad Co. v. Pickett*, 87 Ga. 784, 13 S. E. 750; *Seals v. Augusta Southern R. Co.*, 102 Ga. 817, 29 S. E. 116. Indeed, counsel for plaintiff in error admitted, both in their brief and their oral argument, that the action was not on contract, but was for an alleged tort. Civ. Code 1895, § 2334, requires that "all railroad companies shall be sued in the county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, * * * for the purpose of recovering damages for such injuries. * * * But if the cause of action arises in a county where the railroad company liable to suit has no agent, then the suit may be brought in the county of the residence of such company." What was the cause of action in the present case? It was the breach of the public duty which the defendant company owed to the plaintiff under the relation of carrier and passenger between

them established by the contract. This cause of action must have originated where the breach of duty occurred. In our opinion, this was in Baldwin county. Whatever may be the law in other jurisdictions, in this state a railroad company which sells and issues to a passenger a ticket for his transportation over its own line of road and over the lines of other railroad companies is liable for his safe and sure transportation to the point of destination. *Central Railroad v. Combs*, 70 Ga. 533, 48 Am. Rep. 582. This is also the rule which obtains in England. *Great Western Ry. Co. v. Blake*, 7 H. & N. 987; *Buxton v. Northeastern Ry. Co.*, L. R. 3 Q. B. 549. But in the great majority of the states of the Union the railroad company issuing such a through ticket is liable to the passenger for his safe transportation only as to its own lines of road. 2 Woods, Ry. Law, 1418, and cases cited in note. The law of Georgia being as above stated, when the defendant company sold and issued to the plaintiff a ticket for his transportation from Cordele, Ga., to Charleston, S. O., and back, it undertook, for the consideration which it had received, to safely transport him over its own and the connecting lines of railroad specified in the ticket from Cordele to Charleston and return; and the public duty which it thus assumed was never violated until the plaintiff was wrongfully ejected from the train of the Georgia Railroad & Banking Company, in the county of Baldwin, and it was then as much violated by the defendant company as it would have been if the ejection of the passenger had occurred on its own line of road. When, in the county of Dooly, it failed to stamp the ticket which it sold to the plaintiff, it violated no public duty which it owed him, for it was as much bound to transport him from Cordele to Charleston and return after it had given him an unstamped ticket, as a token of the contract into which it had entered with him, as it would have been if the ticket which it had issued to him had been properly stamped. Its public duty, relatively to the plaintiff, was to transport him in accordance with the contract, and, so long as it met and discharged this duty, no tort was committed. Suppose the plaintiff had purchased from the defendant company, at Cordele, in the county of Dooly, a ticket for his passage, over its own line of road alone, from that point to the city of Macon, in the county of Bibb, which ticket the selling agent of the defendant had failed to properly stamp, and in consequence of such failure a conductor in charge of the defendant's passenger train had ejected the plaintiff therefrom in the county of Houston; would his cause of action for the tort in such a case have originated in the county of Dooly, where he purchased the ticket and the failure of the defendant to properly stamp it occurred, or in the county of Houston, where he was ejected from the train? It seems to us to be very clear that it would have originated in

the latter county, because in that county, and in that county alone, the violation of the public duty which it assumed when it sold him the ticket would have occurred. What difference can it make whether the ejection was from a train on the defendant's own road, or from a train on the connecting road of another company, if the duty of the defendant, under the contract, to safely transport the passenger to his destination, applied as much to the one road as to the other? None that we can see. In either case the cause of action for the tort growing out of the breach of the public duty to transport the passenger in accordance with the contract arises in the county where the tort is committed, and no tort is committed until such breach of duty occurs. The cause of action in the present case originated when and where the tort upon which the action was founded was committed, and this was when the plaintiff was ejected from the train on the Georgia Railroad, and in Baldwin county. This being the county in which the cause of action originated, and the defendant company having no agent therein, the suit was properly brought in Bibb county, in which its principal office and residence were alleged to be located.

Counsel for the plaintiff in error recognize that if the case of *Central Railroad v. Combs*, supra, does establish the principle that a railroad company selling a through ticket, over its own and connecting lines of railroad is liable for the safe and secure transportation of the passenger to his destination, it stands in the way of their contention as to the want of jurisdiction of the city court of Macon in the present case. Accordingly they ask that if that case "is regarded as having decided that a railway company is liable for the safe and sure passage of a person over connecting lines, to whom it sells a ticket," it shall be "overruled or modified." As above indicated, we do not see how this decision can be otherwise regarded, and it seems to have been uniformly so construed by courts and text-writers who have had occasion to mention or cite it. The effect of the request of counsel is that that case shall be reviewed and overruled. There is no request to review the case of *Hawley v. Screven*, 62 Ga. 347, 35 Am. Rep. 126, which established in this state the principle followed in that case, and, in our opinion, it would be useless to review the case in question without reviewing the older case, which, in principle, it followed. In *Hawley v. Screven* it was held that "a passenger who purchased a through ticket from Savannah, Georgia, to Jacksonville, Florida, of the agent of [one railroad company], and had his trunk checked accordingly, could recover of such [company] for its loss, although it showed that there were three connecting roads between the two places mentioned, that it was the first, and that it had safely delivered the trunk to the second." In *Wolff v. Central Railroad Com-*

pany, 68 Ga. 653, 45 Am. Rep. 501, it was held: "Where a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting point through to his destination, and, upon arriving, it has been damaged or has been broken open and robbed, he may sue the road which issued the check, or he may sue the road delivering the baggage in bad order." In that case the suit was against the railroad company delivering the baggage at its destination. In the opinion in the case which we are asked to review, Judge Blandford, referring to these two cases, said: "It may be very safely assumed from these decisions that the law of this state is that, when a railroad company issues and sells a ticket over its own lines of road and over the lines of other roads to a point designated, such company is liable to the passenger thus purchasing such ticket, who checks his baggage through on the line indicated in the ticket, for the safe and secure carriage and transportation of such baggage. And if the railroad company should be liable for the safe and secure transportation of the baggage of a passenger; which is but a convenience and incident of the passenger, it cannot be very readily perceived why such company should not be liable for the safe and secure carriage and transportation of the passenger himself." It seems to us that this is sound reasoning, and that, so long as these decisions in the Baggage Cases stand, the liability of a railroad company to a passenger, to whom it sells a through ticket over its own and connecting lines of road, for his safe transportation to his destination, logically follows. This is the view taken and forcibly presented by Wood in his valuable work on Railway Law. He says: "In some of the states, with an inconsistency which is certainly remarkable, it is held that the first carrier, selling a through ticket, is not liable for an injury to a passenger upon a connecting line, but it is liable for the loss of his baggage by a connecting line. This doctrine necessarily supposes that two contracts are made—one relating to the passenger's transportation, and another relative to his baggage—when in fact but one contract is entered into, which is entire and indivisible. The ticket issued to a passenger is evidence that he has paid for being carried between the termini named therein, and the check given for his baggage is merely evidence that his baggage has been received by the company, to be carried in the usual way to the point designated upon the check. But the real contract between the parties rests wholly in parol, except so far as it may be set forth upon the face of the ticket, and the real intention of the parties is to be determined by reference to the subject-matter of the contract. * * * Indeed, in the absence of any statute, the company is not, at the common law, bound to carry any baggage, except mere personal luggage, and may make

any reasonable regulations relative thereto that it chooses to make; and it seems to us that there is no foundation whatever for the distinction that is made in the case last cited [a Tennessee case] between the liability of the carrier for the safety of the passenger, and the safe delivery of his baggage. The duty and the liability spring out of the same contract, and an inference of a limited liability as to one, and an absolute liability as to the other, cannot be drawn therefrom; and we believe that the reasoning of the court in this case will fail to commend it to the courts as expressing a sound, just, or reasonable doctrine." 2 Wood's Ry. Law, § 359, pp. 1419-1422.

It is contended by counsel for plaintiff in error that "the duty of the carrier was to have given Pearson a ticket according to his contract, which would have been good for passage from Cordele to Charleston and return, and, as it did not do so, there was a violation of the carrier's duty, which occurred in the county of Dooly—a tort growing out of a contract—and, while the tort may not have been completed until Pearson reached the county of Baldwin, on the line of a connecting road, yet the courts of Dooly alone have jurisdiction of this case." This might be a sound argument if the tort growing out of the violation of the carrier's duty consisted in the failure to stamp the ticket which the defendant company sold to the plaintiff, but as the duty of the defendant company, under the contract which it made with the plaintiff, was to safely transport him from Cordele to Charleston and back, notwithstanding its failure to stamp the ticket, it is obvious that no tort was committed until it violated this duty. It violated this duty in the county of Baldwin, and then and there the plaintiff's cause of action for the tort thus committed arose. The trial court did not err in holding that the suit could be properly brought in Bibb county.

Judgment affirmed. All the Justices concur.

(120 Ga. 306)

HALL v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

CRIMINAL LAW—NEW TRIAL—BRIEF OF EVIDENCE.

1. Where, in a criminal case, the accused moved for a new trial on the day that he was convicted, and the motion was set for a hearing within 30 days from the date of the trial and before the end of the term, the accused had until the actual hearing of the motion to prepare, have approved, and file a brief of the evidence introduced on the trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Washington Hall was convicted of crime, and brings error. Reversed.

Herman Brasch, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

CANDLER, J. At the March term, 1904, of the city court of Macon, Wash Hall was tried and convicted of the offense of carrying concealed weapons. The trial, conviction, and sentence took place on March 7th, and on the same day a motion for a new trial was made. The judge issued a rule nisi calling upon the solicitor to show cause on March 12th why the motion should not be granted. On the day last mentioned the motion came on to be heard, and the solicitor moved that it be dismissed on the ground that no brief of the evidence introduced on the trial had been filed with the motion. Counsel for the accused then asked leave to file a brief of the evidence, which had been agreed to as correct by the solicitor. This was refused, and the motion to dismiss was sustained. It appears from the bill of exceptions and the certificate of the clerk of the trial court that that court did not adjourn for the term until April 9, 1904. To the dismissal of his motion for a new trial the accused excepts.

The ruling complained of was erroneous. The accused had 30 days from March 7th within which to file his motion for a new trial. He filed it on the day of the trial, and on the day set for the hearing of the motion, which was within the 30 days allowed him, he tendered to the court a brief of the evidence which was admitted to be correct. If it was correct, the court should have approved it, and passed on the grounds of the motion. When the motion was filed, the court had the right to set it for a hearing at any time during the term, or he might have set it for a hearing in vacation. In the latter event it would have been necessary for the movant to take an order allowing him to file his brief of the evidence in vacation if for any reason he could not file it in term. But, inasmuch as he had 30 days within which to file his motion, if the term of court at which he was tried should last that long after the trial, we can see no reason why, in view of the fact that the hearing was set for a time within 30 days from the hearing and before the end of the term, he should not have until the hearing to prepare and file his brief of the evidence.

There is nothing in any of the decisions of this court cited on the brief of the solicitor that is contrary to the view herein announced. We do not think that Pen. Code 1895, § 1063, requires the filing of the motion and the brief of evidence together. The motion may be filed on one day, and the brief of evidence, under the approval of the court, on another, provided this is done within 30 days after the conclusion of the trial and before the end of the term. It then becomes the duty of the court to approve the brief, if it is correct, at any time before the actual hearing of the motion.

Judgment reversed. All the Justices concur.

(120 Ga. 409)

SOUTHERN RY. CO. v. MERRITT.

(Supreme Court of Georgia. June 9, 1904.)

CARRIERS—INJURY TO PERSON ON TRAIN—EVIDENCE—INSTRUCTIONS.

1. "A verbal inaccuracy in a charge, resulting from a palpable 'slip of the tongue,' and which clearly could not have misled the jury, is not cause for a new trial."

2. The evidence warranted the verdict, and no reason appears for reversing the judgment refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by T. G. Merritt against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

John J. Strickland, N. L. Hutchins, Jr., and D. K. Johnson, for plaintiff in error. H. L. Patterson and N. L. Hutchins, for defendant in error.

COBB, J. The plaintiff alleged that he went upon a train of the defendant company for the purpose of assisting certain female passengers to get upon and obtain seats in the car; that he notified the conductor of his purpose; that immediately after he entered the car, and before the passengers could be seated, the train began to move off, no signal of its departure having been given; that he hastened to the door, and, finding the car moving too rapidly for him to safely alight, went in search of the conductor; that the conductor objected to stopping the train, but finally pulled the bell rope, telling plaintiff to come to the door of the car and prepare to alight; that he got upon a step of the car, the conductor and a negro train hand standing above him; that the conductor ordered him to jump from the car, but he refused to do so on account of the rapid rate of speed at which the train was moving; and that upon his refusal the conductor and train hand violently pushed and shoved him from the car, as a consequence of which he was severely injured. A verdict having been returned in favor of the plaintiff, the defendant made a motion for a new trial, and error is assigned upon a judgment refusing to grant this motion.

The plaintiff in error insists only upon the general grounds of the motion for a new trial, that the verdict is contrary to the evidence, and upon that ground which assigns error upon the following charge: "Then you will ascertain from the evidence, before you can find that the defendant is liable in damages to the plaintiff, either that the railroad was negligent and the plaintiff was not negligent, or that both were negligent, and by the exercise of ordinary care and diligence the defendant could not have avoided the injury, and that the plaintiff is entitled to recover." The assignment of error is upon the concluding portion of the charge, which instructs the

jury that if both were negligent they could find for the plaintiff, unless it appeared that the defendant could not have avoided the injury by the exercise of ordinary care. The use of the word "defendant" in the charge quoted was so palpably a mere slip of the tongue that, before a new trial would be granted on account of it, it should be made clearly to appear that it was probably prejudicial to the company. An examination of the charge of the judge, which is embodied in the record, shows that, in two places just preceding the extract complained of, the judge clearly and distinctly gave the correct rule upon the subject; stating in one place that the plaintiff could not recover if he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, if it was negligent; and in another, that, even though the defendant was negligent, the party injured could not recover if he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. It is not to be presumed that the jury paid more attention to the incorrect charge than to the others; and if they paid equal attention to all, and understood all, they must have understood that the use of the word "defendant" in the charge complained of was a mere slip of the tongue, and the defendant could not have been prejudiced by the incorrect charge. *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 (6), and *cit.*; *Berry v. Clark*, 117 Ga. 964, 44 S. E. 824 (2).

There was evidence for the plaintiff which established the material allegations of his petition, and hence there is no merit in the complaint that the verdict is without evidence to support it.

Judgment affirmed. All the Justices concurring.

(120 Ga. 406)

BOOZER et al. v. NASH.

(Supreme Court of Georgia. June 9, 1904.)

WIDOW'S ALLOWANCE—YEAR'S SUPPORT—SALE OF LAND—ACTION TO RECOVER—PARTIES.

1. Land was set apart as a year's support to a widow and her five minor children jointly. She sold the land, not for the support and maintenance of the family, and put the purchaser in possession. After three of the minor children attained their majority, they, and the two minors by next friend, brought an action, in the old form of "complaint for land," against the vendee of the purchaser from the widow, for the recovery of the land and mesne profits. *Held*, that it was not erroneous to dismiss the action on the ground that the plaintiffs could not recover the land during the life of the widow in an action to which she was not a party.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by J. W. Boozer and others against J. B. Nash. Judgment for defendant, and plaintiffs bring error. Affirmed.

O. A. Nix and R. W. Peeples, for plaintiffs in error. T. M. Peeples, for defendant in error.

FISH, P. J. Certain land was set apart to Martha W. Boozer, widow of George W. Boozer, and her five minor children, jointly, as a year's support. Subsequently she sold and conveyed the land to Coggins, and she and the children moved away, and Coggins was put in possession. He, in turn, sold and conveyed to Nash, who paid full value for the same. The sale by the widow was not for the support and maintenance of herself and children, but the evidence in the case does not show that Coggins or Nash had knowledge of this fact. After three of the children had become of age, they, and the two remaining minors by next friend, brought an action against Nash to recover the land and for mesne profits. On the trial of the case the above facts appeared, and that the widow was in life at the time the action was brought. Upon the conclusion of the evidence, the court, on motion of the defendant, dismissed the case, upon the ground that the plaintiffs could not recover the land during the life of the widow, she not being a party to the case, either for herself or as guardian for her minor children. To this ruling the plaintiffs excepted.

Was the dismissal proper? Our opinion is that it was. Where a year's support is set aside to a widow and children jointly, the widow is entitled to use and control it as long as she lives and the property so set apart lasts, even though the children marry or become of age; and the children, in such a case, cannot force a division of the property so set apart. *Miller v. Miller*, 105 Ga. 305, 31 S. E. 186, and cases cited. The title to land so set apart for a widow and minor children vests in the widow and such children, but the widow has the exclusive control and management of the property. *Howard v. Pope*, 109 Ga. 259, 34 S. E. 301. In *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347, it was held: "Where a year's support has been set aside jointly for a widow and her minor son out of the estate of the deceased husband and father, the widow represents the minor, and the latter cannot file an independent intervention for the purpose of securing the payment of the judgment for the year's support, without showing that the widow has failed or neglected to intervene, or that she is in collusion with other creditors or setting up some other equitable reason." In the opinion in that case Chief Justice Simmons said: "This year's support was set aside jointly to the minor and the widow, and in such a case the widow represents the minor, and has absolute control of the property set apart as the year's support. She can sell or dispose of it without consulting the child, and without any proceeding in any court of law or equity, and without making the child a party in such a proceeding.

She, in effect, becomes trustee for the child for his share in the amount set apart. If he should marry or become of age, he would not be entitled to withdraw from the widow his portion of the year's support." As the widow, under the facts of the present case, had the absolute and exclusive right to control and manage the land in question, it follows that the right of possession was in her, and she was the only party who could sue for its recovery, unless, as was suggested in *Ferris v. Van Ingen*, supra, she failed or neglected to sue, or was in collusion with the defendant, or there was some other equitable reason set up why the action was not brought by her. The present is not an equitable proceeding of any kind, but is simply an action, in the old statutory form, for the recovery of land and mesne profits. Plaintiffs in error rely upon the case of *Vandigrift v. Potts*, 72 Ga. 635. The soundness of the ruling there made seems to have been somewhat questioned in *Howard v. Pope*, supra. The facts in the *Vandigrift Case*, and the reasoning upon which the decision was based, do not require a reversal of the judgment in the case at bar. In that case the widow, after the year's support was set apart to her and her minor children, married again, and she and her husband sold the land which had been set apart, and with the proceeds of sale bought other land, to which they took title in their own names. The children, after becoming of age, brought suit for their interest in the land so set apart. It was held that the sale by the widow was void. In the opinion Chief Justice Jackson said: "We think the marriage of the mother made a complete change of the relation of the parties and the status of the case. Her eye was no longer single towards the children. Her affections were divided, and in a large measure another's. This court decided that she could sell for herself and her children, to feed and clothe them, when necessary to sell in order to support the household; but here that household is broken up, the mother is married, and another head, a stranger to the children, takes possession; and the home is sold, and another is bought, and title to that is not in the mother and children, but in the new husband and wife. Do not her letters of administration abate if she marry? Here there was no administration, except her administration of this year's support for herself and children; the title, the right to support out of it, being equally in her and in them, and she holding theirs in trust for their support, and, if the income support them and her, for them in fee. Do not her letters, her right to sell this property, abate? We think it would be dangerous to uphold the sale under these circumstances, and so rule." The question made in the case now in hand was not then before the court. The point raised there involved the validity of the sale, while the question in the present case is as to the

right of the plaintiffs to bring the action. There the case was made to turn upon the marriage of the widow previous to the sale, and the consequent loss of her right to sell the property set apart as a year's support. But the reasoning in the opinion would seem to lead to the conclusion that she lost her right to control and manage the property by her marriage, for if her power of administration over the property was abated by her marriage, so that she lost her right to sell it even for the support and maintenance of herself and the minor beneficiaries, it would seem to naturally follow that she lost all right to control and manage it, and hence the right of possession would not be in her. It is obvious that this reasoning is not applicable in the present case, the widow not having married again.

Judgment affirmed. All the Justices concur.

(120 Ga. 319)

CENTRAL OF GEORGIA RY. CO. v. GLASCOCK & WARFIELD.

(Supreme Court of Georgia. June 8, 1904.)

SECOND TRIAL—SET-OFF—COSTS ON FIRST APPEAL.

1. Where, in an action for damages, a verdict and judgment are rendered against the defendant; the case is brought to this court, where the judgment of the court below is reversed; and on another hearing the plaintiff again obtains a verdict—the defendant is entitled to set off against that verdict no other costs than those paid by him which were actually necessary to bring the case to this court and obtain a reversal of the erroneous judgment rendered at the first trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Glascock & Warfield against the Central of Georgia Railway Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

Hall & Wimberly, for plaintiff in error.
T. S. Felder, for defendants in error.

CANDLER, J. Glascock & Warfield obtained a verdict against the Central of Georgia Railway Company for \$131. The case was brought to this court by bill of exceptions, and the judgment of the trial court was reversed. 43 S. E. 981. When the remittitur was transmitted to the court below, a *fi. fa.* for \$77.30, accrued costs, was issued in favor of the railroad company against Glascock & Warfield. The case was tried a second time, and the plaintiffs again recovered a verdict. The railroad company then filed a motion to set off against the judgment of the plaintiffs its judgment for the costs which it had paid. Upon the hearing of this motion the court "ordered that the said verdict be credited with the costs paid by the company in carrying said cause to the Supreme Court, and that there be allowed as a set-off to said verdict" the items of

cost for transcript of record for the Supreme Court, certificate and seal to same, costs in the Supreme Court, remittitur, judgment, final record of remittitur, and *fi. fa.*; the total of these items of cost amounting to \$48.30. The railroad company contended that it was also entitled to credit against the verdict of the additional items of cost for entering verdict and judgment on the minutes at the first trial, docketing the motion for new trial, entering five orders upon said motion, sheriff's service before the jury, and recording motion and amended motion for new trial upon the docket of final records; these additional items amounting to \$17.15. The court refused to set off these items against the verdict, and to this refusal the railroad company excepted.

We find no error in the judgment to which exception is taken. The party finally cast in a suit at common law is liable for the costs in the case. This does not include the actual cost incurred in carrying to the Supreme Court a bill of exceptions by which the reversal of an erroneous judgment is obtained, but it does include all other costs incurred in the progress of the litigation. This case is controlled, in principle, at least, by the decision of this court in *McGuire v. Johnson*, 25 Ga. 604, where it was held, in effect, that the only costs taxable against the defendant in error in a bill of exceptions to this court, who loses his case here, but finally gains it in the court below, are those costs which are necessary to bringing the case here, and that these do not include "the costs which have accrued in the court below, which the plaintiff in error may pay or not, as he chooses, but which he is not compelled to pay unless he wishes to obtain a supersedeas." Under this decision, the order passed by the court below was clearly correct.

Judgment affirmed. All the Justices concur.

(119 Ga. 54)

GOODMAN et al. v. BUTLER.

(Supreme Court of Georgia. Nov. 16, 1903.)

CERTIORARI—DISCRETION—REVIEW.

1. This case falls within the well-settled rule that where a petition for certiorari presents questions of both law and fact, and the judge of the superior court, without indicating upon what ground his judgment is based, sustains the certiorari generally, and grants a new trial, the judgment will not be reversed unless it is shown that there has been an abuse of discretion by the judge whose decision is under review.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Gober, Judge.

Certiorari by one Butler against one Goodman and others. From a judgment sustaining the writ, Goodman and others bring error. Affirmed.

E. P. Green, for plaintiffs in error. J. Z. Foster and T. B. Irwin, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 329)

MAYOR, ETC., OF SPARTA v. STEWART.
(Supreme Court of Georgia. June 8, 1904.)

NEW TRIAL—REFUSAL—REVIEW.

1. There was no error in overruling the demurrer to the petition, nor in admitting or excluding evidence. The evidence authorized the verdict, and, the trial judge being satisfied therewith, his discretion in refusing a new trial will not be controlled by this court.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. G. Lewis, Judge.

Action by W. L. Stewart against the mayor and aldermen of Sparta. Judgment for plaintiff. Defendant brings error. Affirmed.

R. H. Lewis, for plaintiff in error. Allen & Pottle and Hunt & Merritt, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 424)

J. B. WATTERS & SON v. RETAIL CLERKS' UNION NO. 479 et al.

(Supreme Court of Georgia. June 9, 1904.)

LIBEL—WHAT CONSTITUTES—UNFAIR LIST—PLEADING.

1. The publication stated the facts and reasons why the defendants placed the plaintiffs on the "unfair list," and, taken as a whole, cast no imputation upon their character as individuals, or upon their solvency or standing as merchants.

2. The words were not actionable per se, and the petition set out no cause of action; failing, as it did, to allege any special damage, or loss of custom, trade, or profits, or any injury of any sort, to plaintiffs' business.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; B. D. Evans, Judge.

Action by J. B. Watters & Son against the Retail Clerks' Union No. 479 and others. Defendants demurred to the petition. From an adverse judgment, plaintiffs bring error. Affirmed.

In May, 1903, the Retail Clerks' Union No. 479 and others published a communication in a Rome newspaper to the effect that for several years it had been the custom of the leading merchants of the city to close their various places of business at 6 o'clock p. m. during the hot summer months, believing that it was to the mutual interest of themselves and their clerks, and that both they and their employes deserved the small amount of rest and recreation that this move-

ment enabled them to have. "As usual, this movement was started this spring, and was with one exception agreed to by all the fair-minded and leading merchants; the firm of J. B. Watters & Son alone refusing to sign the agreement, although every means was resorted to to get them to fall into line and make it unanimous. After they had been approached by a committee from the union and refused to enter into the closing movement, they were put on the unfair list by the union. * * * We ask the support of the public generally in the action that has been taken. We believe that the people of Rome are too broad-minded to patronize or indorse any firm in its efforts to hinder a movement that would give a short period of rest during the hot months to many working men and women." Then followed a list of those who had signed the agreement, and with a request that the public should patronize the signers. There were handbills in reference to the same matter, and containing similar requests. The plaintiffs, alleging themselves to be a partnership, one of whose members was dead, but whose interest was represented by his executor, brought an action against the unincorporated unions, and such members thereof as the plaintiffs had been able to learn were associated therewith. They alleged that they had agreed to sign the agreement to close if all merchants in their line did the same; that the publications were false and malicious, and had been made for the purpose of intimidating as well as damaging petitioners' reputation, and exposing them to public hatred or ridicule, and were so understood by those who read the same, to their damage \$25,000. The defendants demurred on the grounds that there was a misjoinder of parties, and a misjoinder of causes of action, inasmuch as different publications signed by different individuals or officers were all joined in the same suit; that the executor of the deceased partner could not sue; and on other grounds which are immaterial, inasmuch as the judge of the trial court decided all the points in favor of the plaintiffs, except that ground of the demurrer which alleged that the petition set out no cause of action, because the words were not libelous per se, and not actionable without an averment of special damage. The plaintiffs excepted to this ruling.

Dean & Dean, for plaintiffs in error. McHenry & Maddox, for defendants in error.

LAMAR, J. Where it is necessary to allege special damages in order to set out a cause of action, the particular loss or injury must be distinctly stated; the ad damnum clause, "that the plaintiff had been damaged \$25,000," not being the equivalent of such an averment. Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308. In view of this well-recognized rule, and the assignment of error on the judge's order, the present case does

not raise any question as to defendants' liability for a conspiracy. *Brown v. Jacobs Co.*, 115 Ga. 433, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 128; 3 Joyce on Damages, § 2231. Even after a special demurrer calling attention to the omission, there was no amendment. The petition set out no loss of trade, profits, or customers; no decreased ability to buy or sell; no violence; no intimidation of patrons; no interference with plaintiffs' business; and no injury of any sort, except that general damage alleged to flow from the use of the words claimed to be libelous per se. In fact, the plaintiffs treat this solely as an action for libel, and claim in their brief that "the record presents but two questions for determination: First. Are the publications libelous? Second. Are they actionable per se?" In cases of this sort the publication or conversation must be construed as a whole, and in the sense in which it is evident the language was intended to be used. Under this rule, words ordinarily harmless may from the context convey such a meaning as to give ground for an action. On the other hand, words which are sometimes actionable, when taken in connection with the entire article may be deprived of their usual sting and afford no ground for a recovery. So the word "unfair" may sometimes mean "dishonest," and, when by a colloquium or innuendo shown to have this meaning, might give rise to a cause of action. But it does not necessarily involve so serious a charge. It may convey the idea of "discrimination." It may mean that one is "prejudiced" or "partial." It may mean "il-liberal," "hard," "ungenerous," or "exact-ing." But whatever the sense in which it may on occasions be used, it is perfectly evident that in the present case it imputed nothing involving moral turpitude to the firm, or to the individuals composing it, and cast no imputation upon their credit, solvency, or conduct as merchants. Reading the publication as a whole, there was no suggestion of the use of short weights or measures; no accusation of fraud, deceit, or misrepresentation in the sale or purchase of goods. Nor did it charge anything against the honesty, integrity, solvency, or credit of the partnership. A state of facts was given. The words "unfair" and "unfair list" were coupled with these facts, and amounted to a characterization or statement of what defendants thought of plaintiffs' refusal to become a party to the early closing movement. Any one reading the communication must have seen that the plaintiffs were not charged with overstepping their rights or of doing anything unlawful. It was, in principle, analogous to a somewhat similar publication concerning a merchant who refused to contribute to a fund for keeping the streets sprinkled. *People v. Jerome*, 1 Mich. 142. A case even more in point was that of *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397, where the defendant published that, because he had

quit buying from plaintiffs, they privately overbid him, and by "base treachery" secured the property which he had leased, and ordered him immediately to vacate. After stating these facts, the defendant, in the article alleged to be libelous, added: "The firm is not worthy of our support, being guilty of foul and unfair dealings to 'get square,' as they say, with one who exercises the right to trade where he likes; and I request that those who believe in the fair thing as between man and man to give their support to some other house." It was there held (citing *Homer v. Englehardt*, 117 Mass. 539) that the words were not actionable per se, the whole publication showing that the transaction was perfectly lawful, and that, in the absence of an allegation of some special damage, the court could not legally presume that the plaintiffs were degraded in the estimation of the public, or that they suffered loss of character, profits, or business. See, also, *Railroad v. Delaney*, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600, where an employé sued for general damages alleged to have resulted from a false publication that he had gone on a strike. The blacklisting cases, like that of *White v. Parks*, 93 Ga. 633, 20 S. E. 78, cited by the plaintiff in error, do not apply, because there the words were actionable per se, as they tended to lessen the plaintiff's credit; charging, as they did, that he was a delinquent debtor, guilty of dishonest and fraudulent methods. Here the publication was not per se libelous, and no special damages are set out.

The judgment sustaining the demurrer is affirmed. All the Justices concur, except EVANS, J., disqualified.

(120 Ga. 104)

COX v. STRICKLAND et al.

(Supreme Court of Georgia. May 14, 1904.)

PARTIES—JOINT TRESPASSERS—VENUE—LIMITATIONS—NONSUIT—NEW ACTION.

1. While the word "trespass" generally involves the idea of force, yet in its broadest sense it comprehends any misfeasance, transgression, or offense which damages another's person, health, reputation, or property.

2. At common law trespass on the case was the form of action to recover damages for a libel, and persons charged with a joint libel are "joint trespassers" within the meaning of the Constitution, and suable within the county of the residence of any one of such joint "trespassers."

3. The Constitution, in fixing the venue of suits against joint defendants, was intended to be exhaustive, and not to leave a hiatus in which the right to bring a single suit against joint defendants might be lost because of the want of jurisdiction to apply the remedy.

4. Civ. Code 1895, § 3783, in granting the right to renew within six months, forms an exception to the statute of limitations, and has no reference to the subject of venue. The new action may be brought "in any court having jurisdiction thereof in this state." Act 1847, p. 217 (Cobb's Dig. p. 589).

5. While the second suit must be for substantially the same cause of action, it does not have

to be a literal copy of that dismissed. It must be by the same plaintiff, or his legal representative, and against all the defendants who were necessary parties to the first suit, or their legal representatives.

6. Where the liability of the defendants is joint and several, with no right of contribution, as in libel, a second action against all of the defendants to the first suit, served upon some of those jointly suable but severally liable, is within the saving provision of Civ. Code 1895, § 3786.

7. The filing of the petition is treated as the commencement of the suit only when followed by due and legal service. If there is no process and no service, and the plaintiff is guilty of laches, the writ becomes abortive, and the court loses jurisdiction to issue process or to have service perfected.

8. But if the plaintiff is active in his efforts to remedy the nonfeasance of officers, and endeavors to have process issue and service made, the jurisdiction of the court continues to cure the defective process, and to have service perfected, even after the first term.

9. A second original process to perfect service on joint defendants residing in another county may issue by way of amendment after the appearance term.

10. Where service is duly made under such order, the same relates to the date of the filing of the petition, which will be treated as the commencement of the suit, even though such service was not perfected until after the expiration of six months from the dismissal of the first suit. (Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by Horace Cox against J. B. Strickland and others. Judgment for defendants, and plaintiff brings error. Reversed.

An action for libel was brought in 1894, in Clinch county, against 110 defendants, some of whom lived in adjoining counties. This suit was dismissed in February, 1898, and renewed in March, 1898, in Brooks county, against all of the defendants, only five of whom were served. The process was directed to the sheriff of Brooks county. The processes attached to the second originals for the defendants residing in Clinch and Lowndes counties were by the clerk also directed to the sheriff of Brooks county. At the May term, 1898, the four nonresident defendants served therewith moved to dismiss for want of legal service. Without any ruling on such motion, the judge at chambers ordered the clerk to amend the process attached to the second originals "by proper direction, and that the same be served in time for the next superior court of Brooks county." The amendment was made, but the second originals were lost. In January, 1899, during the November adjourned term, copies were established, but so changed as to require the defendants in Lowndes and Clinch to appear at the May term, 1899. Four of the nonresidents, defendants in error, were properly served April 2, 1899. 105 of the nonresident defendants were not served. The defendants in error residing in Lowndes and Clinch counties demurred on

the grounds that they were not joint trespassers, and therefore not subject to the jurisdiction of Brooks superior court; that, the second original having been improperly directed to the sheriff of Brooks, the court could not cause the same to be amended; that service thereunder was void; that the service actually made, not being within six months from the dismissal of the first suit, the case was barred, although service was made in April, 1899, on a petition brought in March, 1898, in renewal of a suit dismissed in February, 1898; and that as 110 defendants were sued and served in the first suit and only 5 were served in the renewal, the case was not against the same defendants. The judge dismissed the case and Cox excepted.

E. H. Myers and S. W. & J. W. Hitch, for plaintiff in error. W. G. Brantley, W. S. Humphreys, and Denmark & Ashley, for defendants in error.

LAMAR, J. An action for libel was brought in Brooks county against King, a citizen thereof, and other joint defendants, who resided in Clinch and Lowndes counties. These latter insist that the superior court of Brooks county had no jurisdiction under that provision of the Constitution allowing suits to be brought in the county of the residence of either "joint trespasser" (Civ. Code 1895, § 5872). They claim that force is the gist of the action in trespass, and that, as there is no force in libel, they are not joint trespassers. In its last analysis, their contention amounts to the proposition that the Constitution refers only to those actions which at common law were known as trespass *vi et armis*, trespass *quare clausum fregit*, and trespass *de bonis asportatis*, and not to any other action for which trespass on the case might have been brought under the ancient forms of pleading.

Undoubtedly the word "trespass" frequently, even generally, conveys the idea of force. But it also includes in its largest sense any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. Anderson's Law Dic. a. v. "Trespass." And this definition was involved in the carefully considered opinion by Justice Lumpkin in *Johnson v. Bradstreet*, 87 Ga. 79, 13 S. E. 250, where it was held that libel was "an injury to the person." In discussing the well-known origin of the "action on the case," Townshend, in his work on Libel and Slander (4th Ed.) 36, says, "Under this class was action for trespass on the case for words—the ancient form of the action." Among remedies at common law, Gould's Pleading, 22, includes "trespass and trespass on the case as actions to recover damages for the wrongful injury to one's person, health, reputation, or property." So that, for some purposes at least, a libel is a trespass. In *Lee*

¶ 5. See Limitation of Actions, vol. 23, Cent. Dig. §§ 555, 564.

v. West, 47 Ga. 313, where two were charged with having enticed the plaintiff's servant, they were treated as joint trespassers within the meaning of the section of the Constitution fixing jurisdiction. Under the Texas statute the defendant was entitled to be sued in the county of his residence, except "when the foundation of the suit was some crime or offense, or trespass for which a civil action in damages may lie, in which case the suit may be brought in the county where the crime or offense or trespass was committed." Rev. St. Tex. 1879, p. 193, art. 1198, subd. 8. An indirect injury was caused by the boisterous language and conduct of a defendant in the presence of a female. The court held that he might be sued out of the county of his residence, the section relating "not only to actions of trespass proper, as known to the common law, but also to actions of trespass on the case." *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618. In *San Antonio, etc., R. Co. v. Graves* (Tex. Civ. App.) 49 S. W. 1103, in a suit against two defendants, the court held that an action may be brought against several joint tortfeasors in the county of the residence of either, treating the word "trespass" as equivalent to "tort," and "joint trespassers" as equivalent to "joint tortfeasors." Under the New Jersey statute (Laws 1855, p. 340) it is provided that, "where any [person] * * * shall in his * * * lifetime, have committed any trespass," the injured party shall have an action therefor against the representative of such deceased. Under this statute an action was brought for backing water on the plaintiff's land, and in answer to the defendant's contention that this was not a "trespass" the court held that, regardless of the technical distinction as to the form of action, the word "trespass," as used in the statute, "must be received as equivalent in meaning to the word 'tort,' so that the effect of the provision is to give a right of suit against the personal representatives of a deceased wrongdoer for any injurious act of a suable nature, without reference to the form in which the remedy must be sought." In the opinion the court said that the synonym of trespass "in law Latin was 'transgressio,' a term which, in its comprehensive signification, embraced every infraction of a legal right. In this sense it comprehended not only forcible wrongs, where the damages were direct and immediate, but also acts the consequence of which made them tortious, * * * 'and in general any misfeasance or act of one man, whereby another is injuriously treated or damaged, is a transgression or tort in its largest sense.'" *Ten Eyck v. Runk*, 31 N. J. Law, 430. Reputation is as much a part of the real man as an arm or limb is of his body. Injury to the reputation is in many respects the legal equivalent of a battery upon a physical member. The fact that it can only be effected by the spoken word or written sign in no way destroys the legal complexion of the act. A man's body

may be assailed with the fist, and it is a trespass. His character may be assailed by the tongue, and that, too, is a form of trespass, involving the use of that constructive violence which alone can reach so intangible an attribute of his personality. There are cases in which it has been held that words may inflict such pain as to amount to cruelty justifying a divorce. And that a libel is a trespass within the language of the Constitution is evident when it is considered that the organic law is to be construed liberally, and so as to accomplish the purpose of the people in convention assembled. There is a strong presumption that the words were not intended to be given any narrow or purely technical meaning in a chapter which was dealing with the general subject of venue, and defining where all suits against joint defendants could be instituted. The Constitution provided where all such suits should be brought in equity cases; where in common-law cases, if there was a joint liability under a contract; and evidently intended to declare what might be the venue in suits where persons were jointly liable for a tort; otherwise there would be a hiatus. If defendants' contention be correct, there would be a right to bring a joint action against those who are alleged to have been guilty of a joint libel, and yet there would be no way of enforcing this right if they resided in different counties. The scope and spirit of the constitutional provision demonstrates that this class of wrongs, this class of trespasses, was not intended to form an exception and stand as a case in which the right was nullified because the remedy failed. Right and remedy should harmonize unless the law forbids. Civ. Code 1895, §§ 3076, 4929.

4. The defendants contend that, the original suit having been brought in Clinch county, and the renewal suit in Brooks county, the case is not saved from the bar of the statute. But the Civil Code of 1895, § 3786, does not require that the suit shall be renewed in the same court or in the same county. This section is but a codification of the act of 1847, p. 217 (Cobb's Dig. p. 569), which allowed the plaintiff to renew "in any court having jurisdiction thereof in this state." *Constitution Pub. Co. v. De Laughter*, 95 Ga. 18, 21 S. E. 1000. Whether the section be treated as a permit or as a requirement, it could not modify the constitutional provision as to where suits could be brought. The law relating to renewals of dismissed cases forms an exception to the statute of limitations, and has no reference to the law of venue.

5, 6. At common law suits frequently abated for matters of form. In such cases the plaintiff was allowed a reasonable time within which to sue out a new writ. This time was theoretically computed with reference to the number of days which the parties must spend in journeying to the court. Hence the name "journeys account." Such renewed suit was but a continuance of that which had

abated, and of necessity was in the same court, against the same parties; and for the same cause of action. This ancient remedy was probably never recognized in this state. *Mahon v. Justices*, Ga. Dec. 201, pt. 2. In lieu thereof, the colonial act of 1767 (Cobb's Dig. 562) provided that in case of reversals or arrest of judgment the plaintiff, his heirs or representatives, might commence a new action within one year. See *Harrison v. Walker*, 1 Ga. 82. Later the act of 1847 (Cobb's Dig. p. 569) provided that whenever any case commenced within the time limited by law shall be discontinued, dismissed, or nonsuited, the plaintiff, notwithstanding the intervening bar of the statute, might at any time within six months of such termination of the case renew or recommence the same in any court having jurisdiction thereof in this state. The act of 1856 (Acts 1856, p. 237) was substantially the same as the act of 1847, except that it added the privilege to renew in case judgment for the plaintiff was arrested. These last two acts are held in *Constitution Pub. Co. v. De Laughter*, 95 Ga. 18, 21 S. E. 1000, to be codified in Civ. Code 1895, § 3786. This section does not contemplate a revival or continuance of the original suit as at common law under "journeys account," but that, the first having been discontinued, dismissed, or nonsuited, a new and distinct suit may be brought. Every citizen is interested in the policy of repose which prevents the enforcement of stale demands. Statutes of limitation are based partly on the theory that nonaction by a plaintiff tends to throw his adversary off guard, making him careless in the preservation of receipts, vouchers, documents, and other evidence needful for his defense. But when a suit is pending, whether it be brought with technical correctness, or not, the defendant is warned to preserve his evidence. The attempted assertion by judicial proceedings of a cause of action in which A. gives B. notice of his claim is sufficient to stop the running of the statute during the pendency of that suit, and for six months thereafter. In like manner, if B. in the same suit, by a set-off or cross-bill (Civ. Code 1895, § 3787; *Crane v. Barry*, 60 Ga. 362; *Hunt v. Spaulding*, 18 Pick. [Mass.] 521) or other appropriate proceeding, should attempt to enforce his cause of action against the plaintiff or other party to the proceedings, the statute would likewise be tolled as to this claim. Notice had been given. The opposite party was warned. If the suit was disposed of on any matter not concluding the merits of the cause of action, or any of the causes of action, asserted in the proceeding by one party against another, it might be thereafter seasonably renewed in the proper forum, in proper form, against any of the proper and all of the necessary parties therein. Some of the statutes on this subject are much more narrow than that contained in the Civil Code of 1895, §

3786. Some limit it to cases in which there has been an involuntary nonsuit; others, to dismissal by the court for some matter of form not involving the merits; others, to dismissals as the result of a reversal; others, to cases where the judgment in favor of the plaintiff has been arrested or set aside. But our statute, construed in the light of the acts from which it was codified, is very broad. It cannot mean that the form and parties to the new cause shall in all respects be identical with the former. The first case may have been dismissed because at law instead of at equity, and vice versa (*Spear v. Newell*, 13 Vt. 288, 295; *East Tenn. Co. v. Ferguson* [Tenn. Ch. App.] 85 S. W. 900; *Crow v. State*, 28 Ark. 685; *Lamson v. Hutchings*, 113 Fed. 321, 55 O. C. A. 245), or because it was defective in making or omitting an averment, or for a misjoinder of parties (*Woodcock v. Bostic* [N. C.] 88 S. E. 881 [6]). Certainly it could not be expected that the second suit would repeat the error of the first, either in parties or pleadings, forum, venue, form of action, or prayer for relief. If the cause of action is the same in both cases, if by the same party or his legal representative, and against a person from whom relief was prayed in the first suit, the second action may be renewed. Of course, the substantial rights of the plaintiff, or liability of the defendant to him or to one another, cannot be enlarged beyond that indicated by the pleadings in the first case. But to the second only those parties are needed who are necessary to enforce and preserve the rights of the respective litigants existing at the time the running of the statute was interrupted by the filing of the first suit. The second suit must be for substantially the same cause of action, though it need not be a literal copy of the petition dismissed. *Hudgins v. Crow*, 82 Ga. 372. It must be by the same plaintiff or his legal representative (*Moody v. Threlkeld*, 11 Ga. 55 [5]), and against all who were necessary parties defendant in the first suit. If they were parties to a joint contract, or entitled to rights, one against another, by way of contribution, in the event the plaintiff recovered, then they or their personal representatives must all be parties to the second suit. *Ford v. Clark*, 75 Ga. 612; *White v. Moss*, 92 Ga. 246, 18 S. E. 13. But it has been held that, even under Civ. Code 1895, § 3915, there is no right of contribution between joint libelers. *McCalla v. Shaw*, 72 Ga. 458; *Hunter v. Wakefield*, 97 Ga. 543, 25 S. E. 347, 54 Am. St. Rep. 438. Where, therefore, the first suit was against two or more such joint tort feors, each of whom was jointly suable, but severally liable, all of the defendants were not necessary parties to the first or the second suit. In the first action they might have been stricken by the plaintiff at any time over objection. *Western Union Tel. Co. v. Griffith*, 111 Ga. 559, 36 S. E. 859. The second suit might have been

brought against all such former defendants, and might have been discontinued as to some after service, or the same result might have been accomplished by not pressing to have them served with process. The presence or absence of any of such defendants severally liable was a matter in which the codefendants had no legal interest. *Fisher v. Cook*, 23 Ill. App. 821 (3). They cannot escape because others were omitted as defendants, dismissed as defendants, or sued and not served as defendants. The liability of those served has not been increased, nor have they been deprived of any right or defense, by reason of the absence of the other tortfeasors. When they were served in the first suit, they were put on notice of plaintiff's intent to enforce by judicial proceeding his cause of action. By such notice they were warned that that case might be dismissed, and another brought against them severally, or with only a part of the other codefendants, if such could lawfully be done; and they must preserve their evidence, and act accordingly.

There are few cases relating to the question of parties defendant to the second suit, but all which we have found on this subject sustain the view above indicated. The statutes of the various states differ in detail, but all are equally silent on the question here involved. The authorities all agree in the proposition that the renewal statute is to be liberally construed. *Gordon v. McCauley*, 73 Ga. 669; *Rountree v. Key*, 71 Ga. 214; *Coffin v. Cottle*, 16 Pick. 385. And this applies to parties defendant, as will appear from *Cox v. Berry*, 13 Ga. 306. A. brought ejectment against B. as tenant in possession. C., the landlord, was made party defendant. Being unable to prove possession in B., the plaintiff dismissed after the bar of the statute had attached. Within six months he brought a suit for the same lot against D. as tenant, to which C. also was a party defendant. He pleaded the statute of limitations. In answer to the proposition that the second suit was not a renewal of the first, because against a different tenant, the court said that it was certainly the same as far as the landlord, C., was concerned. "It is for the same land, in favor of the same plaintiff, and C. was a party defendant in both actions. The act is remedial, and is to be literally [liberally] construed." In *Anthony Investment Co. v. Law* (Kan. Sup.) 61 Pac. 745, Law and his wife gave a note for \$1,200, and coupon notes for the interest, securing the same by a mortgage. The note and coupons, as well as the mortgage, were sold to Watt, payment being guaranteed by the Farmers' Company. There were subsequent transfers, and finally a suit brought to foreclose the mortgage, and the assignee of the coupons prayed for judgment against Law. The foreclosure and cross-action were both dismissed after the bar of the statute on the coupons. Subsequently a re-

newal action was brought on the coupons against the Laws, who raised the point that the parties were not the same as in the first suit. The court said the plaintiff's right was not "affected by the fact that other parties were also defendants in the first action. The two actions, although not identical in form, were substantially alike, and in each case a personal judgment was sought upon the note, and upon similar grounds of liability, so far as the defendants are concerned." In *Pittsburgh R. v. Bemis*, 64 Ohio St. 28, 50 N. E. 745, the plaintiff brought an action for false imprisonment against the railroad and the Wagner Palace Car Company. The latter demurred, and was dismissed. Later the plaintiff's case against the railroad was dismissed for want of jurisdiction. He renewed within the statutory period against the railroad company alone, in another court; and, while no point was made as to the absence of one of the original defendants, the case was held to be saved by the renewal statute. In *East Tenn. Co. v. Lawson* (Tenn. Ch.) 35 S. W. 456 (3), an action to recover 100,000 acres of land was brought against 30 defendants, and dismissed after the bar of the statute, and again brought under the renewal statute against 1 defendant severally liable, and allowed to proceed without the presence of the other 29 defendants. Under the Arkansas statute the plaintiff may commence a new action after he has suffered a nonsuit or his judgment has been arrested or reversed. Under this statute suit was brought against the makers of a note, which was nonsuited after the bar had attached. A new suit within a year was brought against two of the makers of the note, but omitting other defendants who were parties to the first suit. The Supreme Court of Arkansas does not appear to have made any question as to whether the makers were entitled to rights one against another by way of contribution or otherwise, but held that the case was saved from the bar, notwithstanding the fact that all the makers of the note who were sued in the first action were not made parties to the second, saying that the first action was commenced against the other makers of the same note, who are not sued in the present action. Defendants in this suit were, however, parties to the first. The question is not whether a joint liability exists against the makers of the note, but whether a former suit was commenced against the defendants in this suit on the same cause of action. *State Bank v. Roddy*, 7 Eng. (Ark.) 767. See, also, *Williams v. Council*, 49 N. O. 206. It may possibly be argued that these authorities lead to the conclusion that, having sued 110 defendants in the first suit, the plaintiff might institute 110 separate and independent actions—one against each of the persons severally liable. That question is not involved in this case. Here the second suit was against all of the original defendants. The fact that some were not

served does not bring about a result different from what might have been accomplished if all had been served, and during the progress of the case 105 had been voluntarily dismissed.

7-10. In a case against several defendants it is often impossible to serve each in time for the appearance term. The right to amend and to grant continuances reasonably necessary to bring in those who have not been served would seem to be one of the inherent powers of the court which had authority in the first instance to issue the process. Civ. Code 1895, § 4047 (6). Undoubtedly, on general principles, a process loses its vitality after the return day, unless by virtue of the statute, or of some act of the court itself, the right of the officer to serve the same is extended. Sections 4901 and 4902 of the Civil Code of 1895 have enlarged the power of the ministerial officer, and writs served too late for the first term are held good for the succeeding term. If the officer is unable to find the defendant, or any of the defendants, he is required to make return thereof for appropriate action by the court. But if there is no service the plaintiff cannot remain inactive, and, after having been guilty of laches, ultimately move in the cause, and then claim that a suit allowed to remain passive is to be treated as having been commenced as of the time of the filing of the petition. Such result follows only when the suit is kept alive by legal service. Civ. Code 1895, § 4973. But where the plaintiff, on discovery of the failure to serve, or of irregularity in the process, is active to have the fault cured, the court is not without jurisdiction to make the suit effective. *Dobbins v. Jenkins*, 51 Ga. 204; *Peck v. La Roche*, 86 Ga. 317, 12 S. E. 688; *Brunswick Hardware Co. v. Bingham*, 110 Ga. 526, 35 S. E. 772. Each of these cases recognizes that, where there had been no service, the plaintiff's diligence entitled him to orders after the first term requiring the sheriff to perfect service. And in *White v. Hart*, 35 Ga. 269, it was expressly ruled that "a second original process to perfect service on a joint defendant might issue by way of amendment after the appearance term." Here neither the original nor the second original processes were void. The plaintiff was diligent, and the court was authorized to establish lost second originals, to cause them to be properly directed, and to permit service thereof on the nonresident defendants, requiring them to appear at the May term, 1899, of Brooks superior court.

What has already been said as to perfecting service is an answer to the contention that service of the second suit must be perfected within six months. The date of the filing of the petition is to be treated as the commencement of every suit when it is followed up by legal service, and under this rule the present suit was begun within six months from the dismissal of the former, the service

in 1899 being effective, by relation, to keep alive the suit filed on March 3, 1898.

Judgment reversed. All the Justices concurring, except EVANS, J., not presiding.

(120 Ga. 339)

LOUISVILLE & N. R. CO. v. DU BOSE.
SAME v. HOLLIDAY.

(Supreme Court of Georgia. June 8, 1904.)

CARRIERS—REFUSAL TO TAKE PASSENGERS.

1. A railroad company is not bound to receive and transport passengers on a train, consisting of an engine and a freight car, made up for the purpose of meeting an emergency caused by a wreck on its line; and one who, with knowledge of the circumstances, by permission merely of the conductor, takes passage on such a train, cannot recover damages from the railroad company on account of its refusal to give him return passage on the same train, it appearing that such refusal was not capricious or wanton, but was due entirely to the existence of the emergency referred to.

(Syllabus by the Court.)

Error from Superior Court, Tallahassee County; B. D. Evans, Judge.

Actions by Rembert Du Bose and Robert Holliday against the Louisville & Nashville Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Joseph B. & Bryan Cumming and J. B. Park, for plaintiff in error. Colley & Sims, Hawes Cloud, and I. T. Irvin, Jr., for defendants in error.

CANDLER, J. Du Bose and Holliday each brought suit against the railroad company for damages growing out of alleged injuries described in their respective petitions. Du Bose obtained a verdict for \$200, and Holliday one for \$60. The cases were tried separately in the court below, but were argued together here, as both grew out of the same transaction, and are controlled by the same principles of law. In each case the railroad company excepts to the overruling of its demurrer to the petition, and to the refusal of its motion for a new trial.

It appears that there had been a wreck on what is known as the "Washington Branch" of the defendant's road, several miles from the town of Washington, by reason of which regular traffic on that branch had been suspended. An engine and freight car were run from Washington to the scene of the wreck, and the plaintiffs and others requested permission of the conductor in charge of the train to ride thereon, which was granted. The plaintiffs offered to pay the conductor for the round trip, but he would accept fare only one way. He had previously told the plaintiffs that he would probably return to Washington in about an hour. This was about 7 o'clock in the evening. The train, however, did not leave the scene of the wreck until about midnight, and, when it did, the conductor, acting under instructions from the superintendent of the railroad, refused to transport the plaintiffs, who walked back to

Washington; the present suits being based on the physical and mental suffering alleged to have been thereby occasioned.

These facts, which are made to appear from the undisputed evidence, do not, in our opinion, show any right on the part of the plaintiffs to recover damages. The train upon which the plaintiffs rode from Washington to the scene of the wreck was in no sense a regular passenger train. Indeed, it was neither regular nor passenger. Its sole purpose was to meet an emergency with which the employees of the defendant were confronted. This fact was well known to the plaintiffs. The defendant was under no obligation to transport them on this train at all. There is nothing in the evidence to show that they were on the train by the invitation of the conductor. On the contrary, they sought him out, and requested him to allow them to ride on the train; demonstrating that they recognized that he was under no obligation to do so. Nor can it be successfully contended that the defendant is liable to the plaintiffs for the violation of the verbal contract alleged to have been made with them by the conductor to allow them to return on the train when it should come back to Washington. It is true, as a general proposition, that a person on a train may rely on the undertakings of the conductor, within his implied authority; but in the present case the plaintiffs were well aware that an emergency existed which had deranged all regular business on this branch of the defendant's road, and which was liable to upset any plans that might be made by the conductor with reference to the running of this train. When they boarded the train, they took the chances of the happening of such a contingency. It is not made to appear that the refusal to bring them back to Washington was capricious or wanton, and in no view of the case, as disclosed by the evidence, can they recover damages for such refusal. See *Louisville & N. R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968.

Regardless of the points raised by the defendant's demurrers, and the cases as made by the evidence only being argued here upon the cases as made by such evidence alone, we are satisfied that the evidence showed no right on the part of the plaintiffs to recover, and the judgment in both cases is therefore reversed. All the Justices concurring, except EVANS, J., disqualified.

(120 Ga. 408)

MCDONALD v. McDONALD.

(Supreme Court of Georgia. June 9, 1904.)

DOWER—LANDS SUBJECT—RENTAL VALUE—EVIDENCE.

1. A widow is not entitled to dower out of land of which her husband did not die seised and possessed, and to which the husband did not obtain title in right of his wife.

2. Where, therefore, a husband borrowed money, and made to the lender an absolute deed under Civ. Code 1895, § 2771 et seq., receiving a

bond for title from the lender, and at the time of his death none of the notes given by him for the borrowed money had been paid, he had no interest in the land except the equity of redemption, and it was error to hold that his widow was entitled to dower in such land.

3. It was also error, where the evidence was conflicting as to the value for rent of the land assigned as dower while such land was in the hands of the administrator, to direct the jury to find the highest amount proved.

(Syllabus by the Court.)

Error from Superior Court, Jackson County; R. B. Russell, Judge.

Application of Dora McDonald against H. S. McDonald, administrator, for the setting aside of dower in her husband's estate. Judgment for applicant, and the administrator brings error. Reversed.

J. S. Ayers and Pike & Willis, for plaintiff in error. E. C. Armistead and H. H. Dean, for defendant in error.

SIMMONS, C. J. In February, 1901, McDonald borrowed \$2,000 from the British American Mortgage Company, Limited. To secure this loan he made an absolute conveyance of certain land under Civ. Code 1895, § 2771 et seq., giving his notes for different amounts, due at different times, with a stipulation that, if any note should not be paid at maturity, the whole amount should become due. In August, 1901, McDonald died without having repaid any of the money borrowed. An administrator was appointed. The widow of the deceased applied to the superior court for the appointment of commissioners to lay off and admeasure her dower in the lands embraced in the above-mentioned deed. These lands consisted of some 165 acres, and were the only lands in which McDonald had any interest at the time of his death. The commissioners set apart one-third in value of these lands as dower. The application was duly served upon the administrator, who filed a traverse on the ground that the husband had not been seised and possessed of these lands at the time of his death, and that, therefore, his widow was not entitled to dower in them. The mortgage company also filed a traverse to the return, upon what grounds does not appear in the record. The case came on for trial, and evidence was introduced by the applicant and by the administrator. Some time during the trial the mortgage company and the applicant entered into an agreement whereby the mortgage company agreed to withdraw its traverse and objections to the application, while the widow agreed that her dower, if assigned, should not affect the superior lien of the judgment which the mortgage company had obtained against the administrator upon the notes given by McDonald. This agreement was reduced to writing, made the judgment of the court, and ordered entered upon the minutes. The judge then directed the jury to return a verdict in favor of the applicant for the land set apart to her, and also for

the highest proved value of such land for rent during the time the administrator held it. Decree was entered upon this verdict. The administrator excepted to the direction of the verdict and to the decree.

1, 2. It will be seen from the above statement of the facts that McDonald had made an absolute deed to this land to the mortgage company. Although it was made for the purpose of securing a loan, and bond for title was made to McDonald by the mortgage company, conditioned to reconvey the land upon the repayment of the money borrowed, with interest, our Code and the decisions of this court declare that such a deed passes the title. It was an absolute conveyance, and the title passed from McDonald to the mortgage company. Under Civ. Code 1895, § 4687, the widow is entitled to dower in lands "of which the husband was seised and possessed at the time of his death, or to which the husband obtained title in right of his wife." There is no claim in the present case that McDonald obtained title to the lands involved in the right of his wife. He was residing upon the land at the time of his death, and it seems from the recitals in the deed that this was by permission or agreement of the mortgage company. But he had no seisin—no title—and his possession was not of the kind contemplated by the Code when it says "seised and possessed." Unless he was "seised" of the land—had title to it—his widow had no right to dower in it. See *Ferris v. Van Ingen*, 110 Ga. 115, 35 S. E. 347; *Harman v. Stange*, 62 Ga. 167; *Kinnebrew v. McWhorter*, 61 Ga. 33; *Raley v. Ross*, 59 Ga. 875. But it is argued that no one had the right to make this question except the mortgage company, and it had withdrawn its traverse. Certainly the administrator has a right to administer the entire assets of the estate for paying debts and for distribution. He also represents the decedent, and could make any objections to the deed of the mortgage company which the decedent could have made. The administrator is interested in the proper administration of every asset of the estate, and has a right to resist any effort improperly to reduce the estate. The case of *Ashley v. Cook*, 109 Ga. 653, 35 S. E. 89, is not in conflict with what has been said above. That was a case in ejectment, where the claim for borrowed money had been sued to judgment, and the execution levied, and the land sold without reconveyance to the borrower. Cook bought in the land at the sale, and the heirs of the grantor brought ejectment against him. Cook offered the deed of the borrower to the lender in evidence in order to show an outstanding title superior to that of the heirs at law. The latter objected to the deed on the ground that Cook could not connect himself with it, and therefore could not rely upon it in any way. Cobb, J., in discussing this feature of the case, remarked: "As to all the world except the grantee, the gran-

tor in the security deed is the owner of the property. * * * It would therefore seem right and proper that no person should be allowed to use this title in any way to interfere with the rights of the grantor in the deed, whatever they may be, unless the person relying thereon connects himself in some way with the deed." He simply meant to say that Cook, the purchaser at the sale, could not use the deed against the grantor or his heirs unless he connected himself with the deed. In another part of the opinion it is shown that Cook did connect himself with the deed, and was therefore entitled to introduce it in evidence and use it. The case now before us is entirely different. Here the grantor, or his personal representative, the administrator, attempted to use the deed of McDonald to the mortgage company for the purpose of protecting the heirs and creditors of the estate; not to use it "in any way to interfere with the rights of the grantor in the deed," but to use it in the interest of his estate. If Mrs. McDonald has no right to dower in this land, the objections of the administrator would benefit the other heirs and the creditors of the estate. None of the borrowed money having been paid to the mortgage company, and there being no offer to redeem by the widow, the title still remained in the company. The widow had no right to dower in the land, and it was error for the trial judge to direct a verdict in her favor and enter decree thereon.

3. The above being true, the error of the trial judge in directing a verdict for the highest amount proved for rent, when the evidence was conflicting upon the subject, will not necessarily or probably be involved in the next trial, but as matter of practice we deem it best to reassert this principle. In no case where the evidence is conflicting on a material issue has a judge the right to direct a verdict thereon.

Judgment reversed. All the Justices concurring.

(120 Ga. 342)

HARDEMAN v. BELL.

(Supreme Court of Georgia. June 8, 1904.)

TRIAL—INSTRUCTIONS—SALE—ACTION FOR PRICE.

1. A request to charge the legal effect of a portion of the testimony of the sole witness for the plaintiff is properly refused where the same witness on cross-examination contradicts the matters to which the request relates.

2. The evidence demanded the verdict for the defendant.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; A. W. Flite, Judge.

Action by J. W. Hardeman against B. A. Bell. Judgment for plaintiff before a justice, and for defendant on appeal, and plaintiff brings error. Affirmed.

Griffin & Attaway, for plaintiff in error. J. Z. Foster, for defendant in error.

EVANS, J. Hardeman sued Bell in a justice's court, alleging an indebtedness of \$66.72 upon an open account, a copy of which was attached to the summons. An appeal was taken from the judgment of the justice court to the superior court, and on the trial of the appeal case the plaintiff testified on direct examination that the account sued on was just, true, due, and correct as stated. On cross-examination he testified that the defendant did not personally get any of the goods embraced in the bill of particulars; that Walraven got all of the goods, a portion of which he sold himself, and that the remainder were sold by his clerks. He was unable to identify the goods sold by himself. He knew that the amount sold by his clerks was correct, because they were honest. At the trial in the justice court Walraven admitted in the presence of the defendant that he got all of the goods set out in the account. This was all the evidence that was offered by the plaintiff. No evidence was offered by the defendant. The judge refused a written request of the plaintiff to charge the following: "I charge you, gentlemen of the jury, that when the plaintiff testified that the account sued upon was just, due, unpaid, and correct as stated, a prima facie case is made, and, stopping there, it would be your duty to find for the plaintiff." Even if the request presented a correct legal principle as to the effect of the testimony of the plaintiff that the account was just, due, unpaid, and correct as stated, the court properly refused to give the same in charge because on cross-examination the plaintiff wholly failed to make out his case, or to show that any of the goods were either purchased by or delivered to the defendant, or on his order. Plaintiff admitted that all of the goods were purchased by one Walraven. What connection Walraven had with the defendant does not appear in the testimony. Before the defendant could be made liable for any account contracted by Walraven, the authority of Walraven should be made to appear. The verdict for the defendant was demanded by the testimony, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concurring.

(120 Ga. 262)

MC CALL v. MILLER.

(Supreme Court of Georgia. June 8, 1904.)

JUDGMENT—VACATING—ABSENCE OF DEFENDANT—AMOUNT.

1. To authorize the setting aside, in an equitable proceeding, of a verdict and judgment, on the ground that the defendant therein had, by reason of his sickness, been prevented from being present at the trial, it must appear, not only that his absence was from such cause, but that, had he been present, there would probably have been a different result and one more favorable to him. A verdict was directed against a defendant, and judgment entered thereon, for the failure of his counsel to comply with a per-

emptory order of court, duly granted, directing such counsel to produce on the trial a certain written instrument, which the order recited was then in his possession and contained evidence material in the case, the defendant being absent, on account of his sickness, when such verdict and judgment were rendered. *Held*, that the facts recited did not make a case, within the above-stated rule, for setting aside the verdict and judgment.

2. The amount of the verdict and judgment sought to be set aside was not more than was authorized under the facts of the case in which they were rendered.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by E. J. Miller against J. H. McCall. From a judgment overruling a demurrer, defendant brings error. Reversed.

J. G. & J. F. McCall and Z. D. Harrison, for plaintiff in error. Bennet & Bennet and J. D. Kilpatrick, for defendant in error.

FISH, P. J. The record in this case is somewhat confused. We gather, however, from the original petition of E. J. Miller, the exhibits attached thereto, and amendments to the same, the following facts: On January 24, 1900, during the November, 1899, adjourned term of the superior court of Brooks county, verdict and judgment were rendered in favor of J. H. McCall against E. J. Miller and the sureties on his bond given to dissolve a garnishment, in the case of J. H. McCall v. A. P. Ashurst, defendant, M. Brice, garnishee, and E. J. Miller, claimant, who had traversed the answer of the garnishee, and upon which traverse an issue had been formed, judgment having been previously rendered against the defendant, Ashurst, in the main case. In 1898, during the pendency of the garnishment and claim case, counsel for Miller had been served, at the instance of the plaintiff, with written notice to produce, upon the trial of that case, a certain letter from the plaintiff to Miller, dated August 25, 1895, alleged to contain evidence pertinent to the issue in the case, and to be used as evidence in behalf of the plaintiff. Upon the call of the garnishment and claim case on January 23, 1900, during the said November adjourned term, counsel for Miller, in response to the notice to produce such letter, stated to the court that he had the letter in his possession, but was unable to produce it, for the reason that it was then in Moultrie. The court thereupon passed a peremptory order requiring counsel for Miller to produce such letter on the trial, to be used as evidence for the plaintiff. On the next day, January 24th, upon the call of the case for trial, verdict and judgment were rendered against Miller and the sureties on his bond to dissolve the garnishment, for the failure of his counsel to produce such letter in accordance with the peremptory order of the court. (Counsel for Miller, in their brief, say: "The court directed a verdict in favor of plaintiff in error on

account of this failure to produce said letter.") Miller's equitable petition, brought January 27, 1900, against J. H. McCall and the clerk of the court, sought to set aside this judgment. The grounds upon which it was sought to set it aside were: (1) Because petitioner did not know that an adjourned term of Brooks superior court would be held on January 22, 1900, and if he had known it he could not possibly have attended, as he was seriously sick at that time; that his counsel wired him on Monday, January 22d, that the case would be reached, and that he immediately wired his counsel that it would be impossible, on account of his sickness, to attend court; that he would have been present but for his sickness; that the presence and testimony of petitioner was necessary for a successful presentation of his case to the jury, and "that his attorney could not have presented said case before the court without petitioner being there in person." (2) Because his counsel had leave of absence from the November, 1899, term of the court, and, having removed from Quitman to Atlanta about December 1, 1899, did not know that an adjourned term of the court would be held on January 22, 1900, until he saw a notice of it in a newspaper on Saturday, January 20th; that on January 18th his counsel, having heard a rumor to the effect that the adjourned term would be held, wrote to plaintiff's attorney requesting him to wire petitioner's counsel if a trial of the case would be insisted on, and suggesting that the case be referred to an auditor, and that, as no reply to his letter was received, his counsel thought that his suggestion of a reference to an auditor was satisfactory; that petitioner's counsel arrived at Quitman on January —, but did not succeed in seeing plaintiff's counsel until 10 o'clock a. m. on January 22d, when he first learned that the trial of the case would be urged; that his counsel immediately wired petitioner to come, and petitioner replied by telegram that his serious sickness prevented, as stated above, and petitioner also wrote to his counsel on the same day that he was too ill to attend court then, and to have the case postponed until the latter part of the week, when he could be present, but his counsel did not receive this letter until January 24th; that when his counsel removed from Quitman to Atlanta he left the letter, which he had been notified to produce, among the papers in his office at Quitman, and expected to find it there, but when he went to get it he found that his former law partner had carried this letter, with other papers, to Moultrie, and it was impossible for him to get the letter before the case was called for trial, and petitioner, on account of his serious illness, could not furnish his counsel with proper evidence for a legal showing for a continuance, and judgment was given against petitioner. (3) Because the amount for which the judgment sought to be set aside was rendered exceeded the amount which McCall,

the plaintiff in that case, was entitled to recover, for the reason that McCall's contention in that case was that Ashurst, his agent, had taken an order for a monument from Brice, which McCall was to furnish him, which order McCall contended Ashurst had transferred to petitioner, with notice on his part of McCall's interest in such order, and that if McCall was entitled to recover anything from petitioner it would only be the profit which McCall would have made by furnishing the monument, which would not have exceeded \$150. The petition as amended was demurred to on the following grounds: (1) Want of equity; (2) that it appeared from the petition that petitioner was represented by his counsel, who was present in the court when the judgment was rendered; and (3) that it also appeared from the petition that the petitioner was seeking to take advantage of his own laches. The demurrer being overruled, exceptions pendente lite to such ruling were filed by the defendant. Upon the trial a verdict was rendered in favor of the petitioner, setting aside the judgment. Plaintiff moved for a new trial upon various grounds, which being overruled, he excepted, also assigning error upon his exceptions pendente lite.

1. The view we take of the case renders it unnecessary to pass on the motion for a new trial. In our opinion, the general ground of the demurrer to the petition as amended should have been sustained. Considering the facts alleged in the petition, and ignoring the mere conclusions of the pleader, the petitioner was not entitled to the relief for which he prayed. When a regular term of court is adjourned over to a subsequent time, all parties and their attorneys having business in the court are bound at their peril to take notice of such adjourned term. *Rawson v. Powell*, 36 Ga. 255. "The judgment of a court of competent jurisdiction may be set aside, by a decree, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the petitioner." Civ. Code 1895, §§ 3987, 5370. In *Clifton v. Livor*, 24 Ga. 91, it was held: "If a party is prevented by sickness from appearing at the proper court, at the proper time, to make his defense at law, he is entitled to relief in a court of equity." There a bill was filed to set aside a sheriff's sale made under a mortgage execution, and to enjoin the execution of the *fi. fa.* The bill alleged that the complainant was too sick to attend the term of the court at which the rule absolute was granted until late in the evening of the second day of the term, and that when he arrived the rule had been made absolute, although he was informed by his counsel that he, in complainant's behalf, had urged the court to allow complainant until the last day of the term to file his affidavit in terms of the law, which the court refused to do. The bill set out a valid defense which the complainant would have set up if he had

been present. Chief Justice Lumpkin, in delivering the opinion, said, "It is against just such accidents [as the sickness of the complainant] that a court of chancery will grant relief." It seems, however, that a different rule was applied in *Woodward v. Dromgoole*, 71 Ga. 523. There a bill was brought to set aside a verdict in ejectment, and for injunction, etc. The bill alleged that the complainant was notified by his attorney that the ejectment case against him stood for trial, but that some 8 or 10 days before that time he was taken ill in Louisville, and could not attend the court; that, when the case was put on the calendar for trial, his attorney telegraphed to him; he wired back that he was too sick to attend; he did not know that more was required, and he was unable to do more; he also instructed his attorney to consult with another named attorney, whom he desired to represent him, but had been unable to see; that these two attorneys consulted together, and failing to obtain a continuance, and in good faith, deeming it the best thing to be done, filed an equitable plea, alleging that complainant had paid to the plaintiff a large part of the purchase money, and praying that the property be sold, the purchase money paid, and the balance turned over to complainant; that an agreed verdict was rendered accordingly, and that the property had been advertised for sale; that this was without the approval of complainant, and his attorneys did not know fully the facts of his defense; and that, as soon as complainant learned what had been done, he expressed his disapproval and filed the bill. This court reversed the grant of an injunction by the trial judge. Justice Blandford, in delivering the opinion, said that, applying the principles contained in Code, § 3129 (now Civ. Code, § 3988), to the allegations in the bill, it was apparent that there was no equity in it; "that if any harm [had] come to defendant it was by his own negligence and laches. 'Vigilantibus non dormientibus jura subveniunt,' which is a maxim of our law taken from the ancients. 'He that asks help from the gods must first help himself.' (*Æsop.*)" Again, in *Phillips v. Taber*, 83 Ga. 565 (4), 10 S. E. 270, it was held that, to set aside a judgment for defendant's absence from providential cause, he must show, not only that he was absent from such cause, but unable to notify the court of his condition.

Whatever may be the correct rule as to when equity will grant relief against a judgment at law rendered in the absence of the defendant by reason of his serious illness (and there seems to be some diversity of judicial opinion on the subject—1 Black on Judgments, § 334 et seq.), it appears from the petition in the case under consideration that, even if the petitioner had been present when the verdict and judgment which he seeks to set aside were rendered against him, the re-

sult would not have been different. His counsel had been duly notified to produce a certain letter, alleged to contain evidence pertinent to the issue, and to be used on the trial in that case as evidence for the plaintiff. It appeared that, when called upon to produce this letter, the counsel representing the petitioner admitted that it was in his possession, but stated that he was unable to produce it, because it had been carried to Moultrie by his former partner. It does not appear that any request was made that the case be postponed until the letter could be procured, or that any objection was made to the production of the letter because it was not material evidence, or for any other reason; nor does it appear that any objection was made to the granting of the peremptory order requiring petitioner's counsel in that case to produce the letter; nor is there any suggestion in the petition as to what petitioner could or would have done, had he been present, to prevent the granting of the peremptory order to produce this letter, or to prevent the rendition of the judgment against him and his sureties for the failure of his counsel to comply with such order. It has been held that, "to authorize the setting aside of a verdict on account of the defendant having been providentially prevented from being present at the trial, it must be shown that he was injured by such absence" (*Peacock v. Ury*, 52 Ga. 353 [8]); and that, when it did not appear in a motion for a new trial that a different result would have been reached had the movant been present at the trial, the motion was properly overruled (*Ferrill v. Marks*, 76 Ga. 21).

2. From the petition and the exhibits attached thereto, it appeared that J. H. McCall had obtained a judgment against Ashurst for \$405 principal, and that Brice, the garnishee, had answered that he had in his hands the sum of \$461.27, which Miller had claimed and obtained by giving bond to dissolve the garnishment. The judgment rendered against Miller and his sureties was for \$405 principal, and interest on the same at 7 per cent. per annum from the date he dissolved the garnishment and took the fund to the date of the judgment against him and his sureties. The issue in the case was whether the garnishee owed Ashurst or Miller, and the question as to whether Miller had damaged McCall by purchasing from Ashurst, McCall's agent, an order for a monument, which Brice, the garnishee, had given the agent, was not in the case. It is clear, therefore, that there was no merit in the ground of the petition which alleged that the amount for which the judgment sought to be set aside was rendered exceeded the amount which the plaintiff was entitled to recover.

The judgment of the court overruling the demurrer must be reversed. All the Justices concurring.

(120 Ga. 468)

SOUTHERN RY. CO. v. BANDY.

(Supreme Court of Georgia. June 10, 1904.)

CARRIERS—INJURY TO PASSENGERS—ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE.

1. Where a carrier accepts fare to a particular station, it is not sufficient that the speed of the train be slackened, but the company is bound to stop the train so as to afford the passenger an opportunity safely to alight.

2. A passenger cannot rely on the conductor's instructions as a sufficient excuse or justification for doing an act obviously dangerous.

3. It is not a want of ordinary care if a passenger prudently uses the means which the company affords him for disembarking.

4. If, under the direction of the conductor, a passenger gets off of a slowly moving train, the company is liable for the consequent injuries.

5. The evidence was conflicting, but sufficient to sustain the verdict for the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by A. L. Bandy, by his next friend, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In the case of Bandy against the Southern Railway Company the plaintiff, a minor, testified that on the night of November 10, 1901, he bought a ticket from Dalton to Miller's Station, and boarded the train, which was then about an hour and a half late; that just before reaching the station the conductor told him that as they were behind time he would not stop, but would only slow up, called him to the platform, and, as the train continued to slacken its speed, punched him, saying, "Now is the time to get off;" that the speed appeared to the plaintiff sufficiently slow to make it reasonably safe to get off; that he obeyed the command, but in doing so stepped upon a rolling stone, which threw him violently to the ground, occasioning serious injuries, the character of which was testified to by the plaintiff and the attending physician. The testimony of the conductor was in direct conflict with all the material facts stated by the plaintiff. His testimony was confirmed by that of the brakeman and two passengers. All the witnesses showed that the train did actually come to a stop about a car length beyond the point at which the plaintiff got off. There was a verdict for the plaintiff. A motion for a new trial on the general grounds was overruled, and the defendant excepted.

Shumate & Maddox and Harkins & Dodd, for plaintiff in error. W. C. Martin, W. M. Jones, and R. J. & J. McCamy, for defendant in error.

LAMAR, J. The evidence was directly in conflict, but the testimony for the plaintiff brought the case within the decision in Georgia Railroad Co. v. McCurdy, 45 Ga. 288, 12 Am. Rep. 577, where it was held that, if

the company accepts the fare to a particular station, it is bound to stop, and it is not sufficient that the speed is slackened. If, under the direction of the conductor, a passenger gets off of a slowly moving train, the company is liable for consequent injuries, it not being a want of ordinary care if the passenger prudently uses the means which the company affords him for disembarking. *Western R. Co. v. Young*, 51 Ga. 490; *Central R. Co. v. Smith*, 60 Ga. 278; *Jones v. Ry. Co.*, 108 Ga. 570, 29 S. E. 927. In such a case it is immaterial whether the direction to alight from the moving train was given while the passenger was in the coach or on the steps, the length of time between the order and the alighting being unimportant. Of course, the passenger could not rely on the conductor's instruction if it was obviously dangerous to conform thereto; but the evidence here was that the train was moving slowly, and the jury had the right to believe this statement and the further testimony of the plaintiff that he thought it reasonably safe to obey the conductor's command.

Judgment affirmed. All the Justices concurring, except **CANDLER, J.**, disqualified.

(120 Ga. 314)

CHRISTIAN v. MACON RY. & LIGHT CO.

(Supreme Court of Georgia. June 8, 1904.)

COMPARATIVE NEGLIGENCE—PLEADINGS AS EVIDENCE—NONSUIT.

1. Under the evidence the jury might fairly infer that the defendant was negligent in running its cars. If the plaintiff and the defendant were both negligent, the former can recover, unless his negligence was equal to or greater than the negligence of the defendant, or unless he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. The latter question is, under the plaintiff's evidence, unexplained, a close one, and should have been submitted to the jury.

2. Where the plaintiff introduces in evidence a paragraph of the defendant's answer, part of which is in his favor and part against him, the plaintiff is not estopped to rebut the parts which are against him, nor is the jury bound to take them as true. In such case the jury may, for sufficient reasons, believe a part of the admissions and disbelieve the other part; this being a question purely for the jury.

3. It was error to grant a nonsuit.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by R. G. Christian against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Reversed.

M. Felton Hatcher and Crump & Travis, for plaintiff in error. Dessau, Harris & Harris and Bacon, Miller & Brunson, for defendant in error.

SIMMONS, O. J. The first headnote is sufficient without elaboration. The second gave us more trouble. It seemed to some of

¶ 4. See Carriers, vol. 9, Cent. Dig. §§ 1226, 1261g.

us, when the question was argued, that, where the plaintiff put in evidence the admissions and declarations of the defendant by introducing a paragraph of the answer, and these declarations fully exonerated the defendant from all blame, the plaintiff was estopped to deny or contradict them. It was on this theory, we suppose, that the learned judge below granted the nonsuit. After a thorough and careful examination of the authorities, we find that this is not the rule as to such declarations. The rule seems to be well settled, not only in this state, but elsewhere, as evidenced by decisions and textbooks, that where a party introduces statements of his adversary which are partly in his favor and partly against him, he is not concluded by the self-serving portions of such statements, nor estopped to contradict them. It is also well settled in this state that a party may contradict his own witness by showing the truth to be different from what the witness testified. *Skipper v. State*, 59 Ga. 63; *Cronan v. Roberts*, 65 Ga. 678; *McElmurray v. Turner*, 86 Ga. 217, 12 S. E. 359. Some of the plaintiff's evidence did in terms contradict the self-serving declarations of the defendant set out in the paragraph of the answer introduced in evidence by the plaintiff. These cases show that a party who introduces a witness is not absolutely bound by his testimony, but may contradict him, and show the real facts of the case. Nor are the jury bound to believe that part of the declarations which is in favor of the party making them. They may believe or reject the whole, or, for sufficient reasons, they may believe part and reject the remainder. The whole paragraph introduced was made the evidence of the plaintiff, to be used or relied upon by either party as evidence; but it was for the jury at last to determine under all the evidence what part of the paragraph they would believe. Upon this subject, see *Sims v. Ferrill*, 45 Ga. 585 (3). In *Hickson v. Bryan*, 75 Ga. 397, Hall, J., said: "Though an answer was waived, this did not deprive the complainant of the privilege of availing herself of admissions made in it; and, although the whole answer is before the jury, and the admissions are qualified by other parts of it, they are not bound to believe such qualifications." Going outside of this state, we find the same doctrine announced. In Chamberlayne's *Best on Evid.* (Inter. Ed.) § 520, it is said: "Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may consider, and attach what weight they see fit to any self-serving statements it contains. * * * While the whole statement must be received, the credit due to each part must be determined by the jury, who may believe the self-serving and disbelieve the self-harming portion of it, or vice versa." In 1 Greenl. *Evid.* (16th Ed.) § 201, the same principle is announced. In

Mott v. Consumers' Ice Co., 73 N. Y. 543, similar to the present case in that the answer of the defendant was "put in evidence for some unexplained and incomprehensible purpose by the plaintiff," it was said by the New York Court of Appeals: "Ordinarily, a party is not bound by the admission of his adversary, of which he gives evidence, but is at liberty to use it so far as it makes in his favor, and to disprove the residue; that is, he is not estopped by it. The fact that an admission is in a pleading does not change its character or create an estoppel." In another case decided by the same court it was said: "The referee was also right in denying the motion for a nonsuit. The plaintiff had given evidence tending to establish his employment and the length of time that he had labored for the defendant. He then showed, by the declarations of the defendant, his dismissal, and the amount of his salary. In the course of the same conversation the defendant said that the plaintiff got drunk, was absent, and neglected his business. The defendant insists that the admission must be taken together, and in this he is correct; but, as there was other evidence, the referee was not obliged to give equal credit to every part of the declaration. He might, and it seems he did, believe the discharge of the plaintiff established by the admission, as a fact peculiarly within the knowledge of the defendant, and reject the excuse offered at the same time, not only as inconsistent with the other evidence, but as probably suggested upon information obtained from others." *Bearss v. Copley*, 10 N. Y. 93. See, also, *Algase v. Indemnity Ass'n*, 84 Hun, 474, 475, 29 N. Y. Supp. 101; *Schmidt v. Pfau*, 114 Ill. 494 (5), 504, 2 N. E. 522; *Wilson v. Calvert*, 8 Ala. 757; *Pearson v. Sabin*, 10 N. H. 205. For these reasons we think that the court below erred in granting a nonsuit.

Judgment reversed. All the Justices concurring.

(120 Ga. 343.)

CENTRAL OF GEORGIA RY. CO. v. POTTER.

(Supreme Court of Georgia. June 8, 1904.)

CERTIORARI TO JUSTICE—ANSWER—STIPULATION.

1. Where a petition for certiorari attacks a judgment on the ground that it is contrary to evidence, it is necessary that the record shall clearly and definitely state the facts on which the judgment was based.

2. If the answer is not satisfactory, the law provides a method by which either party may test its sufficiency and correct any errors therein. Civ. Code 1895, § 4647.

3. The court cannot act upon an agreement that the answer, where not in conflict with the petition, shall be taken as true, and the petition, where not in conflict with the answer, shall be taken as true, since this involves a comparison of two different statements, and tends

¶ 1. See *Certiorari*, vol. 9, Cent. Dig. § 145.

to create confusion and conflict, where the statute requires clearness and certainty.

4. In the present case the court cannot say that there was any abuse of discretion in refusing to sustain the certiorari. The evidence for the defendant tended to establish that the company was in the exercise of ordinary care. In addition to the statutory presumption of negligence, there was evidence tending to show that the injury might have been avoided, and the judgment is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; W. M. Henry, Judge.

Action by Thomas Potter against the Central of Georgia Railway Company. Judgment for plaintiff, defendant brings error. Affirmed.

John D. Taylor and J. Branham, for plaintiff in error. Wesley Shropshire, for defendant in error.

LAMAR, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 373)

TEASLEY et al. v. BRADLEY et al.

(Supreme Court of Georgia. June 9, 1904.)

REFERENCE — EVIDENCE — ADMISSIONS — INSTRUCTIONS — EXCESSIVE JUDGMENT.

1. The reference of a case to an auditor rests largely in the discretion of the court, and, unless this discretion is abused, a refusal to appoint an auditor will not be held erroneous.

2. Evidence which admits liability on a subsisting debt is not rendered inadmissible because the admission is accompanied with an offer to pay a less sum than admitted to be due.

3. A charge adjusted to a plea is not rendered erroneous because it conflicts with a theory of the defendant which is not pleaded.

4. Irrelevant evidence was properly excluded.

5. If a charge as a whole correctly applies the law, a specified portion on a particular subject will not be deemed erroneous, which, if taken in connection with the whole charge, does not tend to confuse or mislead the jury upon any issue in the case.

6. The amount of interest seems to be excessive, and, if the defendants in error will write off the interest to \$566.57 within 10 days after the filing of the remittitur, a new trial will be refused; otherwise the verdict will be set aside, and a new trial granted.

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Action by Laura M. Sadler against Isham A. Teasley and others. On death of plaintiff, her administrators, P. Bradley and others, were made parties plaintiff. Judgment for plaintiffs, and defendants bring error. Affirmed on conditions.

T. W. Teasley and A. G. & Julian McCurry, for plaintiffs in error. O. C. Brown, W. L. Hodges, J. N. Worley, and James H. Skelton, for defendants in error.

EVANS, J. Laura M. Sadler instituted a suit against Isham A. Teasley to recover certain funds which she alleged had been intrusted to him as a confidential steward or factor for the purpose of collecting, invest-

ing, and taking care of the same for her benefit, and for which she had made demand upon him, but which he had refused to pay over to her. The defendant pleaded that the funds were not delivered to him as a steward or confidential agent, but were given to him as a loan; that the statute of limitations had attached; and that he was not indebted. Pending the suit the plaintiff died, and her administrators were made parties to the case. The jury returned a verdict in their favor, and Teasley made a motion for a new trial, to the overruling of which exception is taken. After the motion for a new trial was made, the defendant died, and his executors were made parties in his stead. The case has been tried twice, resulting each time in a verdict against the defendant. A brief of the pleadings appears in the case in 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113, and reference to that case will disclose the contentions of the parties as made by the pleadings.

1. Upon the call of the case the defendant moved that, inasmuch as matters of account were involved, the case should be referred to an auditor. The court refused to appoint an auditor, and to this ruling exception is taken. The appointment of an auditor is a matter vested largely in the discretion of the court, and, unless this discretion has been abused, the refusal to appoint an auditor will not be held erroneous. Most of the items upon which the plaintiffs were seeking a recovery were not disputed by Teasley. He contended that the money received by him was loaned, and that he had accounted for it; and, further, that more than four years had elapsed since the loan was made, and that the plaintiffs were barred by the statute of limitations from a recovery. The judge, having previously tried the case, was thoroughly familiar with the contentions of the parties, and he did not deem it necessary to refer the case to an auditor. It not appearing that the judge abused his discretion, we cannot say that he erred in refusing to refer the case to an auditor. Civ. Code 1895, § 4582.

2. Complaint is made that the court allowed certain testimony which the plaintiffs in error insist was inadmissible because it was in the nature of an offer of compromise. The evidence objected to tended to show that Teasley had admitted the existence of the debt, and had offered to settle the same for a less amount. This evidence was in support of the allegation in the petition that Teasley offered to settle with Laura M. Sadler "by paying her in land and sundry accounts or obligations he held against various parties, the same aggregating \$3,268, but that [she] refused to accept said offer, for the reason that [she] considered said amount inadequate, and not right; all of which was an acknowledgment on the part of the defendant that he held said funds of plaintiff in trust, as aforesaid, and thereby acknowledged that he held said money, rents

and profits as a continuing and subsisting trust." This paragraph of the petition was demurred to on the ground that the admission therein referred to was a part of a negotiation for a compromise. This specific objection was passed upon when the case was here before, and it was then ruled that evidence offered in support of the allegations made in regard to Teasley's admissions did not amount to an offer or proposition to settle a doubtful or disputed claim, but was more in the nature of an offer to settle an admitted liability. 110 Ga. 507, 35 S. E. 782, 78 Am. St. Rep. 113. There is a clear distinction between an offer to settle an unquestioned claim, or one about which there is no pending difference as to the question of liability, by the payment of a sum less than the amount admitted, and an offer to compromise a claim where the liability is disputed. If the evidence amounts to an admission of the liability, this evidence is not rendered inadmissible because the party admitting the liability offers to settle or compromise the claim by payment of a less sum. If the offer to pay a certain sum is for the settlement of a disputed liability, then it is in the nature of an offer to compromise, and evidence in regard thereto is inadmissible. Kelly v. Strouse, 116 Ga. 875, 48 S. E. 280 (12).

3. Error is assigned upon the following charge of the court: "I charge you further, if Laura Sadler and defendant's wife and Mrs. Bradley agreed with the defendant that out of the estate of James Sadler payment was to be made for the expense and trouble of waiting on James Sadler, if defendant had any such expense or trouble, then defendant had the right to take out of their part of the estate of James Sadler payment for such trouble and expense in waiting on him, if he incurred any trouble and expense in waiting on him. If you believe these sisters agreed with defendant that out of the estate payment was to be made for any trouble and expense in waiting on James Sadler, then you will determine whether or not defendant incurred any expense and trouble in waiting on said James Sadler; and, if so, what said trouble and expense was reasonably worth. I charge you that if these sisters agreed that out of the estate of James Sadler payment was to be made if defendant incurred any expense and trouble, then you will deduct from the estate of James Sadler what said trouble was reasonably worth, and what said expenses were, and then determine, under the rules of law given you in charge by the court, whether or not defendant is liable to plaintiff for one-third of said balance of said estate, if he received any part of it belonging to Miss Laura Sadler. I charge you further, if these sisters did not agree with defendant that out of the estate of James Sadler payment was to be made for such expenses and troubles, or if such agreement was made, but defendant did not incur any trouble and expense in waiting on James

Sadler, and if defendant reserved any part of said estate belonging to Laura Sadler, then you will determine, under the rules given you in charge by the court, whether or not defendant is liable for such part, without deducting anything for such trouble and expense, if it was incurred by defendant." Plaintiffs in error insist that this charge was erroneous, for the reason that it made the assent of Mrs. Bradley necessary to the contract between Teasley and her sisters, in order to entitle him to be paid Laura Sadler's part of the expenses incurred by him in taking care of James R. Sadler. This charge was adjusted to the pleadings in the case. In the amendment to his plea Teasley alleged that prior to the death of James R. Sadler, and when he returned to defendant's home to be taken care of in 1873, there was an agreement between defendant and the children of James R. Sadler that, in consideration of defendant taking care of said James R. Sadler and nursing him while he lived, they would wind up James R. Sadler's estate without administration, and that defendant was to be fully paid for his services and the expenses incurred by him in pursuance of the contract, which amounted to the sum of \$1,000, one-third of which sum was properly chargeable to Laura M. Sadler. The amendment did not state the names of the children of James R. Sadler. The evidence disclosed that at that time there were three in life, and the judge in his charge gave the names of these children, one of whom was Mrs. Bradley, and in effect instructed the jury that, if the contract set up in the amended plea was sustained by proof, then Laura Sadler would be chargeable with her share of the expenses incurred in pursuance of that contract. There was nothing in the pleadings which set up a contract between Laura Sadler and Teasley's wife. The allegation was that all of the children should pay the defendant for his trouble and expenses, and the charge of the court was adjusted to the pleadings, and was free from error.

4. The court excluded the testimony of Mrs. Lizzie J. Teasley, offered by the defendant, to prove that Cynthia Sadler lived at the defendant's a good many years before her death; that she was sick several weeks before she died; and that during her sickness she was waited on by the defendant, and at his expense. The plaintiffs in error insist that, inasmuch as a part of the money alleged to be due was derived by Laura Sadler from the estate of Cynthia Sadler, the defendant, Teasley, was entitled to a deduction from her distributive share of her proportionate part of the indebtedness of Cynthia Sadler which he had paid. The record does not disclose any items of expense which were paid by the defendant. It appears that after the death of Cynthia Sadler her sole estate consisted of a tract of land known as the "Crawford Place"; that it was sold for \$1,500; and that the money was equally di-

vided amongst her three heirs at law, the defendant receiving Laura Sadler's share of her sister's estate. Teasley's contention was that the money he received was delivered to him as a loan. The plaintiffs denied that Laura Sadler loaned the money to him, and contended that, on the contrary, she gave it to him to be invested for her benefit. If Teasley had a demand against the estate of Cynthia Sadler, he should have asserted his claim in 1874, when the estate was divided. It is now too late, after acknowledging that Laura Sadler was entitled to a one-third interest in that estate, and receiving her share, to set up that it should be reduced by certain expenses chargeable to the estate. The evidence was properly excluded.

5. Error is assigned upon the following charge of the court: "If the defendant received from Laura Sadler, or from other sources for her, money or property with the understanding that he was to invest and collect the principal or interest, or both, and reinvest the same from time to time for the benefit of Laura Sadler; and if it was contemplated by the parties that the defendant, Teasley, should use the money for the benefit of Laura Sadler; and if there was no time agreed on between the defendant, Teasley, and Laura Sadler when the money received by the defendant should be returned to Laura Sadler; and if the defendant rendered no account to Laura Sadler, accompanied by an offer to settle, more than four years prior to the institution of this suit; and if he had not notified Laura Sadler that he no longer held such money as hers, but that it belonged to him, more than four years prior to the bringing of this suit; and if Laura Sadler did not make a demand on the defendant, Teasley, for a return of the money, more than four years prior to the institution of this suit; and if defendant did not repudiate the agency more than four years before this suit was commenced—the plaintiff in this case would be entitled to recover against the defendant." The plaintiffs in error insist that the court committed error in giving this charge, because the right of the plaintiffs below to recover did not depend solely upon whether the debt was barred by the statute of limitations, but whether the money received by Teasley was given to him as a trust fund or delivered to him as a loan. This charge of the court was given in connection with instructions on the subject of the statute of limitations. The court had previously instructed the jury that, before the plaintiffs would be entitled to recover, it must appear that Teasley received the money from Laura Sadler as a trustee; and was simply instructing the jury, in this connection, when the bar of the statute would attach. Construed together with the context, there was no error in this charge.

6. Plaintiffs in error contend that the verdict was contrary to designated portions of the charge, and also contrary to law and the

evidence. The verdict was for \$1,385 principal and \$2,983 interest. The amount of principal can be definitely arrived at from the evidence, and the finding of the jury as to the amount of principal due was fully warranted by the evidence. We are unable to ascertain from the record by what process the jury arrived at the amount allowed for interest. It seems to be excessive. The evidence showed that Laura Sadler lived with Teasley, and that during the time he had her money he made certain payments; but the amount of each, and the time when these payments were made, do not clearly appear. There is no data upon which the exact amount of interest can be arrived at. Inasmuch as the evidence does not furnish any definite basis for the calculation of interest prior to demand, the right of the plaintiffs to an allowance of interest should be limited to a recovery of the interest accruing between the date of the demand and the date of the verdict. Accordingly, the judgment is affirmed on condition that the defendants in error will, within 30 days after the filing of the remittitur in the office of the clerk of the superior court of Hart county, write off all interest in excess of \$566.57. This amount is the interest upon the principal found by the jury from the date of the demand up to the time the verdict was returned, calculated at the rate of 7 per cent. per annum. If the defendants in error decline to write off the excess of interest in accordance with this judgment, then a new trial is granted.

Judgment affirmed on condition. All the Justices concurring.

(120 Ga. 472)

JARRETT V. CITY ELECTRIC RY. CO.

(Supreme Court of Georgia. June 10, 1904.)

WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS—PROCESS—AMENDMENT—SERVICE.

1. Where it clearly appears that in the trial of the questions brought up by a bill of exceptions, no evidence was introduced before the trial judge, the writ of error will not be dismissed because the bill of exceptions does not expressly state that no evidence was introduced.

2. Where Jarrett brought suit against a street railway company, and the plaintiff's name was properly stated in the body of the original petition, but was written "Jarvitt" in the "backing" of the petition and in the caption of the process annexed by the clerk, and was also written "Jarvitt" in the copy petition and in the caption of the copy process served upon the defendant, and on the trial the court allowed the name of the plaintiff to be corrected in the caption of the process, in the "backing" of the petition, and on the docket, prior to which time the defendant had answered to the merits, it was not necessary that the process as amended should be served upon the defendant. If, in consequence of the amendment, the defendant was unprepared to go to trial, the court would doubtless have granted it time for preparation.

3. In such case it was therefore error for the court to dismiss the case because the plaintiff refused to have the defendant served with the process as amended.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by C. M. Jarrett against the City Electric Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Seaborn & Barry Wright, for plaintiff in error. Denny & Harris, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concurring.

(120 Ga. 446)

FREEZE v. WHITE.

(Supreme Court of Georgia. June 10, 1904.)

TRIAL—INSTRUCTIONS—APPEAL—REVIEW.

1. Regardless of whether the answer to the petition was good as a plea of payment, evidence in support of such a defense was admitted without objection, and it was therefore not error for the court to charge the law on that subject. *Howard v. Barrett*, 52 Ga. 15; *Rattee v. Chapman*, 4 S. E. 684, 79 Ga. 574; *Savannah Ry. v. Grogan*, 43 S. E. 701, 117 Ga. 464.

2. While part of the charge excepted to was more or less confusing, it was not made to appear in the motion for a new trial that the complaining party was injuriously affected thereby. The contentions of the parties were fairly submitted to the jury.

3. The evidence leaves much room for doubt on the controlling issues of the case, but there was some evidence from which the jury might fairly have inferred that the settlement shown to have been effected between the plaintiff and the defendant's intestate covered the matters in controversy in the present action. The trial judge was satisfied with the verdict, and his refusal to grant a new trial on the ground of insufficiency of evidence will not be held error.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by C. J. Freeze against Newton White, administrator. Judgment for defendant, and plaintiff brings error. Affirmed.

J. P. Brooke and G. B. Walker, for plaintiff in error. H. L. Patterson, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(120 Ga. 344)

E. B. HUNTING & CO. v. QUARTERMAN.

(Supreme Court of Georgia. June 9, 1904.)

INJURY TO EMPLOYÉ—DEFECTIVE APPLIANCES—OBJECTION TO EVIDENCE.

1. There was sufficient evidence to support a finding that the plaintiff's decedent used the staging, the collapse of which caused his death, with the knowledge and acquiescence of the defendants. In such a case it was their duty to exercise ordinary care and diligence for his safety.

2. The evidence objected to was not shown to have been of sufficient materiality, even if inadmissible, to injuriously affect the rights of the defendants; the charge of the court fully and

fairly presented to the jury the issues involved; and the evidence warranted the verdict in favor of the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Action by Hattie Quarterman against E. B. Hunting & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

O'Connor, O'Byrne & Hartridge, for plaintiffs in error. Adams & Adams, for defendant in error.

CANDLER, J. Hunting & Co. were in the lumber business in Savannah, and, in connection with their business, loaded vessels at their docks on the Savannah river. Quarterman was employed by them as foreman of a gang of workmen. His home was in Savannah. While Quarterman was engaged in work for his employers on the northern side of the Savannah river, or the side furthest from the city of Savannah, other employes of Hunting & Co. were loading a vessel on the southern side. To aid in this work, staging had been erected, supported by a rope suspended from the vessel. While Quarterman and the men under him were at work on the northern side of the river, the tide began to ebb, making it impracticable for them to continue their work until several hours had elapsed, and they proceeded to cross the river in a small boat. In landing, they rowed to the vessel which was being loaded, with the intention of crossing the staging before mentioned, and thus getting out on the dock. Quarterman remained in the boat while several of the workmen got out on the staging, when the rope supporting the staging broke, precipitating the staging upon Quarterman, inflicting injuries upon him from which he subsequently died. His widow brought suit against Hunting & Co., alleging that the staging, rope, and tackle were insecure and defective; that this was, or should have been, known by the defendants; and that Quarterman could not, in the exercise of ordinary care, have known that such was the case. On the trial the jury returned a verdict for the plaintiff for \$3,000. The defendants made a motion for a new trial, which was overruled, and they excepted.

1. The point upon which this case mainly turns, and upon which most stress is placed by counsel for both the plaintiff and the defendants, is whether, under the evidence, Quarterman had the right to use this staging as a landing place, or, in other words, to quote from the brief of counsel for the plaintiff in error, "the pressure of the case * * * is on the question whether Quarterman, in using the staging as a landing place, was accepting an invitation of the plaintiffs in error, or was merely a licensee or trespasser." It seems clear that the staging was not designed for use as a landing place, but it seems equally clear that, as a matter of conven-

ience, similar staging on other vessels being loaded by the defendants was so used by their employes; that this was well known to the representatives of the defendants; and that no objection was made by them to the use of the staging for this purpose. There was also evidence which, if believed by the jury, would lead them to find that on the occasion of Quarterman's injuries the regular and usual landing place for the workmen in the employment of the defendants was obstructed, and that it was necessary for them, in order to get on shore, to cross this staging. Quarterman, separated from the city of Savannah by the width of the Savannah river, was entitled, so far as it lay within the province of the defendants to provide him with the means of transit to and from his work, to rely on the reasonable safety of the means so provided; and if the ordinary landing places were obstructed, and it was necessary for him to cross the staging in order to reach the dock, ordinary care and diligence were required of the defendants to see that the staging and its appurtenances were reasonably safe for the purposes to which they were, with their knowledge and approval, put. The case is somewhat analogous to that of an employe of a factory, to whom is owed, as an incident of the duty of the master to provide a safe place to work, the duty to keep reasonably safe the means of ingress to and egress from the place where the work is done. A careful reading of the evidence leads inevitably to the conclusion that there was ample warrant for a finding that the use of the staging by Quarterman as a landing place was with the full knowledge and acquiescence of the defendants, if not that their own act rendered such use on this occasion necessary. Knowing that the staging was likely to be put to this use by their employes from time to time, it was incumbent upon the defendants to exercise ordinary care and diligence for the safety of those who might pass over it. *Bullard v. Southern R. Co.*, 116 Ga. 644, 43 S. E. 39.

2. The motion for a new trial, as amended, contains numerous grounds, but none of them disclose any error of sufficient importance to require a reversal of the judgment of the court below. In one ground error is assigned on the admission of evidence as to a conversation between a witness and the mate of the vessel which was being loaded at the time Quarterman was injured, but, as the evidence objected to was not set out in the motion, this court cannot tell whether its admission was erroneous or not. Error is assigned on the admission of other evidence on the ground of irrelevancy, but it is not made to appear from the motion that the evidence, even if not material, was of sufficient importance to require the grant of a new trial; and, in view of the certificate of the trial judge as to these grounds of the motion, it cannot be said that they disclose any error. It is

complained that the court erred in charging the jury as follows: "If you find in this case for the plaintiff, the form of your verdict would be, 'We, the jury, find for the plaintiff,' and assess the damages at so much, naming a round sum." We cannot agree with the contention of counsel for the plaintiff in error that this was equivalent to instructing the jury that, in the event they should find for the plaintiff, their verdict should be for a substantial amount; and, while the expression "round sum" was not altogether happy, we cannot hold that it affords ground for a new trial. Complaint is made of numerous other extracts from the judge's charge, but most of these have, in effect, been disposed of in the ruling made in the first division of this opinion. The charge was, in the main, accurate, and fairly presented the issues involved to the consideration of the jury. There was abundant evidence that the rope which supported the staging, the fall of which caused the death of Quarterman, was defective when it was furnished to the employes of the defendants; that its defective condition was called to the attention of their representative, who refused to furnish any other; and that Quarterman had nothing to put him on notice of this defect, and was wholly without blame.

The verdict for the plaintiff was fully warranted, and the judgment overruling the motion for a new trial is affirmed. All the Justices concur.

(120 Ga. 481)

HART v. MANSON, Ordinary.

(Supreme Court of Georgia. June 10, 1904.)

REFERENCE — FILING REPORT — JURISDICTION — OBJECTIONS.

1. Where the report of an auditor is filed after the time provided by the order of court referring the case to him, the remedy of the party objecting to the finding of the auditor is to file exceptions to the report in the court in which the case is being tried. *Peavy v. McDonald*, 47 S. E. 203, 119 Ga. 865. It is too late, after the auditor's report has been passed upon by the judge of the superior court, and the judgment of that court brought here by bill of exceptions and affirmed, to raise the question of the jurisdiction of the auditor to file his report after the time allowed by the order, by a petition for injunction seeking to restrain the enforcement of the judgment of the superior court. *Civ. Code 1895, § 3742.*

(Syllabus by the Court.)

Error from Superior Court, Clayton County; E. J. Reagan, Judge.

Action by Z. T. Manson, ordinary, for use, against J. M. Hart. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. W. & John D. Humphries, for plaintiff in error. W. L. Watterson, J. F. Golightly, W. M. Wright, and C. T. Roan, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(120 Ga. 460)

WESTERN & A. R. CO. v. CORDER.

(Supreme Court of Georgia. June 10, 1904.)

CERTIORARI—PAYMENT OF COSTS—CERTIFICATE—BOND.

1. A receipt, signed by a justice of the peace whose judgment is sought to be reviewed on certiorari, showing that the plaintiff in certiorari has paid to him a named sum "in full of all costs to date" (the date of the application for certiorari) in the case in which the judgment complained of was rendered, substantially meets the requirement of the Civil Code of 1895, § 4639, that the party applying for the writ of certiorari must produce a certificate, from the officer whose judgment is the subject-matter of complaint, that all costs which may have accrued on the trial below have been paid.

2. When a certiorari is sustained and the case sent back for another hearing, the certiorari bond becomes functus officio; the security thereon is discharged from further liability, and may become security on a subsequent certiorari bond in the same case.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by the Western & Atlantic Railroad Company against S. A. Corder. Judgment for plaintiff. From an order dismissing a certiorari, defendant brings error. Reversed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. W. E. Mann, for defendant in error.

CANDLER, J. This case comes up on exceptions to the dismissal of a certiorari by the judge of the superior court. The grounds on which the judge rested his judgment were (1) that the security on the certiorari bond was the same as that on a former certiorari bond given by the same party in the same case, the first certiorari having been sustained and the case remanded for another hearing; and (2) that the petition for certiorari was not accompanied by a certificate of the magistrate that all the costs had been paid as required by law. Attached to the petition for certiorari was the following writing, signed by the magistrate: "Received of the Western & Atlantic Railroad Company the sum of five $\frac{45}{100}$ dollars, in full of all costs to date in the case of S. A. Corder v. W. & A. R. R. Co. This 30th day of Jan., 1901."

1. We do not hesitate to hold that the receipt of the magistrate answered every requirement of the law as to the necessary certificate of the payment of costs, and that this ground furnished no good reason for dismissing the certiorari. The Civil Code of 1895, § 4639, does not prescribe any special form of certificate by the magistrate. The primary object of that section is that there shall be a writing under the hand of the justice of the peace showing that all the costs which have accrued in his court have been paid. An itemized statement of costs, receipted by the magistrate, but not stating that it embraces all the costs which have accrued, will not meet this requirement, because it is entirely consistent with the hypothesis that only a part of the costs have been paid. Savannah, etc., R. Co. v. Shell, 72 Ga. 201. In the present case, however, the receipt of the magistrate showed, in effect, that all the costs which had accrued in his court had been paid, and this will not be held defective merely for lack of the technical words, "I certify," etc. See, in this connection, Williams v. Shuler, 94 Ga. 660, 19 S. E. 981.

2. The main point for decision in this case is whether, when a case has been taken by certiorari to the superior court, the certiorari sustained, and the case sent back to the magistrate for another hearing, the surety on the certiorari bond is still liable for the eventual condemnation money, and therefore ineligible to act as surety on a subsequent certiorari bond in the same case. It is contended by counsel for the plaintiff in error that, when the first certiorari was sustained, the bond, which was a condition precedent to its issuance, became functus officio, and that therefore the surety could under no circumstances become liable thereon. We think there can be no doubt that this contention is sound. A proper decision of this question involves the construction, in pari materia, of sections 4639, 4655, and 4656 of the Civil Code of 1895. Section 4639 provides, in part, that with certain exceptions, before any writ of certiorari shall issue, the party applying therefor, his agent or attorney, shall give bond and good security, "conditioned to pay the adverse party in the cause the eventual condemnation-money, together with all future costs." Section 4655 provides that if, on the hearing, the certiorari shall be sustained and a final decision thereon made by the superior court, the plaintiff (in certiorari) may sign up judgment for the amount recovered by him in the court below, together with the costs paid to obtain the certiorari and the costs in the superior court; "but if the certiorari shall be returned to the court below for a new hearing, the plaintiff shall sign up judgment for the costs in said superior court only, leaving the costs paid to obtain the certiorari to abide the final trial below." Section 4656 provides for the judgment to be entered in the event the certiorari is dismissed and a final decision made by the superior court, and concludes with the provision that, "if said case be sent back to the court below, and there be a judgment in said case in favor of said defendant in the court below, the security on the certiorari bond shall then be included as in case of security on appeal." The title of this last section is: "If the certiorari is dismissed, judgment for the defendant." When read in connection with sections 4639 and 4655, the words "if said case be sent back to the court below," etc., would seem clearly to contemplate the sending of the case back for final judgment in favor of the defendant in certiorari after a decision in his favor in the superior court. In other words, where the judge of the superior court

decides the case in favor of the defendant in certiorari, but for any reason declines to enter final judgment, and sends the case back to the justice's court with direction that judgment there be rendered, finally for the defendant in certiorari, the security on the certiorari bond then becomes liable as in case of security on appeal. This construction of the words quoted is entirely reasonable and consistent with the other portions of the section, while any other construction would involve a hopeless conflict with section 4655. In that section explicit direction is given for the rendition of judgment in just such a case as the present, where the certiorari is returned for another hearing; and it is there provided that the plaintiff shall have judgment for the costs in the superior court only, leaving the costs paid to obtain the certiorari to abide the final trial below. It could not have been the intention of the law-making body to provide that the security on a certiorari bond should be liable on the bond regardless of the outcome of the hearing of the certiorari. The case may very properly be analogized to that of the surety on a supersedeas bond given by a plaintiff in error in this court, who is liable only for the costs of prosecuting the writ of error in this court, and not for the amount of the verdict that may finally be rendered in the case. *Franklin v. Kriegshaber*, 114 Ga. 947, 41 S. E. 47. It follows, then, that the surety offered by the plaintiff in certiorari on its bond was not, for any reason given, objectionable, and that the court erred in dismissing the certiorari.

Judgment reversed. All the Justices concur.

(120. Ga. 480)

MONK et al. v. McDANIEL.

(Supreme Court of Georgia. June 10, 1904.)

ADOPTION—PROCEDURE—HABEAS CORPUS—CUSTODY OF INFANT.

1. The Code of Alabama of 1896, § 367, provides that any person desiring to adopt a child "may make a declaration in writing * * * which, being acknowledged by the declarant before the judge of probate of the county of his residence, filed," and recorded, has the effect of adopting the child. If such a declaration shows on its face that the declarant did not reside in the county in which it was acknowledged, filed, and recorded, but in another county of the state, the proceedings were void, and the declarant cannot invoke the same in this state as giving him the right to the custody and control of the child. The probate judge in such a proceeding does not act as a judicial, but as a ministerial, officer; nor will any statements made by him to the declarant as to the immateriality of the latter's place of residence render the adoption proceedings valid.

2. When this case was here before, and reversed upon the ground that the plaintiffs in error were the parents by adoption of the child whose custody was in question, the point above decided was not made or dealt with, but arose upon the second trial. The proceeding to adopt the child being now decided to have been void, and the trial judge having found, upon sufficient evidence, that the defendant in error was a fit and suitable person to take charge of the

child, and had sufficient means to maintain such child, and the plaintiffs in error having shown no better right, there was no abuse of discretion in awarding the custody of the child to the defendant in error, and dismissing the writ of habeas corpus.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; *R. W. Freeman*, Judge.

Application by *W. F. Monk* and others for a writ of habeas corpus to *S. A. McDaniel*. From a judgment dismissing the writ, petitioners bring error. Affirmed.

Brown & Roop and *E. J. Wynn*, for plaintiffs in error. *Hamrick & Smith*, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 469)

FREEMAN v. NASHVILLE, C. & ST. L. RY. CO.

(Supreme Court of Georgia. June 10, 1904.)

INJURY TO EMPLOYE—INSTRUCTIONS.

1. The summary of the contentions of the parties must embrace every material issue made by the pleadings. Where a plaintiff bases his action upon two alleged acts of negligence by the defendant as causing the injury complained of, the omission by the court to state plaintiff's contention as to one of the alleged acts of negligence, and to charge the law appropriate thereto, is error.

2. One is bound to use ordinary care to avoid the consequences of another's negligence, but this duty does not arise until the negligence of such other is existing, or is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend the existence.

(Syllabus by the Court.)

Error from City Court of Floyd County; *Harper Hamilton*, Judge.

Action by Major *Freeman*, by his next friend, against the *Nashville, Chattanooga & St. Louis Railway Company*. Judgment for defendant, and plaintiff brings error. Reversed.

E. P. Treadaway, *Harris*, *Chamlee & Harris*, and *Dean & Dean*, for plaintiff in error. *Payne & Tye* and *W. J. Neel*, for defendant in error.

EVANS, J. Major *Freeman*, by his next friend, sued the *Nashville, Chattanooga & St. Louis Railway Company* for certain injuries alleged to have been sustained because of the railroad's negligence while he was engaged in loading brick on defendant's cars. The railroad company had extended a spur track to the yards of the *Rome Brick Company*, and placed necessary cars on this spur track to be loaded with brick. Whenever it was necessary, the car, in process of being loaded, was temporarily shifted, so as to enable the railroad company to move out the loaded cars and station the empty ones. At the time of the alleged injury the plain-

tiff was in the employ of the brick company, and was engaged in loading an open car (usually used for hauling coal) with brick. He stood on the ground, and was pitching the brick to another employé in the car, who arranged them in tiers. The work of loading the car had progressed to the extent of six rows of brick, each row containing ten layers, when the switch engine and some empty cars were observed coming on the spur track where the car which was being loaded was stationed. The brick company's agent, who was superintending the loading, directed plaintiff to get on the partially loaded car to prevent the brick from falling when the switch engine undertook to couple to this car for the purpose of moving it. While so engaged, the coupling was made, and the brick were knocked down on plaintiff. Thus far in the narrative of the occurrences there is no substantial difference between the parties. The plaintiff contended, and offered evidence tending to show, that the coupling was made with unusual violence; that he did not know, nor had he any opportunity of knowing, that there was a hole in the bottom of the car; and that his foot became pinioned in this hole, and the brick fell on him, inflicting serious injuries. The defendant contended, and offered evidence tending to show, that the coupling was effected in the usual manner, without unnecessary violence, and that the other men in the car got out of the way of the brick, and were uninjured, and that, if plaintiff was injured at all, the injuries were of a trivial nature. The acts of negligence charged in the petition were the manner of making the coupling, which was alleged to be severe, violent, and reckless, and the furnishing by defendant of a car in which there was a hole in the bottom. The trial judge, in his summary of the plaintiff's contentions, wholly failed to refer to plaintiff's allegation of defendant's negligence in furnishing a car with a hole in the floor, and the omission is alleged as error.

1. It is the duty of the court undertaking to state the contentions to give to the jury the contentions on every substantial issue in the case. The petition alleged that the defendant was negligent in two specific particulars, only one of which was stated to the jury. The plaintiff might have escaped injury from the coupling of the cars but for the hole in the bottom of the car, through which he alleges that his foot passed, and prevented him from getting out of the way of the falling brick. If the company was not negligent in making the coupling, but was negligent in its failure to furnish a proper car, the plaintiff was entitled to have this alleged act of the defendant's negligence submitted to the jury. If the defendant was negligent in furnishing a defective car, and the plaintiff did not know of the defect, nor, in the exercise of ordinary diligence, could have known of such defect, and sustained an injury because of this defect, he would be

entitled to recover, if, by the exercise of ordinary care, he could not have avoided the consequence of the defendant's negligence. The petition made this issue, and the plaintiff was entitled to have it submitted to the jury.

2. The errors alleged in the remaining grounds of the amended motion relate to certain charges which plaintiff in error criticises as not being adjusted to the facts of the case, and as eliminating the doctrine of contributory negligence. The charges complained of contained literal excerpts from the opinion of Justice Cobb in *Western & Atlantic R. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, and are adjusted to the particular facts of the case at bar, and are not open to the criticism made against them. The substance of the charges given was that one is bound to use ordinary care to avoid the consequences of another's negligence, but this duty does not arise until the negligence of such other is existing, or is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend the existence.

There was no error in giving the charges complained of, and a new trial is granted because of the error stated in the first division of this opinion.

Judgment reversed. All the Justices concurring.

(120 Ga. 263)

COLLEY v. SOUTHERN COTTON OIL CO.

(Supreme Court of Georgia. June 8, 1904.)

FELLOW SERVANTS—DANGEROUS PREMISES—PLEADING—AMENDMENTS.

1. Employés in the service of and subject to the same general control and direction of a common master, and whose labor conduces to the same general purpose, are fellow servants, although they may be employed in different departments of duty, and so far removed from each other as that one can in no degree control or influence the conduct of the other. *Davis v. Muscogee Mfg. Co.*, 32 S. E. 30, 106 Ga. 126; *Kerr v. Crown Cotton Mills*, 81 S. E. 166, 105 Ga. 510; *Brush Electric Light Co. v. Wells*, 35 S. E. 365, 110 Ga. 192, followed.

2. It is the duty of a master to furnish his employé with a safe place to work, and where the employé is injured in consequence of a breach of this duty he may recover, even though the negligence of a fellow servant may have contributed to the injury.

3. While the allegations of the original petition with reference to the matters referred to in the note just preceding were somewhat vague and indefinite, there was enough in the petition to amend by. The amendment offered was properly allowed, and the petition as amended set forth a cause of action.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by J. F. Colley against the Southern Cotton Oil Company. Demurrers to petition sustained, and plaintiff brings error, and defendant assigns cross-error on allowance of

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 475, 479.

certain amendments. Judgment on main bills of exceptions reversed, on cross-bill affirmed.

Hawkins & Weddington and T. W. Hardwick, for plaintiff in error. Dessau, Harris & Harris, for defendant in error.

COBB, J. Colley sued the Southern Cotton Oil Company, alleging in his original petition as follows: Some time prior to October 24, 1901, defendant employed plaintiff to labor in the capacity of carpenter at and about its factory, doing such work as his superiors would order him to do. Defendant had a cotton press in the second story of its building, in which the lint taken from cotton seed was packed into bales. Alvin Gibson was an employé of defendant, and his duty was to prepare and press or pack the cotton. At the time plaintiff was employed there were two long skids running obliquely from the door of the pressing room to the ground, upon which the bales of cotton were transmitted from the pressing room to the ground. Under these skids there was a passageway from one part of the yard to another, which was used by defendant's employés. There was no other passageway, all the other space in the yard being filled with cotton seed hulls, etc. On or about October 15, 1901, the skids broke, and were removed from the yard. The breaking and removing of the skids was known to defendant's superintendent in charge of the plant, and also to its general manager, whose duty it was to have the skids repaired or replaced with new ones. On October 24, 1901, plaintiff was engaged in the performance of his duties, and while passing from one part of the yard to another, in order to secure a certain piece of timber necessary to be used in the work he was then doing, while just under the door of defendant's pressroom, Alvin Gibson, without any warning to the plaintiff whatever, threw out of said pressroom door a bale of cotton, striking plaintiff on the head and shoulders, violently crushing him to the ground. Plaintiff had no knowledge of the fact that the bale of cotton would be thrown from the pressroom door, had no means of knowing that it would be done, and could not have known of it by the exercise of ordinary care. Gibson was ordered by the superintendent to throw the cotton out from the pressroom door. The defendant was negligent in that it failed to repair the broken skids or to replace them with new ones. The defendant was grossly and criminally negligent in knowingly permitting its agent, Gibson, to throw the cotton out of the pressroom door in such a reckless manner. Defendant owed plaintiff the duty of informing him that cotton would be thrown from the door, in order that he might have been on the lookout. The recklessness and negligence of Gibson in throwing the cotton out of the door shows him to have been an unskilled servant, and this was known to defendant.

The plaintiff was free from fault, and the consequences of defendant's negligence could not have been prevented by the exercise of ordinary care and diligence on his part. The petition describes the injuries, and prays for damages in the sum of \$20,000. By amendments duly allowed the following allegations were made: Defendant's superintendent, referred to in the original petition, had, at the time of giving the order therein mentioned, full control, direction, and supervision of all the employés of defendant; all of them being subject to his orders. The superintendent was defendant's vice principal during the entire month of October. The superintendent was grossly negligent in giving the order referred to. Gibson, the employé, was negligent in throwing cotton at all from the pressroom door, and negligent in doing this without warning plaintiff that he was about to do so. Defendant is responsible for such negligence. At the time of the accident plaintiff had no notice or knowledge or information that defendant or any of its employés had ever thrown cotton from the pressroom door, and had no reason to consider it dangerous or hazardous to pass by the same. Plaintiff was employed as a carpenter to do repair work and carpenter work on the various buildings about the plant of defendant, and his work had no connection with the business of defendant, which was manufacturing seed into oil, and had no connection with the business of repairing and packing or pressing cotton after the seed had been taken therefrom. While plaintiff and Gibson were subject to the control and direction of the same general master, they were not engaged in the accomplishment of the same general object. The pressroom door was nine feet above the ground. The other amendment alleged: At the time the superintendent and vice principal of defendant gave the order to throw the cotton from the pressroom door he directed Gibson and the other employés in that department to throw the cotton down as fast as the same was ready to be thrown down, and about two bales per day were pressed and packed and thrown down. The order was that all cotton should be thrown from the pressroom door until the skids were repaired. The superintendent well knew that, in order for this order to be obeyed, the cotton would have to be thrown down during working hours, and while many of the employés of the defendant were constantly and necessarily using the passageway under the pressroom door; that the distance from the door to the ground was nine feet, and the average weight of the bales of cotton thrown down was 500 pounds, the actual weight of the bale which struck plaintiff being 508 pounds. Plaintiff alleges that under these circumstances the giving of the order was gross and wanton carelessness on the part of the superintendent, for which the defendant is responsible.

The defendant demurred to the original

petition, and also to the petition as amended, and the demurrers were sustained. The plaintiff assigns error upon the judgment sustaining the demurrers, and the defendant, by cross-bill of exceptions, assigns error upon the allowance of the amendments.

It is contended that the original petition set forth a state of facts from which it appeared that the injuries sustained by the plaintiff were the result of the negligence of a fellow servant; that, therefore, it set forth no cause of action, and there was nothing to amend by. Counsel for the plaintiff in error candidly concede in their brief that under the ruling in *Davis v. Muscogee Mfg. Co.*, 106 Ga. 126, 32 S. E. 30, and *Kerr v. Crown Cotton Mills*, 105 Ga. 510, 31 S. E. 166, the plaintiff and Gibson were fellow servants, and that, if these cases are to be followed, the demurrer was properly sustained, unless the original petition can be construed as setting up negligence on the part of the master in failing to furnish the plaintiff a safe place to work, or in failing to keep the same safe after having furnished it. They ask leave to review these cases, and that they be overruled, contending that they are unsound in principle; but after consideration we must decline to overrule the same. Since the decision in *Brush Electric Light Company v. Wells*, 110 Ga. 192, 35 S. E. 365, the principle of the decisions referred to has been steadfastly adhered to, and must now be considered as the settled law of this state. The case of *Bain v. Athens Foundry*, 75 Ga. 718, relied on by counsel as controlling, was distinguished by Mr. Justice Fish in the *Wells* Case, and, in addition to this, was a decision by only two justices, and for that reason not controlling. It is to be determined, therefore, whether the original petition, properly construed, sets forth any averments of negligence of the master which would charge the defendant independently of the negligence of the fellow servant, or which were connected therewith in such a way that the fact that the act of a fellow servant contributed to the injury would not relieve the master from liability for his neglect. The petition alleged that a passageway was furnished for the plaintiff and the other employes, which at the time it was furnished was perfectly safe; that it had been rendered unsafe by the breaking of the skids, and that the absence of the skids brought about a new use for the passageway—that is, as a place for throwing bales of cotton from the door above; and that this new use was the result of an order from one who was to be considered as representing the master. Construing the petition as a whole, it is to be clearly drawn therefrom that this change in the use of the passageway was made under the direction of the master, without notice to the plaintiff, who was accustomed to use the passageway, whose safety was imperiled by the new use to which it was placed. While the throw-

ing of the bale into the passageway was the act of a fellow servant, and one of the risks which the plaintiff would have taken if he had been informed that the passageway was to be put to this use, the new use to which the passageway was put was not the act of a fellow servant, but the act of the master, and the dangers incident to such use was not one of the risks assumed by the plaintiff until he had been put on notice that that part of the premises was to be used in a different manner from that in which it was used at the time of his employment. See, in this connection, 1 *Labatt on Master and Servant*, § 28. So construing the petition, it set forth a cause of action, and the amendments were allowable, being simply an amplification of the somewhat general averments of the petition.

Judgment on main bill of exceptions reversed; on cross-bill affirmed. All the Justices concurring.

(120 Ga. 467)

O'NEILL MFG. CO. v. HARRIS.

(Supreme Court of Georgia. June 10, 1904.)

FORTHCOMING BOND—ACTION—PARTIES—PLEADING.

1. Suit may be brought on a forthcoming bond in the name of the officer to whom the bond was made payable, though he may have retired from office prior to the bringing of the action.

2. The petition in the present case sufficiently alleged the failure to produce the property, and the circumstances necessary to establish the plaintiff's right to bring the suit.

3. In an action on a forthcoming bond, it is not necessary that the execution levied on the property for the production of which the bond was given be set out in the petition, or attached thereto as an exhibit.

4. A petition in such a case is not defective in failing to allege that the property in controversy is that of the plaintiff in execution.

(Syllabus by the Court.)

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by O. I. Harris, for use, etc., against the O'Neill Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Denny & Harris, for plaintiff in error. Griffith & Weatherly and C. E. Carpenter, for defendant in error.

CANDLER, J. This was an action on a forthcoming bond given by a claimant of property which had been levied upon under executions from a justice's court. The action was brought in the name of Harris, the constable to whom the bond was made payable, for the use of the plaintiff in execution. At the time the suit was commenced, Harris was no longer constable, having been succeeded in office by Byars, and the action was brought by him as "former constable of said county." The case is now before this court on exceptions to the overruling of a demurrer to the petition.

1. The principal question raised by the de-

murrer is whether the suit could be brought by Harris after his retirement from the office of constable, or should have been instituted in the name of his successor, Byars. The purpose of a forthcoming bond is to indemnify the levying officer. *Aycock v. Austin*, 87 Ga. 566, 13 S. E. 582; *Turner v. Camp*, 110 Ga. 632, 36 S. E. 76. While, in claim cases, he is required to take a proper bond, when tendered him by the claimant, the responsibility is upon him to see to the correctness of the bond and the solvency of the security. Civ. Code 1895, § 4614. For failure to discharge his duty in this respect he may be held liable after his retirement from office, and it necessarily follows that to his successor, who had nothing to do with the levy or the taking of the bond, no liability attaches. The responsibility incident to the acceptance of a forthcoming bond is personal to the officer who takes it, and hence the bond is made payable to him alone, and not also to his successors in office. Consequently, upon a breach of the bond, the obligee therein, for whose individual protection it was given, may institute suit on the instrument for the use of the plaintiff in execution; and this is so notwithstanding the fact that the plaintiff has, prior to the bringing of the action, gone out of office. Whether the suit may also be brought by the succeeding officer, as the one entitled to the legal custody of the property, *quære*?

2. The demurrer also attacks the petition on the ground that "no failure to deliver the property to the levying officer is shown or alleged; that no connection is shown between the plaintiff in this case and W. M. Byars; that no right is shown in said W. M. Byars to execute or take part in the execution of the justice court process referred to in the petition." This ground of the demurrer is wholly without merit. The petition distinctly alleges the failure of the claimant to deliver the property in accordance with the terms of the bonds. The only "connection" necessary to be established between the plaintiff and Byars is set up in the recital of the fact, as alleged, that the plaintiff was the officer making the levy, and to whom the bond is payable, and that Byars is his successor in office; and this in itself was a sufficient allegation of Byars' right to execute the processes of the court whose officer he was.

3. It is also contended that the petition was defective, in that the *fi. fas.* which were the basis of the levy on the property to which the claim was interposed were not set out in the petition, or attached as an exhibit thereto. We are not aware of any law of pleading which would render necessary, in a case like the present, the incorporation of the *fi. fas.* in question in the petition. No authority to support this contention is cited by counsel for the plaintiff in error, and we are satisfied that no such authority exists. The bonds themselves are set out literally in the peti-

tion, and this was all that was required. *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

4. Nor was it a good ground of demurrer that the petition failed to allege that the property in dispute was the property of the plaintiff in execution. In an action on a forthcoming bond, no issue can properly be raised as to the title to the property involved. The only question to be decided is whether or not there has been a breach of the bond. As was said by Mr. Chief Justice Bleckley in *Anderson v. Banks*, 92 Ga. 122, 18 S. E. 364: "It is not allowable for a claimant to defeat a sale by interposing a claim, and then appropriate the property to his own use, or suffer it to be appropriated by his surety on the claim bond, and then contest, not in the claim case—the very case appointed by law for the purpose—but in a suit on the bond, the right of the plaintiff in execution to sell the property."

The foregoing disposes of all the points made by the demurrer, and necessarily leads to an affirmance of the judgment of the court below. Judgment affirmed. All the Justices concur.

(120 Ga. 440)

THOMPSON v. GLOVER.

(Supreme Court of Georgia. June 10, 1904.)

ACTION AGAINST INTRUDERS—DEFENSE—GOOD FAITH—EVIDENCE.

1. In a proceeding under Civ. Code 1895, § 4808, against intruders, the defendant cannot be evicted, if in good faith he claims a legal right to the possession of the land.

2. While on an issue involving "good faith" a party may testify as to his mental state, the jury are not concluded by what he says in reference thereto, but may test its truthfulness by comparing such claim with all the circumstances attending the transaction.

3. Where, however, there were circumstances amply sufficient to warrant the defendant in contending that the deed under which the plaintiff claimed was void because made by the grantor, when, from her age and mental infirmity, she was unable to contract, and he therefore in good faith claimed the right of possession as one of her heirs at law, and there was no evidence to contradict such claim of good faith, a verdict finding him an intruder was contrary to the evidence.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action by J. M. Glover, by his next friend, against Lawson Thompson. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Lowe was the owner of a tract of land in Glascock county, consisting of 95 acres, on which she resided, but which was rented to her son Lawson Thompson. He had been in possession as tenant for many years, and so remained until the time of her death, in 1900. Mrs. Lowe was about 90 years of age, and shortly before her death made a deed to this land to her great-grandchildren, the Glovers, subject to her life es-

tate. After her death Lawson Thompson continued in possession, but the Glovers rented the land to his son Frank Thompson, who lived in another county, and who is not shown to have taken possession of the rented premises, nor is there any direct evidence that he sublet to his father. When the rent note became due, it was sent to a justice of the peace, who presented it to Lawson Thompson for payment, which was declined; he insisting that the deed to the Glovers was void, as having been made at a time when, on account of her physical and mental condition, Mrs. Lowe was incapacitated to make a valid conveyance. The evidence leaves it very doubtful as to who finally paid the rent note; the justice of the peace who received the money being uncertain as to whether it was paid by Lawson Thompson, or by John Thompson, another of his sons. The Glovers instituted a proceeding under Civ. Code 1895, § 4808, against Lawson Thompson, as an intruder. He defended on the ground that he did in good faith claim a legal right to the possession of the property as one of his mother's heirs at law, contending that the deed to the Glovers was void. His counsel requested the court to charge, in effect, that, even if the jury should find that the deed to the Glovers was valid, that they rented to Frank Thompson, and that Lawson Thompson recognized such contract, and was in as a subtenant, and remained in after the expiration of the term, he could not be proceeded against as an intruder, but that he could only be ousted under the proceedings authorized against tenants holding over. This request was refused. The jury found in favor of the plaintiff. The defendant's motion for a new trial having been overruled, he excepted.

Rogers & Stephens and B. F. Walker, for plaintiff in error. K. J. Hawkins, for defendant in error.

LAMAR, J. In a proceeding under Civ. Code 1895, § 4808, against intruders, the legality of the possession depends on the legality of the original entry. *Murdock v. Miller*, 21 Ga. 388; *McHan v. Stansell*, 39 Ga. 199; *Durden v. Clack*, 94 Ga. 278, 21 S. E. 521. The issue is good faith, rather than good title. Of course, a party may testify to his mental state, and that he claims possession in good faith. But that does not close the question, nor prevent the jury from testing the reasonableness and truthfulness of that statement by comparing it with all the facts and circumstances attending the transaction. *Baxley v. Baxley*, 117 Ga. 63, 43 S. E. 436. Had there been any conflict on this subject, or any facts from which a want of good faith could have been inferred, the approval of the verdict by the trial judge would not be disturbed. But here the contradicted testimony is that Mrs. Lowe extremely aged and very feeble. Even

the witnesses for the plaintiff admitted that she was "childish" and "very peculiar." The testimony of the defendant and of the attending physician went more into details, and tended to establish facts calculated to warrant the claim, in the utmost good faith, that she had not mental capacity to make the deed. When, therefore, the circumstances warranted the contention, and there was nothing to contradict the statement of Lawson Thompson that he in good faith claimed possession of this property as one of her heirs at law, a verdict finding that he was an intruder was contrary to evidence.

Judgment reversed. All the Justices concur.

(120 Ga. 466)

STONECIPHER v. WILSON et al.

(Supreme Court of Georgia. June 10, 1904.)

INJUNCTION — TRESPASS — RESPONSIBILITY OF DEFENDANTS.

1. This was an application to restrain the cutting of timber, based upon the grounds that the defendants were insolvent and that the damages would be irreparable. No other equitable reason for granting an injunction was alleged, nor was there anything in the petition which would bring it within the provisions of the timber cutter's act, embraced in Civ. Code 1895, § 4927. *Held*, that the evidence being insufficient to show that the damages would be irreparable, and there being a conflict in the evidence as to whether the defendants were able to respond in damages, the discretion of the trial judge in refusing to grant an injunction will not be controlled.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Estelle Stonecipher against B. O. Wilson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. E. Mann, for plaintiff in error. Shumate & Maddox and R. J. & J. McCamy, for defendants in error.

COBB, J. This was an application to restrain the cutting of timber. The judge refused to grant an injunction, and the plaintiff excepted. The application was based only upon the grounds that the defendants were insolvent, and that the damages alleged would be irreparable. There was no other equitable reason alleged for the granting of the injunction; nor was there any attempt on the part of the pleader to bring the case within the provisions of the timber cutter's act, embodied in Civ. Code 1895, § 4927. The petition alleged that the plaintiff was the owner of the land, but no abstract of title of any character was attached to the petition. The right of the plaintiff to an injunction depended, therefore, upon whether it was established to the satisfaction of the judge either that the defendants were insolvent, or that the damages would be irreparable. The evidence at the hearing was not of such a character as to authorize a finding that the damages would be irreparable. The petition

alleged that the defendants were not able to respond in damages. This was denied in the answer. The only evidence before the judge on the subject of insolvency was the verified petition and the verified answer. As there was a direct conflict on this vitally material point, the discretion of the judge in refusing to grant the injunction will not be controlled. See, in this connection, *Wiggins v. Middleton*, 117 Ga. 162, 43 S. E. 432.

Judgment affirmed. All the Justices concurring.

(120 Ga. 447)

CANTON COTTON MILLS v. EDWARDS.

(Supreme Court of Georgia. June 10, 1904.)

INFANTS—CAPACITY—INJURY TO EMPLOYÉ—PETITION.

1. While the statute has arbitrarily declared that children under 10 years of age shall not be held criminally responsible, yet, in view of their varying mental and physical capacities, it has not fixed the age at which they may be employed to work.

2. Such question is not to be determined as a matter of law by the courts, but as a matter of fact by the jury.

3. The petition was not subject to demurrer, in view of the allegations that the plaintiff had not been warned, and, by reason of his tender years, was unable to appreciate the dangers, or to remember, understand, or act upon warnings that might have been given as to what was necessary to protect himself while working in the midst of moving machinery.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by Wylie Edwards, by his next friend, against the Canton Cotton Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

Wylie Edwards, by his next friend, brought suit against the Canton Cotton Mills for personal injuries, alleging: That on February 10, 1902, the plaintiff, being a child 10 years old, was employed to sweep floors and make bands for the spinning room. That, in order to get water to drink, it was necessary for him to pass the entire length of defendant's factory, filled with swiftly moving machinery, and that after obtaining a drink of water, and while returning, it was necessary to pass a machine called a "finisher." That he stopped to observe the lap of cotton as it came out of the machine onto the roll. Boylike, and with no knowledge of the danger, he laid his hand on the roll, as he had seen the man in charge of the machine do, when, in some way unknown to the plaintiff, his hand was caught and drawn between the rolls, to his great damage. That plaintiff was not aware of the dangerous character of the machine, nor had he been warned of its danger. That he was so young as not to be aware of the dangerous character of defendant's machinery; nor was he capable of appreciating and guarding against such dangers; nor was he capable of understanding, remembering, and acting upon warnings that might have been

given by defendant; and of all this defendant had full knowledge. That defendant was negligent, in that it retained in its employment, and required to be in its mills among its machinery, a child too young to realize and guard against a danger, and too young to appreciate and act upon any warning, and too young to work in such a place. That it was negligent in failing to warn him, and in failing so to guard its machinery as to make the factory safe for him to work in. That the defendant was negligent in not protecting him from dangers incident to work about a machine of whose dangers he knew nothing, and which, by reason of his youth and inexperience, he was incapable of guarding against. The defendant demurred on the grounds that the petition set out no cause of action; that the injury was the direct result of plaintiff's own negligence; that it was not negligence in defendant not to warn plaintiff, nor was it negligence to employ a child of the age of plaintiff, nor was it bound to inform him as to the dangerous machines in and about the mills on which plaintiff was not expected to work. The court overruled the demurrer, and the company excepted.

Geo. I. Teasley and P. P. Du Pre, for plaintiff in error. Burton Smith and Geo. Gordon, for defendant in error.

LAMAR, J. The age of majority and the age under which there can be no criminal responsibility have been arbitrarily declared by statute. But neither nature nor the courts have fixed any definite age at which children attain the capacity to work. In some children the mind outruns the body, and in others the body outgrows the mind. Some are weak and undeveloped at the age of 14, and others are strong and vigorous at 10. Some at an early age can hunt, drive, ride, swim, and work in many occupations with ordinary safety, while others of the same age, with even greater physical strength, by reason of want of experience, would be unable to engage in the same sports or labors without serious risk. The question of capacity, therefore, is not to be determined as a matter of law by the courts, but as a matter of fact by the jury; applying the principle involved in Civ. Code 1895, § 2901, which declares that "due care in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation." The petition alleged that the plaintiff was 10 years old, ignorant of the character of the machine and of the danger of working therewith as he had seen others do; that he had not been warned; that he was incapable of appreciating, remembering, or acting upon any warnings that might have been given him; and that the company was not only negligent in failing to warn plaintiff, but also in failing to guard its machinery so as to make the fac-

tory safe as a place in which to work. These allegations made it proper to overrule the demurrer. Compare *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674.

Judgment affirmed. All the Justices concurring.

(120 Ga. 449)

E. E. FORBES PIANO CO. v. OWENS et al.
(Supreme Court of Georgia. June 10, 1904.)

JUSTICE OF THE PEACE—ATTACHMENT—JURISDICTION—GROUNDS—CERTIORARI.

1. An attachment in a suit to recover \$100, besides interest and attorney's fees, is not within the jurisdiction of a justice's court, and the justice presiding therein has no power to allow an amendment to the pleadings in such a proceeding.

2. It is not a ground of attachment in this state that the defendant "has left the county." An attachment issued on such a ground is fatally defective, and cannot be amended; and, even if this were not so, the addition, after the words quoted, of the words "and absconded," would not cure the defect in the attachment.

3. Where, on the trial of a writ of certiorari from the judgment of a justice's court, it appears that the magistrate has entertained jurisdiction of an attachment involving more than \$100, including attorney's fees, that the attachment was based on the ground mentioned in the last preceding headnote, and that the magistrate refused to dismiss the attachment on motion of the complaining party, but allowed the plaintiff to amend, the judge of the superior court should sustain the certiorari unconditionally, and render final judgment in favor of the plaintiff therein.

(Syllabus by the Court.)

Error from Superior Court, Gordon County;
A. W. Flite, Judge.

Action by T. N. Owens and others against one Fields. Certain property was attached, and the E. E. Forbes Piano Company filed a claim thereto. Judgment for plaintiffs, and claimant brings error. Reversed.

H. F. Sharp and M. B. Eubanks, for plaintiff in error. Starr & Erwin, for defendants in error.

CANDLER, J. In a justice's court in Gordon county Owens et al. sued out an attachment against Fields, the ground of attachment being that Fields "has left this county," and the indebtedness alleged as the basis of the suit being \$100, besides interest and attorney's fees. This attachment was levied on a piano as the property of the defendant, and a claim to the property was filed by the plaintiff in error, the E. E. Forbes Piano Company. On the trial of the claim case before the justice the claimant moved to dismiss the attachment because the affidavit on which it was based set out no ground of attachment under the laws of Georgia. This motion was overruled, and the plaintiffs were allowed, over objection of the claimant, to amend the attachment by inserting after the words "has left this county" the words "and absconded." The jury in

the justice's court found the property subject to the attachment, and the claimant took the case by certiorari to the superior court. The bill of exceptions recites that the judge of the superior court passed an order "sustaining the judgment of the justice of the peace allowing the amendment to the attachment affidavit, * * * and reversing the verdict complained of on the grounds that the amount claimed, including attorney's fees, exceeded one hundred dollars, and ordered a new trial in said case, and directed the justice issuing the attachment to amend the same so as to make it returnable to the next term of Gordon superior court." Error is assigned upon "so much of said judgment as affirms the judgment of the magistrate in allowing the amendment to the attachment affidavit, and that part of the judgment directing the magistrate to so amend the affidavit and attachment as to make it returnable to the next term of Gordon superior court." The amount in controversy, including attorney's fees, being greater than \$100, it is clear that the magistrate had no jurisdiction to entertain the suit or to try the claim filed to the property in dispute. Being without jurisdiction, it follows that he could not legally allow an amendment to the pleadings in the case. The attachment should have been made returnable to the superior court in the first instance, and in that court any proper amendment could have been offered and allowed. Be that as it may, however, it is clear from the answer of the magistrate to the writ of certiorari that the affidavit and attachment in the first instance were fatally defective, and not subject to amendment, and that even as amended the attachment should have been dismissed. There is no law in this state which authorizes the issuance of an attachment on the ground that the defendant "has left the county" in which the proceeding is brought. Attachment may issue to seize the property of one who "is actually removing, or about to remove, without the limits of the county"; but that is not this case. Originally, therefore, the attachment in this case was invalid whether returnable to the superior court or the justice's court, because issued on a ground which the law does not recognize as a foundation for the writ. In effect, then, there was no attachment before the court, and consequently nothing to amend. However, taking, as we must, the magistrate's answer as stating the truth of the proceedings in his court, the attachment was in no better condition after amendment than before. According to that answer, the attachment, as amended, was upon the ground that the defendant "has left this county and absconded." Attachment is a summary remedy, and must be strictly construed and pursued; and it has been held that an attachment is fatally defective which alleges as the ground for its issuance that the defendant "has absconded." *Levy v. Millman*, 7 Ga. 167:

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. §§ 154, 156, 329.

Brown v. McCluskey, 26 Ga. 577. See, also, *Deupree v. Eisenach*, 9 Ga. 599; *De Leon v. Heller*, 77 Ga. 740 (2b). In any view of the case, therefore, the magistrate should have dismissed the attachment; and the judge of the superior court, on certiorari, should not have sent the case back to the magistrate, but should have rendered final judgment in favor of the plaintiff in certiorari in accordance with the principles here announced.

Judgment reversed. All the Justices concur.

(120 Ga. 290)

W. A. GREER & CO. v. RANEY et al.
(Supreme Court of Georgia. June 10, 1904.)

TRIAL—INSTRUCTIONS — ADVERSE POSSESSION — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. There being in fact no dispute on the subject, it was not error for the judge to charge that there was "no dispute of the fact that the plaintiffs were the heirs of the common grantor." *Southern Ry. Co. v. Chitwood*, 45 S. E. 706, 119 Ga. 28.

2. Plaintiffs having made out a perfect paper title, and the evidence for the defendant failing to show continuous possession under color for seven years before the institution of the suit, the court did not err in failing to charge on the subject of prescription.

3. The newly discovered testimony as to the time when the adverse possession began was cumulative, and of a nature which could have been discovered by the exercise of the diligence required by law.

4. Some of the witnesses to the newly discovered facts had been examined at the trial, and that thereafter they had refreshed their memory as to the date when such possession began was not an absolute ground for the grant of a new trial, but a matter in the discretion of the trial judge.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

Action by J. M. Raney and others against W. A. Greer & Co. Judgment for plaintiffs, and defendants bring error. Affirmed.

Raney, Bruce, Ward, and Christopher, alleging themselves to be the heirs and purchasers from the heirs of Gideon T. Braddy, brought suit against Greer & Co. for damage occasioned by cutting timber from lot No. 234 in the Second district of Wilcox county. For want of information, the defendants neither admitted nor denied that the plaintiffs were the heirs or successors in title of Braddy, but defended on the ground that they had entered "under perfect right, and had perfect right to enter upon and become possessed of the same"; that the plaintiffs have no interest in the land; and that the defendants entered on the lot in good faith, and have a perfect right to do so, under a lease for turpentine purposes from one Faitha Young, formerly Paulk. The plaintiffs made out a perfect paper title, supplementing it by proof that they were the heirs or purchasers from the heirs of Braddy, and the defendants offered no evidence on this subject. The judge charged that there was no dispute as to the

plaintiffs being the heirs of Braddy. The defendants claimed under a paper title, the first link of which was a deed from Braddy to Allen Smith, dated August 25, 1868, but which was satisfactorily shown to be a forgery. There were successive deeds from Allen Smith to John D. Smith, dated July 21, 1885, recorded January 17, 1890; from John Smith to Fletcher, dated November 3, 1887, recorded January 17, 1890; from Fletcher to Elbert Paulk, dated December 1, 1887, recorded November 12, 1895; from Elbert Paulk to Faitha Young, recorded March 9, 1892; and a lease from her dated October 24, 1893, of the turpentine privileges to the defendants, Greer & Co. The defendants' plea did not set up any title by prescription. The deed from Braddy to Smith in 1868 having been shown to be a forgery, there was on the trial some evidence of possession under color, and that there had been a deadening of timber 16 or 17 years before this suit, but no proof to connect the same with defendants' claim. There was also some evidence that Smith, in the fall of 1886 or 1887, cut some logs and boards, and left the boards and all the work done on the land. There was no evidence of possession by Fletcher, who bought on November 3, 1887, and sold to Paulk December 1, 1887. A witness testified that McSwain built a house for Elbert Paulk after the 3d of November, 1887. Witness was unable to say whether the house was built after the 1st of December, 1887, or not. Paulk testified that he acquired a deed December 1, 1887, and had McSwain build him a house, and there was evidence of continuous possession thereafter, but it was not shown to have been for seven years before the suit which was filed November 29, 1894. The jury having found a verdict for the plaintiffs, the defendants made a motion for a new trial on sundry grounds; among others upon the failure of the court to charge on the subject of acquiring title by prescription under color, and on the newly discovered evidence of certain witnesses, some of whom had been examined on the original hearing, to the effect that the house was built or begun in the fall of 1887; that the land had been continuously occupied from in November, 1887, one witness testifying that the building began by or before November 20, 1887. Some of the witnesses to the newly discovered facts had been examined at the trial, but stated that they could not then definitely remember when the improvements began; that since the trial they had refreshed their memories, and can now state positively that the building began in November, 1887, one fixing it as early as before the 15th of November. There was also a showing that these facts had not been stated to the defendants or their counsel, and a showing as to the good character of these witnesses. The motion for a new trial does not contain the affidavit of the defendants or their counsel, but the bill of exceptions recites that

the defendants both swore that they did not know of these new facts until after the trial, and the affidavit of the sole counsel that he never heard of the witnesses knowing anything about this land, and that he used due and reasonable diligence in getting up the evidence for the trial. The defendants except to the refusal to grant a new trial.

J. H. Martin, for plaintiffs in error. Hal. Lawson and Eldridge Cutts, for defendants in error

LAMAR, J. 1. There was no evidence in conflict with that offered by the plaintiffs to establish the fact that they were the heirs or successors in title from Braddy, and it was not error for the court so to instruct the jury. *Southern Railway Co. v. Chitwood*, 119 Ga. 29, 45 S. E. 706; *Civ. Code* 1895, § 4334.

2. The plaintiffs made out a prima facie case, and, unless it was met by some sufficient defense, they were entitled to recover for the value of the timber cut. There is no assignment that the verdict was excessive, and no ruling of the court on this branch of the subject which requires the grant of a new trial. The defendants' answer gave no intimation of an intention to rely upon a title by prescription, nor was there any request for a charge on this subject. The evidence as to possession before November 29, 1887, was wholly insufficient to establish continuous, uninterrupted, and adverse possession under any of the parties through whom defendants claimed. The evidence as to the building of the house showed that it was constructed after the 1st of December, 1887, and less than seven years before the filing of the suit. The court did not err, therefore, in failing to charge on the subject of prescription. *Civ. Code* 1895, §§ 3586, 3589.

3-5. The newly discovered evidence as to possession having begun before November 29, 1887, did not require the grant of a new trial. If the failure to plead prescription was intentional, the defendants cannot raise a new issue and offer evidence thereon after the verdict. If they intended to rely on prescription, there is no sufficient explanation as to the failure to make inquiry of their predecessors in title, or others by whom such adverse possession could be established. They had to prove public and continuous possession—a possession which in its nature was not secret, but notorious—and there is no showing which explains why it could not have been procured by the exercise of the diligence required by law. *Civ. Code* 1895, §§ 5480, 5481. Motions for new trial on the ground of newly discovered testimony are addressed to the sound discretion of the trial judge, but are not intended to serve the purpose of permitting additional evidence by new witnesses to the same fact, nor for cross-examination of those previously sworn (*Hall v. State*, 117 Ga. 263, 43 S. E. 718 [2]); nor, after

a witness has once testified, to allow him to refresh his memory, and then, as matter of course, grant a new trial thereon (*Archer v. Heidt*, 55 Ga. 200 [2]). See *Newman v. Malsby*, 108 Ga. 339, 33 S. E. 997; *Southern Ry. Co. v. Pulliam*, 108 Ga. 808, 34 S. E. 147. The case differs from *Hays v. Westbrook*, 96 Ga. 219, 22 S. E. 893; *G. S. & F. R. Co. v. Zark*, 108 Ga. 800, 34 S. E. 127; and also from *Davis v. Bagley*, 99 Ga. 142, 25 S. E. 20.

6. In view of the state of the record, and of the fact that the verdict for the plaintiffs was demanded, we do not pass upon the motion to review. *Knight v. Isom*, 113 Ga. 613, 39 S. E. 108; *Baxley v. Baxley*, 117 Ga. 60, 43 S. E. 436. Whether Paulk's deed or any preceding deed in defendants' chain had been recorded or not was immaterial. The possession prior to that period was not continuous. That subsequent thereto was for less than seven years before the suit.

Judgment affirmed. All the Justices concurring.

(120 Ga. 323)

SUPREME CONCLAVE KNIGHTS OF DAMON et al. v. WOOD.

(Supreme Court of Georgia. June 8, 1904.)

LIFE INSURANCE—APPLICATION—FALSE STATEMENTS—BURDEN OF PROOF.

1. Where an applicant for life insurance covenants in his application that the statements made to the medical examiner are true, and these statements are made a part of the contract of insurance and form the basis of such contract, any variation in any of them which is material, whereby the nature or extent or character of the risk is changed, will avoid the policy, whether the statement was made in good faith or willfully or fraudulently.

2. In civil cases the burden of proof may be carried by a preponderance of the evidence, which is that superior weight of the evidence upon the issues involved which is sufficient to incline a reasonable or impartial mind to one side of the issue rather than to the other.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by J. F. Wood against the Supreme Conclave Knights of Damon and others. Judgment for plaintiff, and defendants bring error. Reversed.

Hall & Wimberly and E. P. Mallary, for plaintiffs in error. Hardeman, Davis, Turner & Jones, for defendant in error.

SIMMONS, C. J. The courts of the United States and of several of the states have for several years been trying to get away from the earlier decisions in regard to warranties in insurance policies. All of the earlier decisions, so far as we are aware, hold the insured bound by the strict law of warranty, whether the statement warranted be material or not; holding that the parties had the

¶ 1 See *Insurance*, vol. 23, Cent. Dig. §§ 540, 684, 693.

right to agree that a representation was material, though in fact it was not. Latterly some of the courts have strained to construe the statements of the insured as representations wherever they were not unequivocally made warranties. Thus it has been held that where, in the application, certain statements were covenanted to be true, if the policy or contract did not declare them to be warranties, but referred to them as representations or statements, they would be construed as mere representations, so that, if immaterial, their falsity would not avoid the policy. See *Moulou v. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Phoenix L. I. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Northwestern Mut. L. I. Co. v. Woods (Kan. Sup.)* 89 Pac. 189; *Alabama Gold L. I. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816. But the courts in this state are not troubled with these finer distinctions and strained constructions. Mr. T. R. R. Cobb, the great lawyer and codifier, who incorporated the principles of law and equity into our Code, doubtless saw the great injustice and hardship to the insured under the earlier decisions of the courts. It was to change this, we apprehend, that he in 1860 placed in the Code which was adopted in 1863 what are now sections 2097 and 2098 of the Civil Code of 1895. These sections are as follows:

"Sec. 2097. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed, will void the policy.

"Sec. 2098. Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representations of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy."

Thus it will be seen that a policy cannot now be avoided upon the ground of the falsity of a representation, though warranted, unless that representation be material, and the variation from truth be such as to change the nature, extent, or character of the risk. So this court has uniformly construed these sections, as far as we can ascertain. Whenever an applicant for life insurance makes material representations in his application or examination, and covenants that they are true, under the above section of the Code, and these representations are made the basis of the contract of insurance; such contract is void if the representations vary from the truth in such manner as to change the nature, extent, or character of the risk. This is true although the applicant may have made the representations in good faith, not knowing that they were untrue. *Southern L. I. Co. v. Wilkinson*, 53 Ga. 535; *O'Connell*

v. Supreme Conclave Knights of Damon, 102 Ga. 143, 23 S. E. 282, 66 Am. St. Rep. 159; *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595. The representations, when made, if material, are warranties, under the Code; but they differ from the ordinary warranty, in that their falsity does not avoid the policy unless they are material, and the variation from the truth is such as to change the nature, extent, or character of the risk. It is therefore immaterial whether the warrantor acted in good faith in making them. If one sell another a horse, and warrant the soundness of the animal, he is bound by the warranty, whether at the time of the sale he knew or did not know that the animal was diseased. So, too, if an applicant for life insurance inform the insurance company, by a written answer to a question as to whether he has had heart disease, that he has not had it, such answer being covenanted in his application, he is bound by his covenant, without regard to his good faith in making the representation. Such was the present case. The representation was certainly a material one, and doubtless the company acted upon it. It is scarcely conceivable that the company would have issued the policy if the applicant had answered that he was or had been afflicted with heart disease, or even if he had answered doubtfully. We think that, if the answer made was untrue, the plaintiff below cannot recover. In reading the brief of evidence, we find that the testimony was conflicting as to whether the insured was or had been afflicted with heart disease at the time of his application for insurance. The physician who treated him testified that, in his opinion, the applicant was at the time afflicted with the disease. The company's physician, who made an examination at the time of the application, testified that, in his opinion, the applicant had at that time no sign or symptom of the disease. This will be a question for the jury to decide upon the next trial. A great many assignments of error are made in the motion for a new trial upon rulings on evidence and upon the charge of the court. We have not discussed the grounds of the motion seriatim, but have laid down the principles which we think control the case. The views of the trial judge were not in accord with what we have laid down, and a new trial will have to be granted.

2. One of the charges complained of related to the burden of proof. This we will not discuss, further than to say that the second headnote gives the rule in regard thereto as laid down in Civ. Code 1895, §§ 5144, 5145. In the charge given on this subject the judge confused preponderance of evidence with proof to a reasonable and moral certainty, confusing the law as to civil cases with the law applicable in criminal cases. We do not think it proper in a civil case to instruct the jury that the party on whom rests the burden of proof must establish his

contention to a reasonable and moral certainty. If he establishes it by a preponderance or superior weight of evidence, to the satisfaction of the jury, that is sufficient. As to the meaning of "reasonable and moral certainty," see *Bone v. State*, 102 Ga. 387, 30 S. E. 845.

Judgment reversed. All the Justices concurring.

(120 Ga. 411)

VESS v. UNITED BENEV. SOC. OF AMERICA.

(Supreme Court of Georgia. June 9, 1904.)

ACCIDENT INSURANCE—EVIDENCE.

1. This was an action to recover benefits under a policy of insurance which provided for the payment of such benefits in the event the insured should "receive personal bodily injuries of which there shall be visible signs effected solely through external, violent, and accidental means, by reason of which * * * he shall be immediately, wholly, and continuously disabled, so as to cause a total loss of time, and prevent him during such disability from attending to or performing all of the duties pertaining to his occupation." It appeared from the evidence that when the plaintiff was injured he was not "immediately * * * disabled, so as to cause a total loss of time," but that a period of 24 days elapsed from the time of the injury until the plaintiff was first confined to his bed, and that during that period the plaintiff was continuously at his place of business, though not performing the duties usually assigned to him. *Held*, that the plaintiff's own evidence failed to bring his case within the terms of the contract of insurance, and that the grant of a nonsuit was proper. *Williams v. Preferred Ass'n*, 17 S. E. 962, 91 Ga. 698.

(Syllabus by the Court.)

Error from City Court of Athens; Howell Cobb, Judge.

Action by A. W. Vess against the United Benevolent Society of America. Judgment for defendant, and plaintiff brings error. Affirmed.

C. H. Brand, for plaintiff in error. W. C. Thomas, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(120 Ga. 417)

DIETER et al. v. RAGSDALE et al.

(Supreme Court of Georgia. June 9, 1904.)

APPEAL FROM JUSTICE—DISMISSAL—BOND.

1. It is error to dismiss an appeal from a justice's court to the superior court because the magistrate did not send up with the appeal papers a certificate or other evidence that the costs had been paid. *Gibson v. Cook*, 43 S. E. 72, 116 Ga. 817.

2. Where such an appeal is entered, and a bond given as prescribed by the Code, there is no law requiring that such bond be approved by the justice of the peace. Civ. Code 1895, § 4458. If the bond is not sufficient, the adverse party may except to the security, and have the bond strengthened or the appeal dismissed. Id. § 5632.

3. Where in the body of the appeal bond it is recited that the appellant came "within the time

allowed by law" and entered his appeal, and the record shows nothing to the contrary, the appeal will be held to be in time. *Kimbrough v. Pitts*, 68 Ga. 496.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action between A. F. Dieter and others and C. B. Ragsdale and others. From a judgment dismissing an appeal from justice court, Dieter and others bring error. Reversed.

J. S. Du Pre and P. P. Du Pre, for plaintiffs in error. Geo. L. Teasley, for defendants in error.

SIMMONS, C. J. Judgment reversed. All the Justices concurring.

(120 Ga. 380)

GEORGIA, C. & N. RY. CO. v. BROWN.

(Supreme Court of Georgia. June 9, 1904.)

CARRIERS—CONTRACT OF PASSAGE—DEGREE OF CARE.

1. The mere purchase of an ordinary railway ticket by a husband for his wife, even though he pays for it, does not constitute a contract between the husband and the company for the safe transportation of the wife; but the implied contract for safe passage which the law raises from the purchase of the ticket is in favor of the wife, and in her behalf alone an action be maintained for its breach.

2. The charge of the judge as to the degree of diligence which the defendant was required to exercise for the preservation of the health of the plaintiff, even when considered in the light of the entire charge, was, under the peculiar facts of the present case, erroneous, and required the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. J. Reagan, Judge.

Action by S. I. Brown against the Georgia, Carolina & Northern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. N. Worley, H. J. Brewer, and Erwin & Erwin, for plaintiff in error. Geo. C. Grogan and I. C. Van Duzer, for defendant in error.

COBB, J. Brown purchased from the railway company a ticket for his wife. She presented herself for transportation, and the train failed to stop. It is claimed that her health was impaired by exposure resulting from being left at the station. Brown brought an action against the company for the loss of his wife's services, and it was held that he had a cause of action. See *Brown v. Railway Co.*, 119 Ga. 88, 45 S. E. 71. The present suit is one by the wife for pain and suffering growing out of the same transaction. She recovered a verdict, and the railway company assigns error upon a judgment overruling its motion for a new trial, and upon other rulings made during the progress of the trial.

1. Construing the petition as an action

sounding in contract, it is claimed that the contract was between the railway company and the husband, who purchased and paid for the ticket, and that, as the wife was no party to the contract, she has no right of action. Under the decision in *Aiken v. Southern Railway Co.*, 118 Ga. 118, 44 S. E. 823, 62 L. R. A. 666, this question must be decided adversely to the contention of the plaintiff in error. In that case it was held that, where a railway company sold an ordinary ticket, the law implied a contract for safe carriage with the person who presented himself for passage, without reference to who may have actually paid for the ticket.

2. In one ground of the motion for a new trial error is assigned upon the following extract from the charge: "One who has a railroad ticket, and is present to take the train at the ordinary point of departure, is a passenger, although he has not entered the car. In duties toward him directly involving his rights, the company is bound to extraordinary diligence, and, in those touching his convenience or accommodation, to ordinary diligence. Now, as far as her safety was concerned—and, gentlemen, that involves the safety of life, limb, or her health—as far as her safety was concerned, if the defendant company did not exercise extraordinary diligence, and on account of such failure she was injured, she would have a right of action and a right to recover." It is claimed that the effect of this charge was to instruct the jury that in this case the railway company was bound to exercise extraordinary diligence to preserve the health of the plaintiff. We think the charge is susceptible of this construction, and that when so construed it was, under the facts of this case, erroneous and prejudicial to the defendant. While, as was pointed out when the husband's case was here, the gist of the action was not the condition of the waiting room, but was the consequences arising from exposure resulting from the failure to transport, in spite of the fact that plaintiff took advantage of such accommodations as were at hand. Under the peculiar facts of the case, the jury could draw no other conclusion from the charge than that it was the duty of the railway company to exercise extraordinary diligence for the preservation of the health of the plaintiff during the time that she was compelled to wait for the arrival of another train, and in this way they were, in effect, instructed that the defendant was bound to exercise extraordinary diligence in regard to the manner in which it kept the waiting room, as this was the conspicuous element in the transaction which resulted in the alleged impairment of the plaintiff's health. A railroad company is bound to exercise extraordinary diligence for the preservation of the lives and persons of its passengers while they are being received upon its trains, while being transported therein, and while being discharged therefrom; but it is bound

to exercise only ordinary diligence in the preservation of the lives, health, and persons of passengers who are awaiting at stations the arrival of trains, or who are detained at stations as the result of a refusal or failure on the part of the company to stop its trains for the reception of such passengers. *Southern Ry. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015; *Wilkes v. R. Co.*, 100 Ga. 794, 35 S. E. 165. While the judge in one or more portions of his charge distinctly instructed the jury that the defendant was bound to exercise extraordinary care as to the safety of its passengers, and ordinary care as to their comfort and convenience, the charge complained of had the effect of instructing the jury that the safety of the plaintiff involved the preservation of her health, and that to such a matter the rule of extraordinary diligence was applicable. The effect of this charge was to tell the jury that the defendant was bound to exercise extraordinary diligence for the preservation of the health of the plaintiff during the time that elapsed between the failure of the train to stop and the departure of the plaintiff on another train the next day.

Another ground of the motion for a new trial complains that after the judge had charged the jury that it was the duty of the plaintiff to lessen the damages, as far as practicable, by the exercise of ordinary care, he added, "This does not apply in cases of positive and continuous torts." While the charge was in the language of Civ. Code 1895, § 3802, still, in cases like the present, the last sentence of that section should not be charged.

In still another ground of the motion, complaint is made that the court charged the jury upon the subject of the duty of the railway company to furnish a safe place for passengers to enter and alight from its trains. There was nothing in the case authorizing a charge on this subject.

It is, however, unnecessary to determine whether either of the errors last referred to would have been sufficient to require the granting of a new trial, as the judgment is reversed because of the error in charging with reference to the degree of diligence which the defendant was bound to exercise.

Judgment reversed. All the Justices concurring.

(120 Ga. 388)

BARKSDALE v. SECURITY INV. CO.

(Supreme Court of Georgia. June 9, 1904.)

BROKERS—LOANS—AGENCY—EVIDENCE AT FORMER TRIAL.

1. In its principal elements and characteristics this case is ruled by *Merck v. American Freehold Co.*, 7 S. E. 265, 79 Ga. 213.

2. The mere fact that a lender of money deposited in bank a fund which should be subject to the check of a loan broker for the amount of a loan only in the event that the lender, after

¶ 2. See Evidence, vol. 20, Cent. Dig. § 2413.

an examination by himself of the application of the prospective borrower and the security offered, should approve the same, and for himself decide to make the loan, did not render the broker the agent of the lender for the purpose of making loans.

3. A stenographic report of the testimony alleged to have been given by a witness on a former trial was not competent evidence without proof of its genuineness and correctness.

4. If a ruling were proper, it will be sustained, though a wrong reason were given therefor. (Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Action by the Security Investment Company against R. O. Barksdale, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

Colley & Sims and S. H. Hardeman, for plaintiff in error. Wm. Wynne, B. S. Irvin, and Anderson, Anderson & Thomas, for defendant in error.

FISH, P. J. The Security Investment Company, alleged to be a copartnership composed of Elliot M. Beardsley and Augustus A. McKelvey, of Bridgeport, Conn., sued B. F. Barksdale on several promissory notes, and, in addition to a general judgment, prayed for a special lien on certain land described in a deed given as security for the payment of the notes. Defendant pleaded usury. Pending the suit the defendant died, and R. O. Barksdale, administrator, was made party defendant. On the trial, at the conclusion of the evidence, the court directed a verdict for the plaintiff. The case is here upon exceptions by the defendant to the overruling of his motion for a new trial.

From the undisputed evidence in the record we gather the following facts: In the early part of 1888 B. F. Barksdale employed B. S. Irvin to obtain a loan of \$3,800 for him upon the land in question. Irvin was a loan broker, doing business in Washington, Wilkes county, who did not lend his own money, but simply undertook to find parties willing to lend money to prospective borrowers, and charged commissions for his services. He was the correspondent of the Georgia Loan & Trust Company (hereafter called the "Trust Company"), a corporation of this state, which was itself engaged in the similar business of a mere loan broker or negotiator, charging borrowers a commission for its services. Irvin took Barksdale's application for the loan, and forwarded it to the trust company. The loan was made for \$3,800. The notes for the same were dated February 1, 1888, due February 1, 1893, bearing interest at 8 per cent. per annum, payable semiannually, according to interest coupons thereto attached, and were secured by a mortgage on the land in question. The notes and mortgage were executed in favor of the trust company, though it was not the real lender of the money, the papers being executed in this

form for convenience, and immediately thereafter were transferred to John Stringer, the true lender. Irvin charged Barksdale a commission of 10 per cent. for procuring the loan, of which Irvin got 3 per cent. and the trust company 7 per cent., which was deducted from the amount loaned by Stringer. Before the maturity of this loan, the trust company had arranged with the Security Investment Company (hereafter called the "Investment Company") to negotiate a new loan to take the place of the old one. On January 28, 1893, Barksdale again applied to Irvin for a loan of \$3,800, for the purpose of paying off the old loan. In the written application signed by Barksdale, he made the following agreement: "I hereby agree to pay all expenses incurred in negotiating the above loan, in examining the premises, investigating titles to the lands offered as security, and in executing all necessary papers, and I understand that the loan is granted upon the representations above made as to my property and condition, all of which I declare to be true." On January 31, 1893, Irvin, as examiner, made a report of his examination of the premises described in the application, and declared that, in his opinion, the property offered was ample security for a loan of \$3,800. Indorsed on the application were the words, "Renewal of 1872," 1872 being the number of the old loan; also, "Approved by the Security Investment Company. I. W. Beardsley." These indorsements were not dated. Upon this application the new loan was negotiated and made. \$3,800 belonging to the investment company were appropriated to the payment of that amount due John Stringer and in extinguishment of the old loan, and on February 1, 1893, Barksdale executed four promissory notes, payable to the investment company, or order, five years after date, and aggregating \$3,800. These notes had interest coupons attached for semiannual interest at the rate of $7\frac{1}{2}$ per cent. per annum, and there were additional interest notes executed, but not attached, representing semiannual interest upon the principal notes at the rate of one-half of 1 per cent. per annum. All these notes for principal and interest were secured by a deed to the land in question, executed by Barksdale to the investment company upon the same date as the notes, and conformably to sections 1969 and 1970 of the Code of 1882. On January 31, 1893, Barksdale paid Irvin \$475, of which \$152 was for the semiannual interest due on the old loan on February 1, 1893, and \$323 was for commissions for negotiating the new loan. Of these commissions Irvin retained \$57, and sent the balance to the trust company as its share of the same for its services in negotiating the new loan. The investment company was the real lender, and parted with the full amount of \$3,800 paid to Stringer in settlement of the old loan, and received neither any part of

the commissions nor any bonus or brokerage for making the loan. It contracted for nothing more than the lawful interest, and neither expected nor received anything more than that. Its method of doing business was, after making loans, to sell them to other parties as promptly as possible, transferring the principal notes, with the coupons for $7\frac{1}{2}$ per cent. interest, and retaining, as its own profit, the additional interest coupons for one-half of 1 per cent. interest. The principal notes sued on in this case, with the attached coupons, were transferred to other parties, who, after maturity and nonpayment, transferred them back to the investment company, that it might bring suit on them, it having kept the security deed for the benefit of all parties concerned.

The trust company procured the investment company to make loans submitted by it, but it had other correspondents and connections, and often procured lenders through other channels. The trust company had been thus dealing with the investment company for about a year when the loan in the present case was made. The trust company was not engaged in lending money itself, although it appeared that as a business policy it sometimes purchased a loan upon its maturity and nonpayment, which had been negotiated through its instrumentality, in order that the lender might be induced to accept other loans which it might have for negotiation. When the original loan was negotiated February 1, 1888, the Security Investment Company was composed of Burr and Knapp, who were, respectively, the president and vice president of the Georgia Loan & Trust Company. At that time, and until January, 1892, Burr and Knapp, who were brokers, in Bridgeport, Conn., did some business as negotiators of loans, and the trust company paid them a part of the commissions received by it whenever they secured an investor for one of its loans. As the notes and mortgages or deeds were at that time, for convenience, made to the trust company, though the money loaned did not belong to it, but to the parties advancing the same as investors, the facts had to be explained whenever suits were brought to collect the loans. To avoid this, the trust company induced other parties at Bridgeport to form a new security investment company for the purpose of making some of these loans. The old Security & Investment Company, composed of Burr and Knapp, went out of business, and the new Security & Investment Company, composed of entirely different parties, was formed, in January, 1892. As before stated, the trust company never paid this new Security Investment Company any commissions, brokerage, or bonus for loans made by it. All it made was the one-half of 1 per cent. interest per annum, which it secured by retaining the additional coupons for that amount of interest as before stated. Neither Irvin nor the

trust company was authorized by the investment company, which made the loan in this case, to make loans without first getting the approval of the company, and when the loan that was made to Barksdale in 1888 became due the trust company obtained the consent of the investment company to make the new loan and take up the old one. The course of business was for the trust company to forward the papers, such as the application of the borrower, report of the examiner, etc., to the investment company, which passed upon them for itself, and itself decided whether or not the security was good and the terms offered satisfactory, and for itself determined which loans, if any, it would make. While the trust company had no power to lend the money of the investment company until after the latter company had passed on the application and approved the same, and thus authorized the loan, it appeared that the trust company had, in an occasional instance, for the purpose of closing the loan promptly, and as a business policy, made a loan and taken the papers to the investment company, assuming the risk, however, of the investment company approving the loan and agreeing to make it, and that in such cases the investment company had, as a matter of fact, taken the loans, though made without its authority. This did not appear to be the case in the loan made to Barksdale. On the contrary, the uncontradicted testimony of the treasurer and general manager of the trust company was as follows on this subject: "I will say as to this loan [the one made in 1888], the original investor, John Stringer, was paid off the \$3,800.00 entirely. We then had to negotiate the loan through a new party, whom we had secured in the meantime. When this loan became due, we obtained the consent of the Security Investment Company to make the loan, and took up the old loan." But, even if the loan in the present case were made by the trust company before it had been approved and authorized by the investment company, there was no evidence that the latter company had knowledge of this fact. While the evidence on the subject is somewhat confused, viewed in the strongest light for the plaintiff in error it shows that the investment company kept on deposit in the Chemical National Bank of New York money which the trust company could draw on, in favor of the borrower, for the amount of the loan, after the investment company had examined the application and other papers for the loan, and had approved the same, and decided to make the loan. It appeared that Burr and Knapp, the president and vice president of the trust company, were attorneys in fact for the investment company; but what their powers were as such did not appear, further than that Knapp, as such attorney in fact, transferred the notes sued on in this case to the different parties who

purchased them from the investment company.

1. These facts, in view of the prior rulings of this court, demanded a verdict for the plaintiff in the court below, and the court did not err in so directing. In *Merck's Case*, 79 Ga. 213, 7 S. E. 265—the leading case on the subject, which has been frequently followed—it was held: "(1) Where the lender of money neither takes nor contracts to take anything beyond lawful interest, the loan is not rendered usurious by what the borrower does in procuring the loan and using its proceeds. Thus, that the borrower contracts with one engaged in the intermediary business of procuring loans, to pay him out of the loan for his services, and does so pay him, will not infect the loan, the lender having no interest in such intermediary business or its proceeds. (2) By using intermediaries as channels of transmission for papers, relying upon their inspection of property and examination of titles made at the borrower's instance, and forwarding the money through them also at his instance, the lender does not constitute them his agents to make the loan, and is not chargeable with the consequences of dealings between them and the borrower, whether those dealings be public or private, known or unknown." In the opinion in that case Chief Justice Bleckley said: "If he [the lender] holds control of his capital, and decides for himself when he will part with it, and on what terms, and has no terms but lawful interest and good security, and satisfies himself that the security is good, he transacts his own business, and is not to be judged by the law of agency." He further said: "He who is satisfied with another's inspection of property or examination of titles does not render that other his agent by forbearing to inspect or examine for himself," and, if he be a lender, "does not the less judge of the security by basing his judgment on the representation or opinion of whomsoever commands his confidence." Again, the learned justice said: "But grant that the middlemen were by legal implication agents of both parties, the lender as well as the borrower, for several purposes, such as receiving and delivering papers, inspecting the property, examining the title, etc., it is certain, according to the evidence in the record, that they were not agents, express or implied, for making the loan, fixing the terms of it, or accepting the security. Nor did they in fact do these things, but they were done by Sherwood. Now, unless some one who represented the lender in making the contract took or contracted to take for himself or the lender or some other person something from the borrower over and above a legal rate of interest, how could the contract, under our Code, be usurious? It seems to us legally impossible that it could

This language is equally applicable to acts of the case now in hand. Indeed,

the present case, under its facts, is controlled by the rulings made in *Merck's Case*.

2. The mere fact that the investment company deposited in the Chemical National Bank a fund which should be subject to the check of the trust company for the amount of a loan only in the event that the investment company, after an examination by itself of the application of the prospective borrower, and the security offered for the loan, should approve the same, and for itself decide to make the loan, did not render the trust company the agent of the investment company for the purpose of making loans. Such a course of business was evidently for the purpose of more promptly placing the money in the hands of the borrower by saving the time that would elapse if, after the papers should be approved by the investment company and returned to the trust company, and the notes and security deed should be executed by the borrower, and sent to and received by the investment company, it should then forward a check to the trust company for the amount of the loan. Counsel for the plaintiff in error largely relied upon the case of *Clarke v. Havard*, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499, wherein it was held that when one who received money from the owner thereof for the express purpose of lending it out at interest, and with authority so to do, either general or limited, afterwards loaned the money to another, and exacted from the borrower a commission, which, added to the stipulated interest, made an amount which exceeded that which could be lawfully charged as interest, such transaction was usurious, if it was understood between the lender and his agent that the former was to pay nothing for the latter's services, and the circumstances were such that the lender must necessarily have known that the agent intended to charge the borrower, and did charge and collect from him, such commission for making the loan. It is quite apparent that the ruling then made is not applicable to the facts of the present case. In that case Presiding Justice Lumpkin said: "This case is obviously different upon its facts from that of *Merck v. Mortgage Co.*, 79 Ga. 213, 7 S. E. 265, and numerous others of its class, in which the lender received the borrower's application, passed upon it for himself, and for himself decided whether or not the security was good and the terms offered satisfactory. Here Barnett passed upon these and all kindred questions for the lender, manifestly with authority so to do, which was either general or limited by instructions not disclosed. If this does not amount to agency, we have no conception what agency is."

3, 4. O. A. Coleman testified as a witness for the plaintiff. In the motion for a new trial complaint was made that the court erred in excluding certain matter alleged to be testimony given by him in the *Tallafarro*

superior court in the case of Sackett v. Stone, which was offered for the purpose of impeaching his testimony in the present case, it being stated in the motion that the proper foundation was laid for the introduction of such evidence to impeach him by calling the witness' attention to the time when and the place where the alleged contradictory statements were made. From the fact that the motion sets out something more than a page of what purports to be testimony delivered by Coleman in the case of Sackett v. Stone, and then alleges that movant "offered the foregoing testimony of Coleman for the purpose of impeaching his evidence delivered in the case at bar," and "this evidence the court ruled out," we think it apparent that a written report or brief of testimony alleged to have been given by Coleman in the trial of that case was offered in evidence to impeach him. A reference to Coleman's testimony in the brief of the evidence in the present case shows this must be true. He swore: "I testified in the case of Solomon Sackett et al. v. Mary E. Stone, in Taliaferro superior court, in February, 1901. I don't know whether this is correct or not, but I presume so." Evidently he must have been referring to a report or statement of his testimony in that case. Further in his testimony he said: "I don't know why I should be held responsible for what the reporter says in the report of what I said in the last case. I have never read the testimony over. All I undertook to do was to tell the truth, as I do now." If this view of the matter be not correct, then it is certain that the motion does not disclose in what manner it was sought to prove what the testimony of Coleman was in the Sackett-Stone Case. A stenographic report or brief of the testimony alleged to have been given by Coleman in the other case was not competent evidence without proof of its genuineness and correctness. *Hardeman v. English*, 79 Ga. 387, 5 S. E. 70. See, also, *Cox v. State*, 64 Ga. 374 (5), 87 Am. Rep. 76; 1 Thompson on Trials, § 504. No such proof appears to have been made or offered in this case. The reason upon which the trial judge excluded the report, we think, was wrong, but the ruling was correct. "If testimony was properly rejected, the ruling of the court will be sustained, although he may have given an insufficient, or even a wrong, reason therefor." *Smith v. Page*, 72 Ga. 539.

Judgment affirmed. All the Justices concurring.

(120 Ga. 335)

HARDY v. POSS.

(Supreme Court of Georgia. June 9, 1904.)

DISTRESS WARRANT — PROCEDURE — VERDICT — BOND — LIABILITY OF CONSTABLE.

1. The filing of a counter affidavit converts a distress warrant into mesne process, and the proceeding amounts to a suit for rent. In such

proceeding the form of the verdict or judgment is general, and is for the amount found to be due.

2. Where a counter affidavit is filed to the levy of a distress warrant, the only bond the levying officer may take is one for the eventual condemnation money. If the bond taken by the levying officer is conditioned otherwise, and loss is sustained by the plaintiff in the distress warrant, the officer is responsible.

3. The evidence authorized the verdict.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Distress proceedings by W. M. Poss against Alex Boatwright and others. Judgment for plaintiff. On failure of the constable to make the money, a rule was entered against him, and verdict rendered for plaintiff against the defendant in rule. From an order denying a new trial, he brings error. Affirmed.

Jas. M. Pitner, for plaintiff in error. I. T. Irvin, Jr., for defendant in error.

EVANS, J. W. M. Poss sued out a distress warrant in the justice's court of the 171st District, G. M., of Wilkes county, against Alex Boatwright. This distress warrant was placed in the hands of J. T. Hardy, constable of said district, who levied the same. Boatwright made a counter affidavit. The case was returned to the justice's court, and on the trial a verdict was rendered in favor of Boatwright. Plaintiff carried the case to the superior court, where the judgment in the justice's court was reversed, and the case sent back for a new trial. On the second trial in the justice's court a verdict was rendered in favor of the plaintiff. Upon failure of the constable to make the money, a rule was brought against him at the November term, 1903, of the superior court of Wilkes county. An issue was formed, and upon the trial the jury rendered a verdict in favor of the plaintiff, Poss, against the defendant Hardy. Hardy made a motion for a new trial, and, the same being overruled, brought the case here.

It was admitted upon the trial that the constable had taken a forthcoming bond from the defendant in the distress warrant. The constable, in his answer to the rule, set up that the property levied upon by him was never released to the defendant in the distress warrant, but that the same was in his possession at all times until after the rendition of the verdict upon the first trial in the justice's court, when he delivered the property to Boatwright; no order of the court having been taken requiring him to hold the property, nor was he notified that a certiorari would be sued out in the case. He further set up that the defendant in the distress warrant was not now a resident of the county, and that he had no property out of which the money could be made. The movant of the rule offered evidence tending to show that the constable had turned the property levied upon over to the defendant in the

distress warrant on his giving a forthcoming bond, and that the constable was verbally notified immediately upon the return of the first verdict that the case would be carried to the superior court by certiorari. There was also evidence on the part of the movant tending to show that some three weeks after the first trial in the justice's court the constable admitted having possession of the property levied upon at that time, and sought advice as to whether he should keep it, or sell and deposit money in bank to await the final determination of the case.

1. The verdict and judgment had upon the second trial in the justice's court were general, and plaintiff in error insists that the court erred in failing to charge that after a counter affidavit had been filed, and the plaintiff, without objection, went to trial on the issue formed thereby, the action became mesne process; that the general verdict and judgment were illegal, and the plaintiff was not entitled to recover from the constable on the rule. This assignment of error is based on the rulings made in the cases of *Argo v. Fields*, 112 Ga. 677, 37 S. E. 995, and *Barnett v. Tant*, 115 Ga. 659, 42 S. E. 65. The case of *Argo v. Fields* was the foreclosure of the special statutory lien for supplies furnished a tenant, and this court said that it was not lawful to issue a general judgment against the tenant, because the statute only gave the landlord a lien upon the crop made during the year of the tenancy. The issue in the other case arose upon a counter affidavit to a laborer's lien. It will be noted that in both of these cases statutory liens were being asserted. The practice in issues formed upon a counter affidavit to a distress warrant is different. The filing of the counter affidavit converts the distress warrant into mesne process, and the proceeding amounts to a suit for rent (*Chisholm v. Lewis & Co.*, 66 Ga. 729; *Elam v. Hamilton*, 69 Ga. 736), and the plaintiff is entitled to a general judgment (*McNell v. Harker*, 40 Ga. 26; *Seifert v. Holt*, 82 Ga. 757, 9 S. E. 843). Prior to the act of 1894 (Acts 1894, p. 52) the tenant was required to give a replevy bond before he could contest his rent, but since then the party distrained is not required to give a replevy bond where the levying officer retains possession of the property of the tenant levied on. Civ. Code 1895, § 4819. The only change made by the amending act was to allow the defendant in a distress warrant to make his counter affidavit, and have the issue tried without giving the bond for the eventual condemnation money, where the property levied upon remains in the possession of the levying officer. The practice as to the form of verdict and judgment is unaffected by this amendment.

2. Plaintiff in error insists that the court erred in charging as follows: "I charge you further, if the defendant, the constable, levied on the property by virtue of a distress warrant, * * * and did not keep posses-

sion of it, but turned it over to Mr. Boatwright, and took from him a forthcoming bond for the property, and did not take a bond for the eventual condemnation money, then the plaintiff is entitled to recover." Before the amendment of 1894 the defendant in a distress warrant could only make an issue by taking the oath and giving a bond for the eventual condemnation money. Since this amendment he can make an issue by taking the oath and leaving the property in the hands of the levying officer. If the bond for the eventual condemnation money is not given, the plaintiff has the right to have the property remain in the hands of the officer; and if the officer deal with the property in any other manner than one allowed by statute, and a loss is sustained by the plaintiff, the officer is responsible. The officer cannot protect himself by taking any other bond than that for the eventual condemnation money, and, where such bond is not given, the plaintiff is entitled to rely upon the presumption that the officer has done his duty, and is retaining the property in his possession. See *Boyles v. Bank*, 96 Ga. 796, 22 S. E. 582.

3. The case was submitted to the jury under the evidence, and the presiding judge approved the verdict after requiring the plaintiff to write off a certain amount therefrom, which was done. We see no abuse of the judge's discretion in overruling the motion for a new trial.

Judgment affirmed. All the Justices concurring.

(120 Ga. 341)

PITTMAN et al. v. COLBERT et al.

(Supreme Court of Georgia. June 8, 1904.)

JUDGMENT BY DEFAULT—UNLIQUIDATED DAMAGES—INJUNCTION.

1. Where a judgment by default is rendered in a case in which the damages are not liquidated, the defendant is thereby concluded as to the truth of all the material allegations of the petition, save as to the amount of the damages. The defendant may in such a case, notwithstanding the judgment by default, contest before the jury the amount of the damages, and to this end may not only rigidly cross-examine the witnesses for the plaintiff, but also introduce evidence in his own behalf. Civ. Code 1895, § 5073; *O'Connor v. Brucker*, 43 S. E. 731, 117 Ga. 451 (2). See, also, *Lenney v. Finley*, 45 S. E. 317, 118 Ga. 427 (2).

2. The evidence upon one or more of the vital and controlling issues being directly conflicting, the discretion of the judge, exercised in granting an interlocutory injunction until these issues can be determined by a jury, will not be controlled.

(Syllabus by the Court.)

Error from Superior Court, Madison County; H. M. Halden, Judge.

Action by R. L. Pittman and others against J. F. Colbert and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

McWhorter, Strickland & Green, for plaintiffs in error. Shackelford & Shackelford, B. T. Mosely, and Erwin & Erwin, for defendants in error.

COBB, J. Judgment affirmed. All the Justices concurring.

(120 Ga. 253)

ST. AMAND et al. v. LEHMAN et al.

(Supreme Court of Georgia. June 8, 1904.)

INJUNCTION — CONSPIRACY — PLEADING — APPEAL—BRIEF OF EVIDENCE.

The petition alleged that three defendants were blasting and digging a well on a vacant lot, for the purpose of interfering with a well-defined underground stream, in order to destroy complainant's mineral spring, and the valuable improvements maintained in connection therewith. One of the defendants denied the conspiracy, or that damage would result, and claimed, further, that if any damage did result it would not be irreparable. Another of the defendants failed to answer, thereby admitting the confederacy, the threatened injury, and the other allegations in the petition. *Held:*

1. The petition set out a state of facts which was good as against a demurrer, and which if true would have entitled plaintiffs to the injunction prayed for.

2. In view of the failure of one of the defendants to answer, it would have been proper to grant the injunction against him.

3. The fact that the evidence is not briefed is not ground for dismissing the bill of exceptions, but leaves the case for any disposition which may be properly made, without regard to the evidence.

4. The petition and the answer, both being verified, served the office both of pleading and evidence on the application for injunction; and without regard, therefore, to the brief of all the testimony, enough appears to show that there was a conflict of evidence on all material facts.

5. The threatened injuries referred to in the sworn petition were irreparable in their nature. The delay to the defendant, arising from an injunction, would not counterbalance the irreparable injury which might flow to petitioners if the injunction were refused, and their mineral spring destroyed by the blasting and digging, and the jury on the final trial, on a full hearing of all the testimony, should find that the plaintiff was entitled to the relief prayed for.

6. In view of the state of the record, the judgment is affirmed, with direction.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by J. S. Lehman and others against J. G. St. Amand and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

St. Amand and the other executors of E. W. Marsh filed their equitable petition against Ray of Douglas county, Brooker of Cobb county, and Lehman, a nonresident, as well as their associates and confederates, averring that E. W. Marsh was at the time of his death the owner of the Sweetwater Park Hotel and Bowden Lithia Springs property, in Douglas county, on which he had erected bathhouses, cottages, and hotel, laid out a park, and constructed a branch railroad, at a total expense of about a half million dollars;

that the chief value of the property consisted of the mineral springs, the waters of which had been analyzed, and at great expense advertised, thereby building up a large business in the bottling and sale of the water, besides attracting many visitors to the springs and property; that the defendants are now, and have been for some time, engaged in sinking a well on property which petitioners are informed is claimed to be owned or controlled by Lehman, his confederates and associates; that this excavation is being made by the defendants to injure and damage the property of the estate of Marsh, although there is no indication that a spring would ever approach the surface at that point, or on any of the lands claimed to be owned by Lehman or either of the other defendants, but that they hope, and so express themselves, that they will intersect the underground current or well-defined stream of mineral water flowing through said land to the present spring of petitioners; that said stream is well known and defined, and there has never been any difficulty in ascertaining its exact course; that said Ray, Lehman, and the other defendants are now engaged in pounding with heavy machinery upon the strata of rock, and are sinking and blasting for the purpose of cutting off the flow of said underground current, and, if allowed to proceed, the damage to petitioners' estate will be irreparable; that this is being done for the express purpose of destroying the right and property of the estate, and so as to divert the present stream from its natural course, and cause the water to sink lower into the excavation proposed to be made, and thereby totally destroy the value of the estate so far as the mineral water is concerned; that the defendants have no improvements on the land or near it, and do not occupy it, either by themselves or by tenants, and there is no necessity for doing the work, and no reason for it, except to injure the property of petitioners; that all of the defendants well know that for many years no one has been allowed to blast, pound, bore, or otherwise interfere with the stone around the spring, for fear of endangering the quality and quantity of the water flowing into the spring through the underground stream aforesaid; that none of the defendants would be able to answer in damages; that, while some might be able to pay what debts they owe at present, they are totally insolvent so far as being able to answer the damage to the estate if they are not enjoined; that therefore petitioners are remediless. They pray for process against Ray, of the county of Douglas, and ———, of the county of Cobb, and Lehman, and, if Lehman cannot be served with process, that he be served by publication, and for an injunction restraining the defendants from interfering with the rights of petitioner, or from digging, blasting, pounding, drilling, or boring the well and excavation complained of, and for a permanent injunction against each from further acts, by them

selves or agents, toward sinking the well at the place designated, or at any other point that will in any way interfere with the property of the estate. The petition was verified positively by one of the petitioners. In his sworn answer, Lehman admitted that he was a nonresident. For want of sufficient information, he neither admitted nor denied the allegations as to the value of the improvements or character of the business created in connection with the springs. He averred that he had employed Brooker to bore the well, and that Brooker had engaged Ray to assist him therein; and claimed that he owned the land on which the well was being dug. He denied that it will injure the plaintiffs' springs; denied that he had any purpose in any way to damage the plaintiffs in the free use of their mineral spring; denied that there is any well-defined current; and averred that if there is any such stream it is impossible of ascertainment, and that there is a stream between the well and the proposed well. He denied that he was insolvent. "In answer to paragraph 17, defendant says that plaintiffs are not remediless in courts of law, and that they have no right to ask equitable relief; that, if he has damaged or should damage them in any way on account of the matters set up in their petition, they have a complete and adequate remedy at law." Ray, one of the defendants, was personally served, but filed no answer. The defendant Brooker is alleged in the petition to be a resident of Cobb county, but appears to have been served by the sheriff of Douglas county leaving a copy of the petition and process at his residence. The judge refused the injunction against all the defendants, to which the plaintiffs excepted. On the call of the case here, counsel for Lehman moved to dismiss the bill of exceptions, on the ground that there was no bona fide effort on the part of plaintiffs to brief the evidence.

W. A. James and J. S. James, for plaintiffs in error. Roberts & Hutcheson, for defendants in error.

SIMMONS, C. J. The petition charged that the three defendants had confederated for the purpose of injuring the plaintiff. Lehman alone answered. Even if there were defects in the service as to Brooker, Ray was properly served, and failed to answer. His silence was therefore to be treated as an admission of the sworn allegations of the petition, warranting an injunction against him; and if, as claimed, we cannot consider the evidence, it leaves the record in such shape that we can at least determine that it would have been proper to enjoin Ray from the continuance of the wrongful act alleged against him, and admitted to be true by his silence. According to the allegations of the verified petition, the defendants had confederated together to blast, pound, and dig the

rocks on a vacant lot adjoining plaintiff's spring, not for the purpose of obtaining water useful to the defendant, but with the sole intent of injuring the plaintiff and destroying a mineral spring of great value, around which he had constructed an immense plant. While the word is not used, the facts amount to a charge that the defendants are acting maliciously. If, as alleged, the effort is to destroy a known or well-defined subterranean stream, or to divert it from the spring of the lower proprietor, the plaintiff is not without remedy, even though the flow is underground. Or if the evidence shall show that it is a case of interference with percolating waters, and that the defendants are actuated by malice in wasting or diverting the water, the plaintiffs are still entitled to equitable relief. *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, cited in *Saddler v. Lee*, 66 Ga. 48, 42 Am. Rep. 62. And compare *Barclay v. Abraham* (Iowa) 96 N. W. 1080, and *Stillwater Co. v. Farmer* (Minn.) 93 N. W. 907, 60 L. R. A. 875, as to the effect of malice and waste.

Lehman's answer was in the nature of a demurrer, answer, and plea combined. It admitted the digging of the well, and in so far as it denied that there was any underground stream running from it to the spring, or that any damage would be occasioned to the plaintiff by the digging of the well, it raised an issue of fact which could properly have been considered by the trial judge on the application for injunction. In so far, however, as it set out "that plaintiffs are not remediless in courts of law, and that they have no right to ask equitable relief; that, if he [defendant] has damaged or should damage them in any way on account of the matters set up in their petition, they have a complete and adequate remedy at law"—it was performing the office of a demurrer, which, however, should have been overruled, for it is hard to imagine any case to which the remedy of injunction to prevent irreparable damages would be applicable if not to facts like those set out in this petition. Had it appeared, therefore, that the interlocutory relief prayed for was refused on this ground, a reversal would necessarily result. And so, too, if it was denied because of conflicting evidence. For while, ordinarily, the court will not interfere with the chancellor's discretion in passing upon disputed facts, there are some cases in which the fact of conflict does not deprive the petitioner of a remedy by which to preserve the status until the disputed issue may be submitted to the jury in a trial in which both parties have the right to cross-examine all the witnesses. This distinction was pointed out in *Everett v. Tabor*, 119 Ga. 128, 45 S. E. 72, though the opinion was not published until after the interlocutory hearing in the present case. It was there said that there would be strong reason to grant the injunction if the delay to one party would not counterbalance the irreparable injury which might flow to the petitioner

were the chancellor to decide the facts in a way different from that which might be determined by the jury on final verdict. The present case is within that rule. The well of the defendants is being dug on a vacant lot. They have no immediate occasion for its use, and the injunction can only occasion a delay from which no serious or irreparable damage can flow. But if the blasting or digging should divert the underground stream, or destroy the spring of the plaintiff, and if on the final trial the jury should find in favor of the plaintiff, it is manifest that an enormous damage, of a character considered irreparable in law, would be inflicted. Money could not compensate for what had been done, and refilling the well would not undo the harm which had been done.

It is said, however, that the plaintiffs have not made any bona fide effort to brief the evidence, and that therefore the case should be dismissed. But this result does not flow from a disregard of the rule of practice. *Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73. It does prevent this court from inspecting the brief of evidence, and, if the case was solely dependent upon a consideration of what appeared therein, an unconditional affirmance would necessarily result. But the petition and answer were both sworn to, and in reading them as pleadings we necessarily are put in possession of the fact that the parties were diametrically at issue, and that there was a conflict in the evidence. The testimony must conform to the pleadings, and could do no more than add to the conflict. In consideration of which, and that no harm could come to the defendants from granting the injunction, and that irreparable injury might flow to the petitioners from its refusal, we affirm the judgment. But under Civ. Code, §§ 5998, 5586, we direct that the judgment of affirmance shall not prejudice the right of the plaintiff to present another application for an injunction. *Brown v. Joiner*, 77 Ga. 232, 3 S. E. 157; *Ford v. Harris*, 95 Ga. 97 (4), 22 S. E. 144; *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S. E. 841.

Judgment affirmed, with direction. All the Justices concurring.

(120 Ga. 355)

LANE et al. v. BROTHERS AND SISTERS OF EVENING STAR SOC.

(Supreme Court of Georgia. June 9, 1904.)

ASSOCIATIONS—RIGHT TO USE OF NAME—INJUNCTION.

1. "An association has a right to adopt a title by which it is to be known, the unauthorized use of which will be restrained by a court of equity." 4 Cyc. 304, and authorities there cited. It was accordingly not error for the court in the present case to enjoin the defendants from obtaining a charter under a name already used by the plaintiff to designate what the court was authorized to find was a department of its organization.

2. The funds in dispute were not claimed by the defendants in their individual capacity, but as officers of what they contended was an independent voluntary association. There was ample evidence to authorize a finding that this alleged society was merely a department of the plaintiff, which was an incorporated mutual benefit organization. While the court was without authority, at an interlocutory hearing, to order the funds in dispute (which, under the evidence for the plaintiff, had been wrongfully withdrawn by the defendants from the bank in which they were deposited) paid over to the plaintiff, equity required that the funds be held in the custody of the court to abide the final determination of the cause. The judgment will therefore be affirmed, with direction that the court appoint a receiver to take charge of the money in controversy to await the final judgment to be rendered. As to the power of the court to appoint such receiver, see *McGarrah v. Bank*, 43 S. E. 987, 117 Ga. 553.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by the Brothers and Sisters of the Evening Star Society against O. B. Lane and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John R. L. Smith, for plaintiffs in error.
Ross & Grace, for defendant in error.

CANDLER, J. Judgment affirmed, with direction. All the Justices concur.

FOWLER v. DAVIS.

(120 Ga. 442)

(Supreme Court of Georgia. June 10, 1904.)

REFERENCE—REPORT—ERROR—EXCEPTIONS OF FACT—PRESUMPTIONS—EQUITY.

1. While the report of the auditor was concise and brief, it appears to embrace findings upon all of the material issues made by the pleadings; and it has not been made to appear that there was any error in refusing to recommend the report on the ground that the same was too indefinite, and did not cover the issues involved.

2. When error is assigned upon the refusal of a judge to approve an exception of fact to an auditor's report in an equity case, the burden is upon the plaintiff in error to show, to the satisfaction of the Supreme Court, that the finding of the auditor is unsupported by evidence, the presumption being that the finding is correct; and, where it does not distinctly appear that the finding is unsupported, the judgment of the trial judge refusing to approve the exception of fact will be affirmed.

3. Whether a petition sets forth an equitable or a legal cause of action depends upon the relief prayed for, and a petition which prays for a dissolution of a partnership, an accounting, and an injunction certainly makes an equity case.

4. No sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Pickens County; Geo. F. Gober, Judge.

Action by J. R. Fowler against A. W. Davis. Judgment for defendant, and plaintiff brings error. Affirmed.

N. A. Morris and W. T. Day, for plaintiff in error. John W. Henley, for defendant in error.

COBB, J. Fowler brought a petition against Davis in which he alleged that they had entered into a partnership for the purpose of buying and selling live stock, and that the partnership was subsequently extended to a livery stable business, and to the buying and selling of tanbark. The terms of the agreement between the parties in reference to what was alleged to be the original partnership are set forth. It is alleged that upon a fair accounting the defendant would be indebted to the plaintiff on matters connected with the partnership enterprise. It is also alleged that the plaintiff is indebted to the defendant on different matters, but that after these are all deducted the defendant would still be indebted to the plaintiff. The prayers of the petition were that a dissolution of the partnership be decreed, that the defendant be enjoined from suing the plaintiff upon any demand he might have against him, that there be a general accounting of all matters of controversy between them, and that the plaintiff have judgment against the defendant for the amount which might be shown to be due after such an accounting. The defendant's answer set forth his version of the arrangement between himself and the plaintiff in reference to the purchase and sale of live stock, which differed in some particulars from plaintiff's version, and distinctly denied that this arrangement constituted them partners. It was denied that this arrangement had ever been extended to include either a livery stable or a tanbark business, though it was admitted that there were some transactions between the parties in reference to tanbark. It was alleged that, upon a fair accounting of all the matters above referred to, the defendant would not be indebted to the plaintiff in any amount, but that plaintiff was indebted to defendant stated sums upon notes and accounts; and judgment was prayed against the plaintiff for the amounts due. The case was referred to an auditor, who made a report which was in effect a finding that the arrangement between the parties was as contended by the defendant; that there was no partnership; that upon an accounting between the parties, growing out of the transactions, the defendant was not indebted to the plaintiff anything; that the plaintiff was indebted to the defendant the amounts claimed on the notes referred to in the answer, and a given amount on the accounts, but less than that claimed in the answer; and that defendant was entitled to a judgment for these amounts against the plaintiff. The plaintiff filed a motion to recommit the case to the auditor, and also filed exceptions to the report. The court overruled the motion to recommit, as well as the exceptions of law, refused to approve the exceptions of fact, and directed a decree to be entered in accordance with the auditor's report, which was

To these different rulings the plaintiff excepted.

The evidence before the auditor was voluminous, and the brief filed with his report was a very extensive document. The report itself embraced less than a page of legal cap written with a pen. It contains ten distinct findings, which are not classified by the auditor, but all of them may be properly denominated exceptions of fact, unless the first, which is simply a finding "that there was no partnership," be construed as in the nature of a finding on the question of law involved. The plaintiff filed both an exception of law and an exception of fact to the finding just referred to. The first nine findings of the auditor constitute in effect a finding by him that the version of the defendant in reference to the transaction between the parties was correct, and that upon an accounting based on this version the defendant is not indebted to the plaintiff in any amount. In other words, these findings are in effect a finding against the plaintiff on the cause of action alleged in the petition. The tenth finding sets forth that the plaintiff is indebted to the defendant a given amount on notes and a given amount on account. This is a finding in favor of the defendant on the prayer of his cross-petition. The report is very concise and pointed, and while it does not set forth the calculations by which the auditor reached the results stated in his findings, and there is not a distinct finding of the different amounts which went to make up the aggregate result, still the report seems to cover all of the material issues made by the pleadings; and we cannot say that there was any error in the refusal of the judge to recommit the case to the auditor. See, in this connection, Civ. Code, §§ 4585, 4587, 4593.

In an equity case an exception of fact to an auditor's report is not submitted to a jury unless the judge approves the exception, and it is discretionary with the judge whether he will approve the exception. Civ. Code, § 4596; *Cranston v. Bank*, 112 Ga. 617, 620, 37 S. E. 875, and citations. If the judge refuse to approve an exception of fact in an equity case, this court will not reverse the judgment, unless it is made to appear that he has abused his discretion, and in no case will it be held that there has been an abuse of discretion when there is any evidence to authorize the finding of the auditor. See the case just cited, and the cases therein referred to. It is incumbent, therefore, upon a plaintiff in error who complains of the refusal of the judge to approve an exception of fact to an auditor's report in an equity case, to show to the satisfaction of this court that the finding of the auditor complained of in the exception was unsupported by the evidence; the presumption being that the finding was correct. After a careful examination of the voluminous brief of evidence in the present case, we cannot say that it has been shown with certainty that any finding of the auditor was entirely unsupported by the evidence, and therefore error has not been made to ap-

pear in the ruling of the judge refusing to approve the exceptions of fact.

But it is said that this was not an equity case, and that therefore the exceptions of fact should have been submitted to a jury in any event. Whether a case is an equity case or a common-law case depends largely, if not entirely, upon the prayers. *Steed v. Savage*, 115 Ga. 97, 41 S. E. 272 (1). The plaintiff prayed for an accounting, but an accounting may be had either at law or in equity. But he also prayed for a decree dissolving a partnership, and for an injunction, and under the latter prayer obtained a temporary restraining order. That the case is an equity case does not seem to admit of any doubt.

The foregoing discussion disposes of all the questions involved except the one arising out of the auditor's finding that there was no partnership. It is unnecessary to determine whether, under the facts alleged in the petition, the plaintiff and the defendant were partners. As the auditor found that the relation existing between them was as set forth in the defendant's answer, and as the rights of third persons are not involved, and the auditor has made a full accounting between the parties in the light of his finding as to what were the facts with reference to their relationship to each other, it is immaterial to the present controversy what that relationship be denominated. The auditor has found what was the agreement between the parties, and has given effect to the rights of each under the terms of that agreement, and it is immaterial whether the relationship of partners existed, or that merely of principal and agent. No sufficient reason has been shown for reversing the judgment.

Judgment affirmed. All the Justices concurring.

(120 Ga. 347)

LITTLE v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 9, 1904.)

INJURY TO EMPLOYÉ — VIOLATION OF LAW — RULES OF COMPANY — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

1. An employé cannot recover damages of a railroad company for an injury proximately caused by his violation of a penal statute or municipal ordinance. The principle is not modified where the employer may have directed the employé to violate the law, or may have sanctioned the continuance of a custom amounting to a contravention of the law.

2. The rules of a railroad company for the government of its employés are not obligatory, as such, upon those who do not know them, and to whom they have not been promulgated.

3. An employé cannot recover of a railroad company if he is negligent, and his negligence appreciably contributes to his injury.

4. The contentions of the plaintiff as made by the pleadings were fairly submitted to the jury.

5. The application of the charge of the court on the subject of contributory negligence to the evidence necessarily controlled the verdict, and the verdict for any minor error of law will not be set aside.

(Syllabus by the Court.)

Error from City Court of Macon; Robt Hodges, Judge.

Action by J. H. Little against the Southern Railway Company. Judgment for defendant, and plaintiff brings error, and defendant assigns cross-error. Judgment on main bill of exceptions affirmed. Cross-bill dismissed.

J. H. Little sued the Southern Railway Company for injuries alleged to have been received from a collision between two switch engines, one of which was operated by him as engineer. About 7 o'clock on the afternoon of July 1, 1902, he was directed to "break up" a train of cars just arrived from the North, in order to make up another for the South. In the performance of this order, it was necessary for him to pull his train to a point on the main line sufficiently far to clear a certain switch, and then push the cars back in a siding from this switch. Plaintiff started out on the main line with about 13 cars, loaded with coal, attached to his engine, and ran down the main line, crossing the track of the Central of Georgia Railroad Company, and stopped his train after the crossing was cleared. The track of the defendant road was down grade after the crossing was reached, and the plaintiff was unable to back his train into the switch intended. He made several attempts to do so, each time pulling his train a little further off to get the "slack," but was unable to push his cars back. Then he started his train down grade towards the passenger depot, running at a speed of about 8 or 10 miles an hour, crossing two streets of the city of Macon without checking his speed, and ran through a railroad culvert, located on an abrupt curve, into a switch engine that was bringing some cars from an opposite direction. In approaching the culvert his view of this switch engine was cut off by the high embankment through which the culvert extended. He contended, and the railway company denied, that he received a signal from the yardmaster to pull his train forward after his ineffectual efforts to back the cars. The evidence offered by the plaintiff tended to show that, in moving his train forward, he was acting under orders from the yardmaster; that the engine collided with was at the time running backward in making a "flying switch," and had no light or outlook on the rear; that the collision was the result of the negligence of the servants in charge of that engine in failing to provide proper warning, and in making a flying switch in opposition to the rules of the company; that, when plaintiff stopped just beyond the railroad crossing, he was signaled to go ahead by the defendant's servant; and that the collision was not the result of any negligence on his part. On the other hand, the railroad company offered evidence tending to show that the plaintiff violated the rules of the yard in moving his train so far; that he failed to stop within 50 feet of the track of the

Central of Georgia Railroad, an intersecting railroad; that he failed to check the speed of his train when he was crossing the public streets of the city of Macon; and that at the time of the collision he was running his train at a speed of 15 to 20 miles an hour, in violation of the ordinance of the city of Macon which limited the rate of speed to 5 miles an hour. The jury returned a verdict for the defendant, and the plaintiff, by direct exception, brings the case here for review.

John R. Cooper, M. W. Harris, and J. H. Hall, for plaintiff in error. Dessau, Harris & Harris, for defendant in error.

EVANS, J. 1. Within an hour after the plaintiff began to discharge his duties in shifting the cars, he violated two statutes of the state and a municipal ordinance of the city of Macon. When he ran on the main line with his cars, he failed to observe Civ. Code, § 2234, which required him to stop within 50 feet of the place of crossing the Central Railroad, which was an independent railroad. He did not stop before crossing the Central Railroad, but immediately after clearing the same he brought his cars to a full stop. It was afterwards that he ran his train down in the direction where the collision occurred. Plaintiff in error contends that in no sense was the failure to stop within 50 feet of the Central Railroad crossing a contributing cause of the injury, for the reason that he had crossed the railroad and come to a full stop, and, even if he had been negligent in violating the statute requiring him to stop within 50 feet of the crossing, that, having stopped his train just beyond the crossing, his failure to observe the statute could not have contributed to the injury. On the other hand, the railway company insists that this was a down grade, and, if he had stopped within 50 feet of the crossing, he would have been able to push the cars back into the siding, and that, because of his failure to observe the statute, and in going beyond the Central of Georgia Railroad crossing to a point so far down grade, he was unable to push the cars back, and was guilty of negligence. The court submitted this issue to the jury; instructing them that, unless they believed the failure on the part of the plaintiff to comply with this statute was a contributing cause of the injury, he would not be chargeable with negligence in failing to observe it.

Section 2234 is primarily designed to prevent collisions between the trains on the intersecting roads. Although the plaintiff did not comply with the statute in stopping within 50 feet of the intersecting road, he did bring his train to a full stop after crossing the track of the Central of Georgia Railroad Company. Relatively to what occurred after crossing that track, the failure to stop before he crossed it was not the proximate

cause of the collision. Diligence might have required him to ask for assistance in backing his train, instead of moving further down grade, but his failure to stop his train within 50 feet of the railroad crossing is too remote to be regarded as a contributing cause of the collision with the other engine. But as the jury were instructed that this would not be an act of negligence unless it was found to be a contributing cause of the injury, and as the evidence demanded a finding that the injury proximately resulted from the violation of the statute requiring him to check the speed of his train while approaching a street crossing, and in running faster than was permitted by the municipal ordinance, the submission of this irrelevant issue should not have the effect of vitiating the only verdict which could properly have been rendered under the facts of the case.

After the plaintiff had stopped his train beyond the railroad crossing, and was unsuccessful in his attempts to back the cars, he started forward at a speed estimated by the witnesses as from 8 to 20 miles an hour, crossing two streets in the city of Macon without checking the speed of his train. The court charged Civ. Code, §§ 2222, 2224, requiring an engineer to check the speed of his locomotive within 400 yards of such crossings, so as to be able to stop in time should any person or thing be crossing the track; and in this connection the court instructed the jury that, if they believed that the failure of the plaintiff to observe this statutory requirement was a proximate cause of his injury, he would not be entitled to recover. There are several cases construing these sections of the Code. Their application has been confined to injuries to person or property occasioned by a railroad company at a grade crossing, and in these cases it has been held to be negligence per se not to comply with the statute. There has been no adjudication as to what effect a failure to observe this statute would have upon the engineer in the event he was injured at a point either on or near the crossing. The statute makes it the duty of the engineer, and not of the railroad company, to blow the whistle and check the speed of the train. If he fails to do this as required by the statute, he is subject to indictment for a misdemeanor; and if, in the commission of this criminal act, an injury results which could have been avoided but for the commission of that act, his right to recover from the railroad company will be defeated. 1 Labbatt on Master & Servant, § 362; Missouri Ry. Co. v. Roberts (Tex. Civ. App.) 46 S. W. 270. The same may be said as to the violation of the speed ordinance of the city of Macon, which prohibits the running of trains in that portion of the city at a greater rate than 5 miles per hour. The plaintiff admits that at the time he sustained the injury the speed of his train was 8 to 10 miles an hour. When he collided with the other engine he was in actual violation

of the speed ordinance of that city. He had just passed two street crossings without checking the speed of his train, or attempting to do so. He rushed towards the impending collision in disobedience of the state statute requiring him to check the speed of his locomotive at street crossings, and in disobedience of the municipal ordinance limiting him to a speed of 5 miles an hour. If his injury was caused by reason of a violation of either the statute or the ordinance, he would not be entitled to recover. But he says that he was commanded by the railroad company to disobey both the statute and the speed ordinance, and that, even if there was no express command to that effect, there had been such repeated violations as to amount to a custom. It would be contrary to public policy for courts to relieve a citizen of the consequences of his act in violating the law or his duty to society, and it cannot be any defense that some one else either assisted in the offense or commanded him to do it. *Ry. Co. v. Roberts* (Tex. Civ. App.) 46 S. W. 270. It is no justification for one criminally responsible for his conduct that another commanded him to do an act which is inhibited by law. No custom, however universal, could have the effect of repealing a penal statute, and the mere forbearance of the corporation to prosecute for repeated violations of the ordinance would not amount to an implied repeal of the ordinance. *Central R. R. v. Curtis*, 87 Ga. 425, 13 S. E. 757. In *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385, a widow of a deceased employé sued the Western & Atlantic Railroad Company to recover damages because of the death of her husband by the alleged carelessness of the employés of the railroad company while her husband was acting as engineer. The defendant pleaded that at the time of the killing the railroad company was engaged in the transportation of insurrectionary troops to fight against the forces of the United States, and that the plaintiff, in propelling the train, was in resistance to the government of the United States. The court there ruled that where two or more parties are engaged in the same illegal transaction, and one is injured by the negligence or carelessness of the other, the courts will not lend their assistance to either party to recover damages. See *Martin v. Wallace*, 40 Ga. 52; *Redd v. Muscogee R. Co.*, 48 Ga. 102. While approving the principle in the last three cases cited, we have serious doubt as to its application in those cases. It follows that, if the railway company either commanded or connived at a violation of the penal law, the plaintiff, who was the actual perpetrator, could not recover of the defendant for an injury traceable to a violation of the statute.

2. The court charged that an employé of a railway company is not bound by any rule, regulation, custom, or usage not communicated to him or furnished to him or spoken

or told him, and of which he had no knowledge, and of which he could get no knowledge by the use and exercise of ordinary care and diligence. The error assigned upon this charge is that the law does not impose upon the employé the duty of exercising ordinary care in ascertaining the rules of the company. He is only bound by the rules promulgated by the company, and of which he has knowledge. As applied to the evidence, the jury could have understood the charge only to mean that an employé is not bound by any rule of which he had no knowledge, but, if there was furnished him an opportunity to learn the rules, and by the exercise of ordinary care he could have acquainted himself therewith, this would amount to knowledge. This statement of the rule is recognized in *Port Royal Ry. Co. v. Davis*, 95 Ga. 299, 22 S. E. 833; *Carroll v. Ry. Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214.

3. In order for an employé of a railroad company to recover damages from the company for an injury received while in its employment, it must appear that he was free from fault. This principle has been stated in many forms. The charge of the trial judge on this subject was modeled on *Prather's Case*, 80 Ga. 427, 9 S. E. 530 (2), 12 Am. St. Rep. 263. The statement of the doctrine that an employé of a railroad company cannot recover if he "immediately or remotely, directly or indirectly, caused the injury or any part of it, or contributed to it at all," has been approvingly cited in *W. & A. R. R. v. Herndon*, 114 Ga. 168, 39 S. E. 911. In *Banking Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613 (2), it was said that "the negligence of the plaintiff, however slight, which contributes in an appreciable degree to the cause of the injury, defeats a recovery." If the negligence of the employé appreciably contributes to the injury, he cannot be free from fault, and, to recover, he must show himself blameless.

4. Complaint is made that the contentions of the plaintiff were not fully submitted in the charge. If the plaintiff desired any further elaboration of his contentions, he should have made an appropriate request. The charge was very elaborate, and covered every material phase of the case, and submitted every substantial issue to the jury.

5. Plaintiff in error did not make a motion for a new trial, but by direct exception complains of the various rulings and charges of the court. When he pursued the latter course, he staked his right to a reversal of the verdict upon strictly legal grounds. The controlling question in the case is the contributory negligence of the plaintiff in violating a penal statute and municipal ordinance. The charge of the court on this subject, applied to the evidence, necessarily controlled the verdict, and any minor errors of law will not have the effect of reversing the verdict.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concurring.

(120 Ga. 475)

**CENTRAL OF GEORGIA RY. CO. v.
WEATHERS.**

(Supreme Court of Georgia. June 10, 1904.)

RAILROADS—INJURIES TO STOCK—PETITION.

1. The petition was good as against a general demurrer, and as amended it fully met the objections raised by the special demurrer filed.

2. In an action for damages against a railroad company for injuries to live stock, the presumption raised against the company, under Civ. Code, § 2321, upon proof of damage to the stock by the running and operation of the locomotive, cars, or other machinery of the defendant, extends only to the negligence alleged in the petition; and where the only negligence alleged was the failure to have a headlight on the engine which it was claimed caused the injury sued for it was not error for the court to charge that, if the plaintiff proved that the injury occurred as alleged in the petition, "the presumption of law would be * * * that it was the result of negligence on the part of the defendant—that is, that its failure to have a headlight on the engine was negligence." The last part of this charge clearly related to the presumption as above.

3. The record discloses no error in the admission of evidence; the ground of the motion based on the affidavits of persons who were not introduced as witnesses on the trial does not contend that these affidavits contained newly-discovered evidence, and sets forth no error on the part of the trial court; the evidence, while conflicting, was sufficient to sustain the finding for the plaintiff; and it does not appear that the court erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; W. M. Henry, Judge.

Action by T. K. Weathers against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. Taylor, J. Branham, and W. S. McHenry, for plaintiff in error. H. F. Sharp and C. A. Thornwell, for defendant in error.

CANDLER, J. This was a suit for damages against a railroad company for alleged injuries to the plaintiff's mule, as a result of which the mule was rendered wholly useless. The petition charged that the defendant "was negligent in the running of its train [by which the mule was struck], and that the engine pulling said train did not have up a headlight, and that it was so dark that one was necessary." The particular train by which it was alleged the mule was struck was set out in the petition, and the injuries to the mule were described. The defendant demurred generally and specially, the general demurrer setting up that the petition failed to allege any specific acts of omission on the part of the company or its agents that would constitute negligence and authorize a recovery. To meet this demur-

rer the plaintiff amended his petition by alleging that the track or roadbed of the defendant at the point where the injury occurred was very nearly straight for a distance of about 400 yards south of the trestle where the mule was injured; that, if the company had had a headlight on the engine at the time of the injury, its servants would have seen the mule before running upon it, and could have stopped the train in time to have avoided the injury. It was charged that the running of the train at the time in question without a headlight was negligence on the part of the defendant company, and that, as a result of this negligence, the mule was not seen, and was run over and injured. The defendant insisted upon its demurrers, notwithstanding the amendment, but they were overruled. Exceptions pendente lite were filed to the overruling of the demurrers, and error assigned thereon in this court. On the trial the plaintiff introduced evidence from which the jury were authorized to find that the mule was struck by the train and injured as alleged in the petition, that at the time of the injury it was dark, and that the engine had no headlight. The evidence for the defendant was squarely in conflict with that for the plaintiff, and tended to show that the mule was not struck by the train at all. The jury found a verdict for the plaintiff, and the defendant made a motion for a new trial, to the overruling of which it excepted.

1. That the petition was good as against a general demurrer is fully settled by the decision of this court in the case of Seaboard Air Line R. Co. v. Pierce, 120 Ga. —, 47 S. E. 581. The defendant could not admit the allegations of the petition and escape liability. It is equally clear that, in view of the amendment offered by the plaintiff, the special demurrer was properly overruled. The allegations as to the straightness of the track from the place of the injury in the direction from which the train was coming, the darkness of the evening, and the failure of the defendant to have any headlight on its engine clearly made out a case of negligence on the part of the company, in the absence of which the presence of the mule on the track could have been discovered and the injury avoided. The defendant was put on ample notice that the sole act of negligence relied on by the plaintiff was the alleged failure to have a headlight burning on its train, and was in a position to meet this issue by proving either that it did have a headlight, or that at the time in question it was daylight, and none was needed. The fact that on the trial the company did seek to prove the latter of the two alternatives renders it unnecessary to further discuss this feature of the case.

2. In the amendment to the motion for a new trial error is assigned upon the following charge of the court: "Now, gentlemen, if he [the plaintiff] has proved all these things to your satisfaction, then, nothing else ap-

peating, he would be entitled to recover, because, if nothing else appeared except what I have just stated to you, then the presumption of law would be, when it is shown that the mule was injured in the manner charged, that it was the result of negligence on the part of the defendant; that is, that its failure to have a headlight on the engine was negligence." The objection made to this charge was that the court erred in the use of the phrase, "that its failure to have a headlight on the engine was negligence." From the entire charge of the court as sent up in the record it appears that in the portion thereof to which exception is taken the court was instructing the jury as to the law contained in Civ. Code 1895, § 2321. After reading that section, and just preceding the charge quoted, the court charged: "Now, gentlemen, in this case, before the plaintiff would make out his case *prima facie*, and nothing else appearing, * * * he must show that at or about the time mentioned in his petition * * * he was the owner of the mule described in the petition, and he must show that on that date the mule was struck by the engine or train of the defendant in this county; and he must show that it was injured in the particulars he sets out, by being struck in that way, or some one of those particulars, and must show that thereby it was so much injured as to be useless, and to render its killing necessary; and he must show that that mule was struck by the defendant's engine by reason of the fact that at the time the engine had no headlight; and then he must, of course, show some value of the mule." Taking this in connection with the portion of the charge complained of, which immediately follows it, it will be seen that, far from furnishing any ground for complaint on the part of the defendant, it is open to the criticism that it placed too great a burden on the plaintiff, in that it instructed the jury that, in order for the plaintiff to make out a *prima facie* case, he must show that the mule was struck by the defendant's engine by reason of the fact that at the time the engine had no headlight. When the plaintiff showed to the satisfaction of the jury that his mule was struck, as alleged in his petition, by the defendant's train, and proved the damages resulting therefrom, his case was *prima facie* made out; and the law, under section 2321 of the Civil Code of 1895, raised a presumption of negligence on the part of the defendant as alleged in the petition. This being the case, it was unnecessary, in order to make out a *prima facie* case, for the plaintiff to specifically prove the negligence alleged. Without entering into any discussion of the various decisions of this court on the subject, it is sufficient to say that in this state the law requires a plaintiff suing a railroad company for damages to person or property by the running of its trains to set out specifically in his petition the acts of negligence upon which he

relies for a recovery, and a petition which is deficient in this respect is subject to a special demurrer. *Blackstone v. R. Co.*, 105 Ga. 380, 31 S. E. 90; *Russell v. R. Co.*, 119 Ga. 705, 46 S. E. 858; *Seaboard R. Co. v. Pierce* (Ga.) 47 S. E. 581. The case of *Sims v. R. Co.*, 111 Ga. 820, 35 S. E. 696, would seem to hold a contrary view; but the *Sims* Case was decided by a divided bench, and must therefore yield as authority to the other cases cited, each of which was a unanimous decision of a full bench. This court has repeatedly ruled that a plaintiff cannot recover for acts of negligence proved against the defendant other than those alleged in his petition; and that while, under certain circumstances, evidence might be admissible as to other acts of negligence, such evidence can in no case be made the basis of a recovery in the absence of an allegation in the petition setting it up and claiming damages therefor. If there can be no recovery for acts of negligence not alleged in the petition, it follows as a logical conclusion that there is no presumption of negligence against the company other than as to acts alleged by the petition to have been negligent. The charge complained of, taken as a whole, in effect presented this view to the jury, the only fault in it being that it went further, and charged that the plaintiff must prove the particular act of negligence alleged in order to make out a *prima facie* case. This burden was not upon the plaintiff, although, as a matter of fact, it appears that he did introduce evidence to show that the injuries sued for were inflicted after dark on the day in question, and that at the time the engine carried no headlight. The evidence for the defendant tended to show that the engine in question did not strike the plaintiff's mule at all, and that at the time when it was claimed the mule was struck it was daylight, and no headlight was needed to enable the engineer to see the mule if he had been upon the track. The jury, under a fair charge, found in favor of the contentions of the plaintiff, and rendered a verdict in his behalf.

3. The motion also complains of the admission by the court of certain evidence for the plaintiff over the objection of the defendant's counsel that it was irrelevant. The mere fact that the evidence was irrelevant would not, without something to show that it injuriously affected the complaining party, be cause for a new trial. The evidence in question, however, which consisted of a written report of the section boss to the headquarters of the company, contained several statements which, inasmuch as the section boss was himself a witness on the trial, were relevant on the question of the credit to be given his testimony before the jury; and the admission of the report in evidence was not, therefore, for any reason assigned, erroneous.

What purports to be a third ground of the amendment to the motion for a new trial might have had a persuasive effect upon the

trial judge, inasmuch as it was based upon affidavits of witnesses of known character and standing as to material facts bearing upon the questions at issue on the trial before the jury. These affidavits were not offered as newly discovered evidence, and they could have had no other purpose than to affect the judge when he came to pass upon the general grounds of the motion. It was within the discretion of the court to consider the affidavits for this purpose, but he was in no sense bound to do so. It is a settled rule of this court that, where there is a conflict in the evidence, and the trial judge is satisfied with the conclusions reached by the jury, the verdict and judgment will not be disturbed. Following this rule, regardless of the truth of the disputed issues of fact, the jury having determined those issues in favor of the plaintiff, and the trial judge having approved their finding by refusing to grant a new trial, we will not interfere, although we might, as an original proposition, believe that the jury ought to have found differently. Taking the affidavits to which we have referred, we might be satisfied that the finding of the jury was wrong; but, those affidavits not being offered as newly-discovered evidence, we hold that upon none of the grounds of the motion was the refusal to grant a new trial erroneous.

Judgment affirmed. All the Justices concur.

(120 Ga. 312)

LAMAR v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

COMMON CHEAT—CONTRACT OF HIRING.

1. An act of the General Assembly, approved August 15, 1903 (Acts 1903, p. 90), provides that if any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure money or other thing of value from the hirer, with intent not to perform the service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and shall be punished as for a misdemeanor. *Held*, that such act does not violate the constitutional inhibition against imprisonment for debt; the legislative purpose being, not to punish for a failure to comply with the obligation, but for the fraudulent intention with which the money or other thing of value is procured.

2. The evidence warranted the verdict, and there was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Valdosta; W. H. Griffin, Judge.

Kibby Lamar was convicted of crime, and brings error. Affirmed.

Wilcox & Johnson, for plaintiff in error. S. M. Varnadoe, Sol., for the State.

COBB, J. The accused was prosecuted under the provisions of the act approved August 15, 1903 (Acts 1903, p. 90), which are

set forth in the first headnote. In Calhoun's Case, 119 Ga. 312, 46 S. E. 428, which was also a prosecution under this act, no question as to the constitutionality of the act was raised, but attention was there called to the fact that the legislation was probably the result of prior decisions of this court under the laws in reference to cheating and swindling. In addition to the cases cited in Calhoun's Case, see Edge v. State, 114 Ga. 113, 39 S. E. 889. In the present case the accusation was demurred to on the ground that the act provided for imprisonment for debt, and if this objection is well taken the act is void. Civ. Code 1895, § 5718. If the act prescribes a punishment for a simple violation of a contractual obligation, it is beyond the power of the General Assembly. But if its purpose is to punish for fraudulent and deceitful practices, it is valid, even though the fraud or deceit may arise from the failure to comply with a contractual engagement. Fraudulent practices which resulted in one obtaining the money or property of another were in a number of instances denounced as crimes by the common law, and by statute, both in England and in this country, a number of such practices have been declared to be crimes, although the particular practice was not embraced within the definition of any common-law offense. The right of the lawmaking power to declare fraudulent practices a crime does not seem to have ever been seriously questioned. The various sections embraced in the chapter of our Penal Code which deals with the subject of cheats and swindlers show that not only are many of the fraudulent practices which were condemned at common law still crimes in this state, but that the General Assembly has from time to time created other offenses which are based upon such practices. See Pen. Code 1895, § 658 et seq. The General Assembly cannot, under the guise of a statute creating a criminal offense, imprison one who has failed to pay a debt; but if one in becoming a debtor perpetrates upon another a fraudulent practice, it is not beyond the province of the lawmaking power to denounce as a crime the fraudulent practice, and imprison him who has been guilty of the practice, notwithstanding he may be at the same time under the obligation of a debtor to him upon whom the fraud was perpetrated. It is reasonably clear that in enacting the statute now under consideration the legislative purpose was not to punish one simply for a failure to pay a debt, but was to punish the act of securing the money or property of another with a fraudulent intent not to perform the service, the promise to do which was the consideration for such money or property. This distinguishes the present case very clearly from that of State v. Coal Company, 92 Tenn. 81, 20 S. W. 499, 36 Am. St. Rep. 68, which was cited and relied on by the plaintiff in error. Nor does our decision necessarily conflict with that in Carr

v. State, 106 Ala. 35, 17 South. 350, 34 L. R. A. 634, 54 Am. St. Rep. 17, also cited by the plaintiff in error. The court construed the statute involved in that case in such a way as to make its chief purpose the collection of a debt by duress of imprisonment, and if this construction was right the conclusion inevitably followed. Our statute is not susceptible of such a construction. There was no error in overruling the demurrer.

The evidence authorized the verdict, and no reason appears for reversing the judgment.

Judgment affirmed. All the Justices concurring.

(120 Ga. 453)

NASHVILLE, C. & ST. L. RY. v. MILLER.

(Supreme Court of Georgia. June 10, 1904.)

RAILROADS—INJURY TO PASSENGER—MITIGATION OF DAMAGES—INSTRUCTIONS—PLEADING.

1. The fact that a person other than the wrongdoer, as a mere gratuity, pays to one injured as the result of his negligence a sum of money equal to the amount he would have earned had he been able to work during the period of disability, will not mitigate the damages due by the wrongdoer to the injured party for lost time.

2. The rule just stated is applicable, though the person making the payment is the employer of the injured party.

3. Quare, whether the wrongdoer can plead the payment to diminish the amount of his liability, when, under the terms of the contract of employment, the injured party had a legal right to demand it.

4. When a petition in an action for personal injuries contains allegations which in a general way show that the plaintiff has lost time, and evidence which fixes the time lost and the value of such time with certainty is admitted without objection, a charge that plaintiff is entitled to recover for lost time such an amount as the evidence authorizes will not be held to be erroneous, though there is in the petition no distinct claim for damages on account of lost time.

5. None of the evidence objected to was inadmissible for any of the reasons assigned.

6. An allegation in a petition that the plaintiff "has suffered and will continue to suffer great pain" is sufficient to authorize the admission of evidence that mental pain has been suffered, and, when such evidence is admitted, there is no error in charging the jury that in assessing the damages they may take into consideration the mental pain suffered by the plaintiff.

7. The charge as a whole was free from error. The verdict was warranted by the evidence, and was not excessive. No sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by J. T. Miller against the Nashville, Chattanooga & St. Louis Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Rosser & Brandon and Ben J. Conyers, for defendant in error.

COBB, J. Miller was a railway mail clerk, and received injuries as the result of a collision between the train upon which he was working and another train. He brought his action for damages against the railway company, and at the trial it was conceded that he was entitled to recover; the sole issue in the case being as to the amount of damages which should be awarded him. The jury returned a verdict for \$4,000. The defendant made a motion for a new trial upon numerous grounds, and complains that the court erred in overruling the same.

1-3. Error is assigned upon the following charge: "It is immaterial whether the government paid the plaintiff anything or not. That would not affect the rights of the plaintiff in this case to recover against the railroad company." Error is further assigned upon the refusal of the judge to give in charge a written request which was as follows: "Plaintiff admits in his testimony that he received from the government his regular salary during the time he did not work on account of his injury. This being so, I charge you that he cannot recover anything on this account for time lost, as claimed in his declaration." King, an assistant division railway mail superintendent, testified as follows: Plaintiff "returned to work about June 10, 1903—about the time his year expired. If he had not gone back to work he would have been granted further time, but his pay would have stopped. The government pays them for one year when they are disabled from work. This is done on physician's certificate for no period longer than sixty days consecutively, and not to exceed one year in total." The amount thus received by the plaintiff was \$1,400. While the statute or regulation of the Post-Office Department under which this payment was made does not appear in the record, nor is it cited in the briefs of counsel, the payment was evidently made under the provisions of section 1424 of the postal laws and regulations, which reads as follows: "Whenever a railway postal clerk shall be disabled while in the actual discharge of his duties by a railroad or other accident beyond his power to control, he shall send to the division superintendent a certificate of his attending physician or surgeon, sworn to before an officer authorized to administer oaths, who has an official seal, setting forth the nature, extent, and cause of his disability, and the probable duration of the same; and such further evidence as to the character of the disability as may be necessary shall be furnished. The division superintendent will forward the certificate, with his recommendation, to the general superintendent of the railway mail service, who will submit the matter to the Postmaster-General, who may, in his judgment, the facts justifying such action, grant such disabled clerk leave of absence with pay for periods of not exceeding sixty days each, and not exceeding one year in all."

In considering whether the assignments of error under consideration are well taken, it is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. When one engaged in any calling or avocation from which he derives a pecuniary benefit is compelled to give up for a time the performance of his duties, as the result of an injury inflicted upon him by a wrongdoer, he is entitled, as a general rule, to demand compensation for the time thus lost at the hands of the wrongdoer who inflicted the injury. The general rule is that, where a wrongdoer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If, from motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums, the reception of which are directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him. Thus, it has been held that the damages will not be reduced by any amount of insurance received in consequence of the wrongdoer's act. See *Western & Atlantic Railroad v. Meigs*, 74 Ga. 857 (5); *Cunningham v. R. Co.*, 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683. Nor will the fact that medical attention and nursing have been rendered gratuitously preclude the injured party from recovering the value of such services (*Brosnan v. Sweetser* [Ind. Sup.] 26 N. E. 555; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Varnham v. Council Bluffs* [Iowa] 3 N. W. 792), though it has been held that no recovery can be had for the value of services of this character rendered by members of the family, unless an agreement to pay for them be shown (*Goodhart v. R. Co.* [Pa.] 35 Atl. 191, 55 Am. St. Rep. 705). Ought the rule to be different where the employer, from motives of humanity, sympathy, business interest, and the like, pays to the injured employé, as a mere gratuity, for a given time, an amount which he would have been authorized to demand if he had performed the services of his employment, but which he had no right to demand unless the services were performed? In Texas it has been held that an amount paid by an employer, whether paid as the result of a direct undertaking or as a mere gratuity, cannot be pleaded in mitigation of damages. *Missouri Ry. Co. v. Jarrard*, 65 Tex. 560. In an Indiana case the same rule was laid down, though it does not appear distinctly

whether the payment was made as the result of a contract or as a gratuity. *Ohio R. Co. v. Dickerson*, 59 Ind. 317. It has been held by the courts of last resort of New York and Alabama, and by intermediate courts in Missouri, that where an employer pays to his employé, during the period of his disability, an amount which would be equal to his wages earned if he had been at work, the employé cannot seek compensation for lost time against a wrongdoer who causes the time to be lost. See *Drinkwater v. Dinmore*, 80 N. Y. 390, 36 Am. Rep. 624; *Montgomery Ry. Co. v. Mallette*, 92 Ala. 210, 9 South. 363 (6); *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375 (6), 385; *Ephland v. Ry. Co.*, 57 Mo. App. 147 (4), 160. A ruling to the same effect seems to have been made by Lore, C. J., on circuit in Delaware. *Chielinsky v. Hoopes*, 40 Atl. 1127 (6). None of these cases seem to lay any stress upon the question as to whether the payment was a gratuity, or was required by the contract of employment. The cases referred to above are cited in the different text-books on Damages. These text-writers do not agree as to what is the correct rule, but Mr. Watson distinctly takes the position that the sounder view is that which would preclude the wrongdoer from taking advantage of the employer's having, from reasons satisfactory to himself, paid to his injured employé an amount which would have been equal to his wages if he had performed the services for the period during which he was disabled. See *Watson's Dam. Pers. Inj.* § 479; 1 *Suth. Dam.* (3d Ed.) § 158; 2 *Rorer on R. R.* p. 859; 1 *Joyce on Dam.* § 231; *Voorhies on Dam.* p. 61. See, also, the article written by Mr. Watson, the author of the work above cited, in 8 *Am. & Eng. Enc. L.* (2d Ed.) p. 649. We think the view taken by Mr. Watson, and which seems also to be concurred in by Mr. Sutherland and Mr. Rorer, is sounder than that which appears to be approved by the other text-writers. The wrongdoer may show, in defense to a claim for lost time, that no time has been lost; and this, of course, is right and just, because, if no time has been lost, no compensation is due from anybody on account of lost time. But if time has been lost as the result of a tort, sound sense, common justice, and, it may be, public policy would demand that the tortfeasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong—it may be, a grievous and outrageous wrong—but that some third person, not only not in sympathy with the wrongdoer, but despising him and his act, has, from some worthy motive, paid to the injured person an amount which, if it had come from the wrongdoer, would have equalled the damages which would have been assessed against him. There is nothing in the record to show that the government, in its contract of employment with railway postal clerks, stipulates for the payment of salary

during periods of disability; and, so far as the record discloses, when such an employé is disabled from work, he cannot, as a matter of right, demand anything from the government by way of compensation during the period of disability. There is nothing in the testimony of the witness King to indicate that payments are made in such cases otherwise than as a matter of grace. If we look at the postal law or regulation above quoted, it is perfectly clear that the payment is a mere gratuity on the part of the government. We are therefore not confronted in the present case with the necessity for deciding the question as to what would be the rule in the event that the injured employé, under his contract of employment, had a right to demand of his employer the amount which he would have earned as wages during the period he was disabled. On this question we now make no authoritative ruling, but we do rule that where an employer pays to an injured employé, as a matter of grace, the amount which he would have earned as wages if he had not been disabled, a wrongdoer who brings about the disability has no concern with this transaction between the employer and the employé, and the amount so paid is not to be regarded as in any sense compensation for lost time. Hence there was no error in the charge complained of, nor in refusing the instruction requested.

4. Complaint is also made that the court's charge in reference to lost time was erroneous, for the reason that there was no allegation in the petition claiming compensation for lost time. The petition did not in terms ask damages for lost time. It did allege that the plaintiff "was confined to his bed for many weeks"; that he was "earning \$1,400 at the time of his injury"; that "his capacity to labor has been largely and permanently impaired." He claimed damages in the sum of \$500 for doctor's bills, medicine, and nurse hire; laying the aggregate damages which he claimed to have sustained in the sum of \$10,000. Under these general allegations the plaintiff offered evidence to show that he had lost time, and the evidence set forth with certainty the time lost, to wit, one year, less two days. In *Savannah Ry. Co. v. Holland*, 82 Ga. 258, 10 S. E. 200, 14 Am. St. Rep. 158 (4), it was held that it was not necessary that punitive damages should be claimed *eo nomine* in a petition; that it was enough if the facts alleged and the proof be such as to warrant the assessment. In the present case the general allegations of the petition were sufficient to show that time had been lost, and any defect in reference to specific details should have been taken advantage of by special demurrer. The evidence in reference to lost time having been admitted without objection, there was no error in the charge that plaintiff was entitled to recover for lost time if the evidence authorized it. In *Western & Atlantic R. Co.*

v. *Patillo*, 99 Ga. 97, 24 S. E. 958, there was neither allegation nor evidence in reference to lost time, and it was therefore manifest error to instruct the jury on the subject. In the present case there was ample evidence admitted without objection, and the allegations of the petition, though general, were sufficient to cover the subject in the absence of a special demurrer.

5. In four grounds of the motion for a new trial, complaint is made of rulings of the court on the admission of evidence. In two of them it is alleged that it was error to admit certain evidence in reference to the character of the injuries sustained by the plaintiff, on the ground that there was no allegation to authorize the admission of such evidence. In another ground the evidence objected to was by a witness that the plaintiff complained of a great deal of pain, the objection being that it was hearsay; and, in still another ground, evidence of the plaintiff's wife was objected to, to the effect that the plaintiff returned home from his first trip after the injury, and immediately went to bed, and that she had to rub him quite often. The allegations of the petition were sufficiently broad to authorize the admission of the evidence first above referred to, and the other evidence was not inadmissible for any reason assigned in the motion for a new trial.

6. The judge charged the jury that, in determining the damages to be assessed, they could take into consideration the mental suffering that the plaintiff had undergone as a result of the injury. Objection is made to this charge on the ground that there were no allegations in the petition to authorize any charge on the subject of mental pain. The petition alleges that the plaintiff was confined to his bed for many months on account of the injury, and that "he has suffered and will continue to suffer great pain." This allegation in reference to pain was sufficiently broad to authorize the introduction of evidence in regard to mental pain, and, evidence to this effect having been introduced, there was no error in charging on the subject.

7. The motion for a new trial contains numerous exceptions to the charge, but, when the extracts excepted to are considered in the light of the entire charge, we do not think they were erroneous for any reason assigned, nor was any error committed which required the granting of a new trial. The charge, taken as a whole, seems to have fairly and fully submitted the issues to the jury. If the judge did not go into detail as fully as defendant's counsel desired, this should have been made the subject of special requests, or at least the attention of the judge should have been called thereto. We find no error of law which in our opinion would authorize a reversal of the judgment. The remaining question grows out of that ground

of the motion which complains that the verdict is excessive. Under the view we have taken of the case, the evidence authorized a finding of \$1,400 for lost time. The evidence also authorized a finding for the physical suffering which the plaintiff underwent, and this would itself be sufficient to justify the remainder of the verdict, even if nothing was allowed for mental suffering, and the jury had determined the issue in reference to permanent disability in favor of the company.

Judgment affirmed. All the Justices concurring.

(120 Ga. 402)

HOLMES et al. v. HOLMES et al.
(Supreme Court of Georgia. June 9, 1904.)
SECOND TRIAL—INSTRUCTIONS—LAW OF THE CASE.

1. The charge complained of was fully in accord with the law of this case as announced when it was first before this court (33 S. E. 216, 106 Ga. 858). The requests to charge were, in part, contrary to the doctrine laid down. Those which were not, and which were pertinent and applicable, were fully covered by the charge as given. The evidence was conflicting, but warranted the verdict, and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Action between Joshua Holmes and others and Carter Holmes and others. From the judgment, Joshua Holmes and others bring error. Affirmed.

See 33 S. E. 216.

Hamilton McWhorter and John J. Strickland, for plaintiffs in error. W. M. Howard and S. H. Sibley, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(120 Ga. 858)

NATIONAL BLDG. ASS'N v. QUIN.
(Supreme Court of Georgia. June 9, 1904.)
USURY — PLEADING — ADMISSIONS OF AGENT—RECEPTION OF LETTER—EVIDENCE—ACTS OF AGENT.

1. The answer of the defendant was not subject to demurrer upon the ground that it attempted "to set up the plea of usury, and [contained] no allegation of fact which, if proved, would take the contract sued on out of that class of contracts of building associations recognized by the law as not being usurious."

2. Declarations of an agent as to business transacted by him, in order to be admissible against his principal, must have been made by him while representing the principal in the transaction in controversy, and must also have been a part of the negotiation, and constituting the *res gesta*.

3. Evidence that a letter was written to a given person does not authorize a presumption that he received it, unless the evidence also shows that such letter was properly addressed, duly stamped, and mailed.

4. It is erroneous to admit in evidence, over proper objection by the party against whom it is offered, an advertisement published in a newspaper by a person while acting as his agent in a matter to which it is claimed such advertisement referred, when it appears that such person made the publication in his individual capacity, and there is no evidence to show that the party against whom it is offered authorized the publication, or by subsequent ratification adopted it as his own.

(Syllabus by the Court.)

Error from City Court of Washington; W. H. Toombs, Judge.

Action by the National Building Association against B. L. Quin. Judgment for defendant, and plaintiff brings error. Reversed.

W. A. Slaton, for plaintiff in error. S. H. Hardeman and Colley & Sims, for defendant in error.

FISH, P. J. There was a demurrer to the answer filed by the defendant, which demurrer was overruled by the court, and the first question to be decided is whether the court erred in this ruling. The suit was apparently one by a building and loan association against one of its borrowing members and stockholders for the recovery of the amount due to the association by such member and stockholder upon an advance made by it to her upon her stock, and for the establishment in the judgment of a special lien upon described land, which had been conveyed by the debtor to the creditor as security for the debt. The answer of the defendant set up the defense of usury, under which she sought both to reduce the amount of the plaintiff's claim and to invalidate the security deed. The demurrer was "that said answer is not sufficient in law, for that it attempts to set up the plea of usury, and contains no allegation of fact which, if proved, would take the contract sued on out of that class of contracts of building associations recognized by the law as not being usurious." Taking the allegations of the plaintiff's petition to be true, the case would fall within the well-settled rule in this state that the ordinary contract between a legitimate building and loan association and one of its borrowing members and stockholders is not usurious, although the borrower may therein obligate himself to pay more for the use of the money advanced upon his stock than interest thereon at the highest rate which the law authorizes in other contracts. But these allegations, except as to the giving of the bond sued on and the execution and delivery of the security deed, were expressly denied by the defendant. All that she admitted was "that said bond and written instrument sued on were given by her as alleged in the petition," and she immediately explained and limited this admission by alleging that "they were given as security of said loan of \$1,800 and six per cent. interest," and that, "under the contract between her and plaintiff, she was a

mere borrower, and not in any wise a stockholder in said plaintiff company"; that the plaintiff "approached her, before said loan was made, with the distinct proposition to loan her the said \$1,800, stating that it did not wish any stock subscriptions or to obtain any stockholder, but merely [desired] to loan its money, of which it had an abundance to loan"; "that the money would not bear exceeding six and one-half per cent. per annum, and that their method of doing business was adopted merely as a convenient way of loaning and securing its money"; that she "was assured by the plaintiff that the intention of both parties, which was to act merely in the relation of lender and borrower, would be accomplished by the execution of the papers she signed, and that she was borrowing the money at the rate of six and one-half per cent. as aforesaid." She further alleged "that plaintiff adopted this method of doing business, not bona fide as a legitimate building and loan association, but merely as a device to evade the laws of Georgia in regard to usury, and in fraud of [her] rights," and that the "whole business of plaintiff's company was on the line of this transaction with defendant, and its sole purpose in doing business in this state was to lend money at usurious rates of interest." The answer denied the allegation of the petition that at the time the contract was entered into the defendant was a member of the alleged building and loan association; denied the allegation that, while a member of such association, she applied for and obtained an advance on stock which she owned therein; and, after making these denials, admitted the giving of the bond set out in the plaintiff's petition, but qualified and restricted this admission as above indicated, so that it did not conflict with these denials, but amounted simply to an admission that she did execute and deliver the written instruments to the plaintiff, but did so merely for the purpose of borrowing money from the plaintiff, who had adopted this method of making loans in order to evade the laws of this state against usury.

If the understanding between the parties, prior to and at the time that the contract was entered into, was that the defendant was not to become a stockholder in a building and loan association, but the relation of the parties was to be merely that of lender and borrower, and in this transaction the plaintiff adopted the mere forms of a building and loan association's method of doing business, "not bona fide as a legitimate building and loan association, but merely as a device to evade the laws of Georgia in regard to usury," certainly these facts would take the contract between the parties "out of that class of contracts of building and loan associations recognized by the law as not being usurious." The question raised by the demurrer was not whether the contract alleged in the plaintiff's petition was usurious, but whether

the contract alleged in the defendant's answer was usurious. The contract set forth in the petition was one thing, and the contract alleged in the answer was another. The one was apparently a legitimate building and loan association contract. The other was simply a contract for the loan of money at usurious interest, masquerading in the habiliments of a building and loan contract for the purpose of concealing its real usurious character. Whatever else may be said of the defendant's answer, it was not subject to this demurrer. The demurrer was evidently based on the ruling of this court in *Goodrich v. Atlanta National Building & Loan Association*, 96 Ga. 808, 22 S. E. 585, which is cited by counsel for defendant in error in its support. In that case it was held that "the pleas alleging usury, and which were stricken, on motion, by the court, containing no averments of fact which take the present out of that class of cases in which, according to the rulings of this court, contracts purely mutual between the members of building and loan associations, where each member takes an interest in the several contributions to a general fund, are held to be not usurious, were therefore properly stricken." While the answer of the defendant in that case did allege that "the scheme by which she borrowed the money was a scheme to evade the usury laws of this state, and the contract usurious," it set up no facts to show that the actual contract between the parties was otherwise than as the plaintiff alleged. The defendant there did not deny that the plaintiff was a legitimate building and loan association, nor deny that she was, when the contract sued on was entered into, a member and stockholder of such association, nor did she deny that the contract sued on was the one which she made with the plaintiff. So there were no averments of fact in reference to the contract or the relations of the parties to take the case out of the established rule with reference to building and loan contracts.

As we have seen, the demurrer in the present case simply presented the question whether, if the defendant proved all that she alleged, the plea of usury would be sustained. We are clearly of opinion that the plaintiff could not admit all the allegations of the answer as to the relations of the parties when the contract was entered into, and their mutual understanding and intention in reference thereto, and still maintain the action for the full amount sued for, and a special lien on the land alleged to have been conveyed to it to secure the payment of the debt. The court did not err in overruling this demurrer.

2. Three of the grounds of the motion for a new trial may be considered together, as the same considerations will dispose of each of them. O. M. Smith, a witness for the defendant, testified in part as follows: "Mr. J. M. Anderson was the state agent of the plaintiff.

When he first came to Washington, he approached me to act as agent for the National Building Association. I declined to talk to him about it. I told him that our people had been so badly hit by building associations that he could get no subscribers to the stock of such associations here. He said he did not wish to get subscribers to such stock, but all they wanted was borrowers. Said the company had a great deal of money to loan; had fifty thousand dollars to place in Washington, Ga. At first I refused to consider his proposition, but he afterwards talked to Mr. R. H. Wooten, and came back to me, and, after he explained it to me, I accepted the position. Mr. Anderson told me the interest on the money advanced by the company would amount to about 6% in advance, making an interest rate of not more than 6½%. Upon this I took the local agency, and advertised the lending of money at 6½%, as shown by this advertisement." The plaintiff moved to rule out this testimony, because no authority has been shown in Anderson to bind the plaintiff by the admission contained in such conversations, and because the testimony showed that this was not a part of the *res gestæ* of the transaction between the plaintiff and the defendant. This motion was overruled by the court, and, in the motion for a new trial, error was assigned upon this ruling. H. P. Quin, a witness for the defendant, was asked by defendant's counsel: "Did you ever have a conversation with J. M. Anderson with reference to this matter between Mrs. Quin and the association?" He answered: "I had a conversation with Mr. J. M. Anderson about a year after this contract was made. He told me that the primary object of the association was to lend money, and that Mrs. Quin would be settled with at the rate of 6½%, and that she would be allowed that rate of interest on all that she had paid into the association." The plaintiff objected to this testimony upon the grounds that no authority had been shown in Anderson to bind the association; that parol evidence was not admissible to alter or contradict a written contract; and because the evidence was not a part of the *res gestæ*. The court overruled this objection, and complaint was made in the motion for a new trial of this ruling. Subsequently the plaintiff moved to rule out this testimony upon the same grounds, and the overruling of this motion is one of the grounds upon which a new trial was asked. Neither the declarations of Anderson made in his conversations with Smith, nor his declarations in the conversation with Quin, were a part of the *res gestæ* of the transaction involved in this case. Anderson did not represent the plaintiff in any negotiation with the defendant. His declarations to Smith did not even relate to the contract in controversy, but to an entirely different transaction, between different parties. His declarations to Quin were made long after the contract between the plaintiff

and the defendant was entered into, and, besides, were not the declarations of an agent of the plaintiff who represented it in the negotiation with the defendant. Declarations or admissions of an agent as to business transacted by him are not admissible against his principal unless they were part of the negotiation, and constitute the *res gestæ*, or the agent be dead. Civ. Code 1895, § 3034; Griffin v. Montgomery & West Point R. Co., 26 Ga. 111; Evans v. Atlanta Ry. Co., 56 Ga. 498; Chattanooga R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; Hematite Mining Co. v. East Tenn. Ry. Co., 92 Ga. 268, 18 S. E. 24; Southern Ry. Co. v. Kinchen, 103 Ga. 186, 29 S. E. 816; Southern Ry. Co. v. Allison, 115 Ga. 635, 42 S. E. 15. The declarations of an agent, in order to be admissible against his principal, must relate to the identical transaction in controversy. Dorne v. Southwork, 11 Cush. (Mass.) 205; Barber's Adm'r v. Bennett, 62 Vt. 50, 19 Atl. 978.

While Wharton lays down the rule that "a party who commits the management of his whole business, or a particular line of business, to an agent, is bound by the admissions of the agent, as to his entire business committed to him," and that "when the agent is a general agent, representing his principal continuously," it is not "necessary for the admission of such declarations that they should either have been part of the *res gestæ* or should have been authorized" (Whart. Ev. § 1177), the courts are by no means harmonious in holding such to be the rule. There is, however, no necessity for us to consider this question in the present case, for clearly there was no evidence to show that the plaintiff had committed the management of its whole business to Anderson, or that it had committed any business whatever to him, save, perhaps, that of the selection and appointment of local agents in the state of Georgia. If he had any other power as "state agent," the evidence fails to disclose it. Indeed, all that it can be fairly said the evidence shows as to his authority is that he had authority to select and appoint a local agent for the plaintiff for the city of Washington, Ga., and the only evidence of even this authority is that he induced Smith to accept such agency; and the plaintiff apparently ratified his act in so doing, by afterwards recognizing Smith as its local representative to a certain extent. It follows that the court erred in each of these rulings.

3, 4. Another ground of the motion for a new trial is that the court erred in admitting, over the objection of the plaintiff, the following advertisement, printed in the Washington Gazette of December 8, 1899: "Money to loan on City Real Estate, 1 to 10 years, rate 6 per cent. O. M. Smith." This was objected to on the grounds that it was immaterial, that the advertisement appeared to have been published several months after the consummation of the contract sued on,

and that no proof had been offered to connect the plaintiff with it. We think that the court erred in admitting this advertisement in evidence. It appeared upon its face to be simply the advertisement of O. M. Smith, and there was no evidence which showed that the plaintiff had any connection whatever with it. For this reason, if for no other, it was inadmissible. Counsel for the defendant in error contend that it was admissible because the defendant's husband testified that he saw the same advertisement in this paper before he, as agent for his wife, began with Smith the negotiations which resulted in the contract in controversy, and because Smith testified that he sent a copy of this advertisement to the building and loan association. While Smith did testify that he inclosed a copy of this advertisement in a letter which he wrote to the association about other matters, there was nothing to show that this letter was properly addressed, duly stamped, or mailed, and, unless all this had appeared, no presumption of the receipt of the letter could have arisen. 22 Am. & Eng. Enc. L. 1255, and cases cited in notes. Besides, even if we assume that the letter, with its inclosure, was received by the plaintiff association, there was no proof that Smith's letter to the association about other matters contained anything which required the plaintiff to either ratify or repudiate his act in publishing this notice, nor was there anything to show that the plaintiff did not repudiate it. Smith himself testified that it was his advertisement, and not that of the association, and certainly his mere inclosure of a copy of it in a letter which he wrote to the plaintiff about other matters, without more, would not place the plaintiff in a position where it had to either ratify or repudiate the publication.

There was no error in admitting, over the objection of the plaintiff, the itemized statements of account sent by the plaintiff to the defendant.

Judgment reversed. All the Justices concurring.

(120 Ga. 418)

SIMPSON v. WICKER.

(Supreme Court of Georgia. June 9, 1904.)

COSTS — AFFIDAVIT FORMA PAUPERIS—NEW TRIAL—GROUNDS—LIMITATIONS.

1. Under the act approved December 20, 1899 (Acts 1899, p. 79), an affidavit in forma pauperis before a foreign notary, with his seal attached, is receivable in the courts of this state, and sufficient to prevent a dismissal of a bill of exceptions for failure to pay costs.

2. The refusal to dismiss a case because of the failure of the plaintiff to attach a bill of particulars does not afford ground for the grant of a new trial. Civ. Code 1895, §§ 4963, 5642.

3. The evidence was conflicting. There was testimony that at the time the services were rendered the defendant was a resident of this state, and shortly afterwards removed therefrom, so that the claim was not barred by the statute. Civ. Code 1895, § 3783.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by R. H. Wicker against J. H. Simpson. Judgment for plaintiff, and defendant brings error. Affirmed.

Dr. R. H. Wicker brought suit by attachment against Mrs. J. H. Simpson. The defendant filed a plea of the statute of limitations; that she was a married woman, and had never undertaken to pay the debt sued on, which was for medical services rendered to herself. She further pleaded that the debt had been paid by her husband. There was evidence that she and her husband lived in Alabama; that she returned to Georgia, and while ill sent for the plaintiff, agreeing to pay him out of her separate estate, and stating at the same time that she had returned to Georgia to live. A few months thereafter she returned to Alabama, and had been living there five or six years before the suit was brought. The plaintiff testified that he had sent her his bill; that she replied, admitting its correctness and her responsibility therefor, and promised payment. There was practically no dispute as to the correctness of the account, but much evidence for the defendant to the effect that she had never moved back to Georgia, and had never promised to pay the debt out of her separate estate, and had never treated the claim as due by herself. The jury found for the plaintiff. The defendant moved for a new trial on the general grounds, and because the court erred in not dismissing the attachment suit upon the ground that plaintiff did not attach a bill of particulars, and because the court allowed the testimony of the plaintiff as to the contents of a lost letter from defendant, admitting the debt and promising to pay the same, on the ground that the suit was not based thereon. On the call of the case here, attention was called to the fact that the affidavit in forma pauperis had been made before a notary in the state of Alabama, and, while his seal was attached, there was nothing to show that under the laws of Alabama a notary had the right to administer oaths, or that he was in fact a notary.

C. E. Carpenter and Cantrell & Ramsaur, for plaintiff in error. H. F. Sharp and Starr & Erwin, for defendant in error.

LAMAR, J. 1. Under the requirements of Civ. Code 1895, § 5614, the clerk of this court has raised the question as to whether an affidavit in forma pauperis made in a foreign state before a notary public is sufficiently authenticated by that officer's seal, where there is nothing further to show that he has statutory authority to administer oaths. The matter is of practical importance, inasmuch as it involves the admissibility of such affidavits on applications for injunction and in other legal proceedings. Nor is it free from difficulty, for there is great conflict in

the decisions as to whether a notary public has the inherent power to administer an oath, or to attest affidavits, in any matter not connected with the protest of commercial paper. The question has never been directly and authoritatively passed upon in this state. In *Charles v. Foster*, 56 Ga. 612, it was decided that there was no presumption that he had any authority to attest a claim affidavit and approve a claim bond; this being out of the sphere of commerce, and involving the power of a magistrate or justice of the peace, his seal was no proof that he had such jurisdiction. In *Brunswick Hardware Co. v. Bingham*, 107 Ga. 270, 33 S. E. 56, "there was no authentication, other than his own signature, that the person attesting, the affidavit was a notary," it appearing both from the published opinion and the original record that no seal was attached. Outside of Georgia the decisions are directly in conflict on the subject. The courts of Alabama, Illinois, Michigan, Colorado, and Indiana hold that affidavits before a foreign notary are inadmissible when authenticated solely by his seal of office. Some of these decisions are based, at least in part, on the language of the statute defining the terms upon which foreign affidavits may be received in legal proceedings. In England, Maryland, District of Columbia, New York, and Minnesota the courts receive such affidavits when authenticated by the notary's seal. The Supreme Court of Minnesota, in *Wood v. St. Paul, etc., Co.* (Minn.) 41 N. W. 308, 7 L. R. A. 149, delivered a vigorous opinion to the effect that such affidavits were admissible when attested by the seal, and that, whether the power of notaries to administer oaths and attest affidavits was of statutory or customary origin, it was universal, and that, for a time beyond living memory, affidavits made before foreign notaries, when attested under their seals, had been received in the courts of England. *Walrond v. Van Moses*, 8 Mod. *323, was decided in 1722, before our adopting statute. There, on an application to change bail, the court held that "a plaintiff who was in Holland might make an affidavit there and get it attested by a public notary, and should be admitted in evidence to hold the defendant to special bail here." In *Tucker v. Ladd*, 4 Cow. 47, an affidavit taken before a notary in New Hampshire was allowed, over objections, to be read in a hearing in New York. 21 Am. & Eng. Enc. L. 565. At one time there appears to have been doubt as to the power of notaries to attest affidavits in this state. It was removed by the act of 1863. Pol. Code 1895, § 503 (4). This statute, however, was probably in part declaratory of a power already recognized. Prior to that date no act had been passed defining their duties, or authorizing notaries to administer any sort of an oath. When they were elected by the General Assembly (Acts 1814, p. 78), or by the courts (Cobb, Dig. p. 206), nothing was said

as to their powers or duties. They were referred to as officers whose functions were well known, among which was the power to administer oaths. For the fee bill of 1792 (Cobb, Dig. p. 352) allows them to charge "for every protest and oath included, \$2.00," and "for administering an oath in any other case, .25."

From the act of 1792, therefore, it seems evident that the Legislature assumed that notaries had the power to administer oaths by virtue of their office. It was a power not then granted, but recognized as inherent in notaries the world over. That such was the practice appears from *Solomon v. Lacey*, Dudley, 82, where "the bare certificate of a notary public of New Jersey to the oath" was received here in 1831. And therefore, whatever the conflict elsewhere, there was fair room to contend that in this state there was a legislative recognition that they had the power by virtue of their appointment. If so, it was not necessary to produce a foreign statute to show that they could do what was here recognized as a power inherent in the office. Still the doubt continued, and in 1870 the Legislature passed an act now contained in Civ. Code 1895, § 5060, authorizing pleas, answers, and defenses to be sworn to before certain officers, including notaries public; and, as the greater includes the less, it was no doubt argued that if they had the right to make such answer, which could be used as evidence on hearings for injunction, parties could likewise use, in the same case, affidavits attested by the same notary. This view, however, was not adopted in *Brunswick Hardware Co. v. Bingham*, 107 Ga. 273, 33 S. E. 56. Then came the act of 1899, by which the General Assembly expressly declared that any affidavit made out of the state of Georgia before any notary public, justice, judge, chancellor, or commissioner of any court of equity of the state or county where the oath was made, or before any other officer of said state or county who is authorized by the laws thereof to administer oaths, shall have the same force and effect, and be recognized in like manner, as if it had been made before any officer of this state authorized to administer the same. The proviso thereto did not make the act self-destructive and repeal it at the moment of its approval. The proviso was to the effect that the act should not apply to affidavits required to be made within the state of Georgia, nor should it impair or render invalid any of the existing provisions of law for making affidavits out of this state. For example, it did not repeal Civ. Code 1895, § 5060, relating to pleadings, nor Civ. Code 1895, § 3621; nor did it destroy whatever power to administer oaths was possessed by commissioners of deeds under Pol. Code 1895, § 120. *Sugar v. Sackett*, 18 Ga. 462 (3).

From the legislation generally, from their supposed customary powers, and from the

language of the act of 1899, it is clear that foreign notaries are authorized to attest affidavits, and that the same may be received in legal proceedings here with the same effect and under the same circumstances as if made in Georgia. The act of 1899 is, however, silent on the subject of what shall be sufficient evidence of their official character and power to administer oaths. It does not say whether a statement to that effect in the jurat will be sufficient, nor whether there must be attached a certificate from the Secretary of State, or of the court making the appointment, or a copy of the statute conferring the power. It is evident that, so far as notaries are concerned, the silence in the statute must mean that the usual authentication by his seal of office is sufficient. Otherwise, who can say what else is necessary, or how it is to appear that he is what he claims to be, or has the authority to do what he actually does? The decision in *Shockley v. Turnell*, 114 Ga. 373, 40 S. E. 279, related to an affidavit before a clerk of a county court, with nothing to show that he was a clerk. He was not one of the officers named in the act of 1899, and there was no evidence that he had authority under the laws of Texas to administer oaths. We conclude that in the present case the affidavit in forma pauperis, attested as it was by a notary under his seal, is properly receivable, and that the case should not be dismissed for failure to pay the cost.

2. The failure to attach a bill of particulars was a defect in the pleadings which did not authorize a dismissal, except in the event that after motion therefor the plaintiff failed by the second term to supply the omission. Besides, defects in the pleadings cannot properly be used as a ground for a motion for a new trial. Civ. Code 1895, §§ 5642, 4963.

3. The evidence was conflicting, but there was sufficient to show that the claim was not barred by the statute. There was testimony that, at the time the services were rendered, the defendant was living in this state, and shortly afterwards removed to Alabama, where she has since lived. The statute did not run in her favor if such was the case. Civ. Code 1895, § 3783. The letter received by the plaintiff from the defendant, together with his positive testimony that the contract had been made with the wife and not the husband, was sufficient to establish that the debt was the wife's and not the husband's. There was no error assigned on the charge of the court, and the evidence was sufficient to warrant the verdict.

Judgment affirmed. All the Justices concur.

(120 Ga. 370)

GAINES v. LUNSFORD.

(Supreme Court of Georgia. June 9, 1904.)

WAYS OF NECESSITY—WHEN GRANTED.

1. The Constitution provides for ways of necessity, but not for those of convenience; nor

does it guaranty the landowner the right to connect directly with a public road, if there are other ways affording reasonably sufficient means of access therefrom to his farm or residence.

2. Where a tract is touched by steep and hilly "settlement roads," there is no such necessity as will warrant the taking of private property, in order to construct thereon a way leading to a public road which is in better condition, and on which heavier loads may be drawn.

3. Nor is the rule changed by the fact that a cut or obstruction exists on plaintiff's land, between his residence and the settlement roads.

4. Nor can a way of necessity across the lands of another be laid out because the settlement road is liable to be closed. As long as it is open to plaintiff's use, no legal necessity for opening another way exists.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; E. J. Reagan, Judge.

Action by A. S. Lunsford against F. L. M. Gaines. Judgment for plaintiff. Defendant brings error. Reversed.

Sam L. Olive, for plaintiff in error. Jos. N. Warley, for defendant in error.

LAMAR, J. There are no plats in the record to show the situation of plaintiff's and defendant's land, nor the location of the public road, nor where the "settlement roads" referred to in the evidence touch the farm, nor, indeed, where the proposed way begins or ends. Even the plat referred to as attached to the petition is not brought up, and it is therefore difficult to determine where the private road is to start, and with what it is to connect. Aided by the argument, however, we infer that plaintiff's residence is located near the center of his farm. It appears that for many years there has been a private way leading therefrom across the lands of Gaines, the defendant, to what we infer was a public highway. This path or way was not 15 feet wide, its route had been changed from time to time, and it had not been worked by plaintiff and his predecessor in title, so that under Pol. Code, §§ 662, 678, no prescriptive right had ripened. Being unable to continue its use, he applied for the establishment of a way of necessity over practically the same route. The record shows that plaintiff's farm was touched by two settlement roads, and that he could have reached either over his own land, and without crossing the plantation of Gaines. It is claimed, however, that a farm road from plaintiff's dwelling would have had to cross a deep cut or obstruction in his field, that it would have been expensive to construct the route over the same, and that a way thus laid out would lead to settlement roads which were steep, hilly, and in such bad condition that it was impossible to haul thereon more than half a load.

At common law, where the grantor conveyed land otherwise inaccessible, there was of necessity an implication that he had unintentionally omitted to convey a means of access thereto. This necessary implication

¶ 2. See Easements, vol. 17, Cent. Dig. § 53.

entitled the landlocked grantee to a way out to whatever public or private roads furnished access to the original tract, in the laying out of which, due regard, of course, had to be had to the convenience of the grantor. Such ways by implication are still recognized in this state. Civ. Code, § 3065. But in addition to these common-law ways of necessity, the Constitution provides for acquiring similar easements over the land of those with whom the applicant had no privity of estate, declaring (Civ. Code, § 5729) that, "in cases of necessity, private ways may be granted upon just compensation being first paid by the applicant." It does not provide whether he shall have a right to reach a highway, or some private way ultimately leading to a highway, though there are in the books some suggestions that the way of necessity contemplated under similar statutes elsewhere is one which connects the private land with a public road. See notes in *Pettingill v. Porter*, 85 Am. Dec. 677. But the use of the common-law phrase "way of necessity," and the many authorities holding that wherever necessity ceases the right to such way ceases (Civ. Code, § 3066), lead to the conclusion that, if the owner of the landlocked farm can reach a highway by means of another private or quasi public road, he is not under that necessity which alone entitles him to condemn the land of his neighbor. Such was the ruling in *Chattanooga R. Co. v. Philpot*, 112 Ga. 154, 37 S. E. 181, where Justice Cobb said: "If there is a way by which the applicant can lawfully reach his farm or place of residence, a case of necessity does not exist." There the owner of land could reach a private way which extended to the public thoroughfare. In *Turnbull v. Rivers*, 3 McCord, 131, 15 Am. Dec. 622, it was held that, if the land can be reached by a distant or difficult road, the grantee is not entitled to a way across the lands of the grantor.

2-4. The settlement roads are in bad condition, but not impassable. Access to a public and better road would be more advantageous. But the way of necessity contemplated by the Constitution is not a way of convenience, nor is it, indeed, intended to give the applicant the shortest route to market. If there is a defective road touching his land, or it is otherwise accessible without crossing the property of the abutting owner, the Constitution does not warrant taking the latter's property in order to reach a better highway. That would serve the applicant's case, rather than his necessity. The defects in these highways or private ways must be corrected at the expense of the public, the applicant or others having occasion to travel thereon. The delays, expenses, and burdens cannot be avoided by taking the land of another, even on just compensation. Nor does the fact that there was a cut or obstruction in plaintiff's farm between his residence and the settlement road change the legal com-

plexion of this case. The burden of crossing these natural barriers falls upon him, and not upon another. "A way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way to his own land may be." *Dee v. King*, 73 Vt. 378, 50 Atl. 1109. Particularly is this true where the record does not show the character of the obstruction, its nearness to the highway, the additional cost of construction, and its relation to the value of the tract. There might be cases where one side of a plantation is bounded by a highway with precipice, morass, or other natural obstruction of a character that makes it not absolutely impossible to reach the outlet to market, yet the expense would be so out of proportion to the value of the estate as to warrant laying out a way of necessity in an opposite direction, to a road beyond the land of an intervening owner. Nothing of that sort appears here.

Under the *Philpot* Case, it was error to allow testimony that the existing settlement road might be closed against the use of plaintiff. He can travel thereon at the present time. That right makes it unnecessary to use the land of the defendant. When the way is closed it will be time enough to determine whether proceedings should be taken to reopen that, or to grant another over the land of defendant.

Judgment reversed. All the Justices concurring.

(120 Ga. 311)

ROBINSON v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

WITNESS—IMPEACHMENT—CRIMINAL LAW—INSTRUCTIONS.

1. Where a witness is sought to be impeached for contradictory statements in an affidavit alleged to have been signed by him, and the witness is unable to read the affidavit, it is not an abuse of discretion for the court to refuse to allow counsel to read the affidavit in the presence and hearing of the jury, in order to ascertain from the witness whether he signed it; the judge stating to counsel that he may read the affidavit to the witness after the jury has been sent out.

2. Neither the evidence nor the prisoner's statement involved the question of voluntary manslaughter, and there was no error in so instructing the jury. Even if the question had been involved, the accused would not be heard to complain of this instruction to the jury, for the reason that his counsel had expressly requested the court so charge. *Cochran v. State*, 39 S. E. 337, 113 Ga. 736; *Quattlebaum v. State*, 46 S. E. 677, 119 Ga. 433; *Harris v. State*, 47 S. E. 520, 120 Ga. —.

3. A juror will not be heard to impeach his verdict. Hence a ground of a motion for a new trial tending to impeach a verdict on the ground that the jurors, before signing their verdict of guilty, had agreed to recommend the accused for pardon, cannot be considered when not verified except by one of the jurors.

4. There was no error in any of the rulings of which complaint was made, the evidence author-

ised the verdict, and the trial judge did not abuse his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Charlton County; T. A. Parker, Judge.

F. B. Robinson was convicted of crime, and brings error. Affirmed.

J. L. Sweat, for plaintiff in error. John W. Bennett, Sol. Gen., John C. Hart, Atty. Gen., and Toomer & Reynolds, for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(120 Ga. 307)

HORTON v. STATE.

(Supreme Court of Georgia. June 8, 1904.)

APPEAL—WAIVER OF ERROR—MANSLAUGHTER—INSTRUCTIONS.

1. A party cannot obtain a reversal for an error which he has invited, as by a request to charge, or by formal admission that a given principal was not involved in the case.

2. But the fact that one of defendant's counsel, in arguing to the jury, insisted "that there was no manslaughter in the case, but that it was a case of self-defense, and another of his counsel contended that the defendant was justifiable because of the invasion of his house," did not deprive the defendant of the right to a charge on the subject of manslaughter, if it was otherwise demanded by the evidence.

3. The evidence which warranted the charge on the subject of self-defense also called for an instruction on the law of manslaughter as contained in Pen. Code 1895, § 65.

Candler, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Will Horton was convicted of murder, and brings error. Reversed.

Horton was indicted for the murder of Pearson. It appeared that Pearson had been drinking, and went with his wife to the house of Horton, and sent for a bottle of liquor; that Horton took a drink; and that Pearson took several, and finally lay on the bed. According to the testimony of Mrs. Pearson, wife of the deceased, Horton was seated in a chair, apparently asleep. Pearson, in a sort of stupor, rose from the bed, inquiring who had a gun drawn on him. Horton told him to hush, got up from the chair, and, without further cause, took a pistol from its place on the wall and made an attempt to shoot. Thereupon Mrs. Pearson ran between the two men and attempted to get her husband out of the door. Seeing that she could not get him out of the house, she pushed him on the floor. He fell against the baseboard, with his head slightly raised, and, while he was thus lying, Horton fired; the bullet, according to the testimony of a physician, entering the right side of the neck, and ranging down diagonally in the direction of the left hip. Mrs. Pearson, the sole eyewitness, insisted that Mrs. Horton had rushed out of the house, screaming for help, at

the time the trouble began. The accused, in his statement, said that he and Pearson had had some difference about a purchase, in consequence of which Pearson had been quite abusive, and that, when he (the accused) was returning home that evening, he proposed to one Jackson, who was with him, that, in order to avoid a difficulty, they should not pass the house where Pearson was. This statement was supported by the testimony of Jackson and of a brother of Pearson. The defendant, in his statement, further claimed that when Pearson came to Horton's house he was drinking and abusive, and finally picked up a chair, and, in a stooping and threatening position, advanced upon Horton, who claimed that he shot in order to protect and save himself. A physician testified that the range of the bullet in Pearson's body could have been produced by a shot fired at a man approaching in a stooping position. There was evidence from several witnesses to the effect that Horton at once proceeded to the county seat, and was waiting at the jail to surrender himself to the sheriff; that he stated to several persons that he had killed Pearson "because he was coming at him with a chair," in self-defense, and "because Pearson was trying to run over him." Several witnesses testified that, without indicating by whom it was to be done, Pearson, during the day he was killed, had said he expected to be "killed with his shoes on." Mrs. Pearson testified that she would not be certain whether her husband had touched Horton or not; that, if so, it was not done violently. In another place she said: "My husband did not curse Horton. If he touched him at all, it was not very roughly." Several witnesses testified that Mrs. Pearson had said that, when it first began, she thought it would be a knockout, until Joe got a chair and Horton got the pistol." This she denied, but she admitted that she said she thought that at first it was "only a bluff." A verdict of guilty of murder, with recommendation to mercy, having been returned, the defendant made a motion for a new trial on the general grounds, and because the court allowed the wife of the deceased to testify without allowing the wife of the accused the same privilege; because the court failed to charge on the subject of the credibility of witnesses; and because, after the witnesses had been put under the rule, the court allowed Mrs. Pearson to testify a second time, after she had heard the evidence of the witnesses and the defendant's statement. The court charged on the subject of defense of person and habitation, justifiable homicide, and the fears of a reasonable man. The defendant assigns as error that he failed to charge on the subject of manslaughter. As to this, the court certifies in a note that one of the counsel for the defendant "insisted that there was no manslaughter in the case; that it was a case of self-defense"; and that another of his counsel "insisted that

he was justifiable because of invasion of defendant's home." The defendant excepted to the refusal to grant a new trial.

A. J. Camp, W. H. Scoggins, F. M. Richards, and W. A. James, for plaintiff in error. W. K. Fielder, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LAMAR, J. No written request therefor having been presented, the failure to charge on the credibility or impeachment of witnesses affords no sufficient reason for the grant of a new trial. We find no error in any of the other assignments, except in that relating to the court's failure to charge on the subject of manslaughter. The judge charged the law of self-defense, and the evidence which made that proper also called for an instruction on the subject of manslaughter. Indeed, as we understand it, the trial judge did not base his omission to charge thereon upon the ground that there was no evidence to warrant the same, but, from the note to the motion for a new trial, it is inferable that his silence in this respect was due to the fact that one of defendant's counsel "insisted that there was no manslaughter in the case; that it was a case of self-defense," and the other "insisted that he was justifiable because of invasion of defendant's home." Plaintiff in error is not responsible for the verbiage of the note, and therefore it is to be construed, not strictly against him, but liberally in his favor. We conclude that the note states what was the contention of counsel in argument, not a formal admission, as in *Coney v. State*, 90 Ga. 143, 15 S. E. 746, and *Griffin v. State*, 113 Ga. 281, 38 S. E. 844. It is true that a party cannot obtain a reversal for an error which he has invited, as by a request to charge. *Quattlebaum v. State*, 119 Ga. 433, 46 S. E. 677. But because counsel insist that their client is not guilty of anything, he does not thereby lose the benefit of every defense warranted by the evidence. Parties are frequently held to their "theory of the case," and cannot rely on one in the lower court and on another here. But testimony not sufficient to sustain a plea of self-defense may yet be sufficient to require a charge on the law applicable to manslaughter. If the jury had believed the entire statement of the accused, and that he acted in self-defense or under the fears of a reasonable man, they could have found him not guilty. They may have believed only a part of his statement, or only a part of that tending to confirm his statement, but that did not necessarily mean that they should convict of murder. It was necessary, in view of the record, that they should be instructed as to what they should do if they found that, while Pearson was making an attack, it was not a felonious assault, and also what they should do if they believed that Pearson was making an attack, but that it was not of a character sufficient to excite the fears of a

reasonable man. As to these points, of course, we do not mean to express any opinion, but, under the evidence, there were three possible verdicts—murder, manslaughter, and justifiable homicide. The court properly charged as to the first and last, but failed to give any instructions as to the second. Considering all of the circumstances of the case, this omission deprived the defendant of an instruction on a vital and material matter, the right to which he did not lose because his counsel argued that he was completely justified in what he did, and it entitles him to a new trial. *Hatcher v. State*, 116 Ga. 619, 42 S. E. 1018; *Kimball v. State*, 112 Ga. 541, 37 S. E. 886; *Chestnut v. State*, 112 Ga. 367, 37 S. E. 384 (4).

Judgment reversed. All the Justices concur, except CANDLER, J., who dissents.

CANDLER, J. (dissenting). In my opinion, the decision of the majority is in conflict with the rulings of this court in the cases of *Cochran v. State*, 113 Ga. 736, 39 S. E. 337, *Quattlebaum v. State*, 119 Ga. 433, 46 S. E. 677, *Harris v. State*, 120 Ga. —, 47 S. E. 520, and *Robinson v. State* (this day decided) 47 S. E. 968, as well as with the sound and equitable principle that no man should be allowed to take advantage of an error which he has induced or invited. From the certificate of the trial judge, which is conclusive, it appears that the accused "insisted that there was no manslaughter in the case," and he should not now be heard to argue that the refusal to charge the law relative to that offense was error.

(120 Ga. 332)

FRANKLIN v. CALLWAY, Sheriff.

(Supreme Court of Georgia. June 9, 1904.)

CHATEL MORTGAGE—CROPS—PRIORITIES.

1. Under the act approved December 21, 1899 (Acts 1899, p. 78; Van Epps' Code Supp. § 6592), a mortgage dated July, 1903, given to secure money furnished to aid in making the crop for that year, is superior to the lien thereon of an older common-law judgment obtained in 1899, even though such mortgage on such crop was not recorded until November, 1903, and after the levy of the *fi. fa.* on the matured crop. (Syllabus by the Court.)

Error from City Court of Washington: W. H. Toombs, Judge.

Action by A. Franklin against one Moss. Judgment for plaintiff. On refusal of J. W. Callway, sheriff, to turn over proceeds of execution sale and a discharge of the rule against the sheriff, Franklin brings error. Affirmed.

From the agreed statement of facts in the record it appears that on March 11, 1899, Franklin obtained a judgment in Oglethorpe county against Moss; that it was recorded on the general execution docket April 4, 1899; that subsequently Moss moved to Wilkes county, and in July, 1903, under the provisions of the act approved December 21,

1899, gave to Armor a mortgage on his crop in Wilkes county. Before the mortgage was filed for record, the common-law execution was levied on corn which was "part of the crop, but matured and gathered." The corn was sold under the justice's court *fi. fa.*, but the sheriff refused to turn over the proceeds to Franklin, because the execution on the mortgage in favor of Armor against Moss had been placed in his hands, claiming the money. It was admitted that the mortgage had been filed for record November 13, 1903, after the levy of the common-law *fi. fa.* The judge discharged the rule against the sheriff, and directed him to pay the money to Armor. To this ruling Franklin excepted on the ground that the failure to record the mortgage until after the levy made its lien inferior to that of Franklin's execution. The other grounds of the bill of exceptions were abandoned, including that in which the constitutionality of the act of December 21, 1899, was attacked in so far as it made the lien of a younger crop mortgage superior to a common-law execution antedating December 21, 1899.

James M. Pitner, for plaintiff in error. W. A. Slaton, for defendant in error.

LAMAR, J. The act approved December 21, 1899 (Acts 1899, p. 78), relating to the lien of mortgages on crops, given to secure the payment of money and other articles necessary to aid in making and gathering the same, is limited in its application. It says nothing about the priority of such mortgages over bona fide purchasers, liens to secure ordinary debts, younger judgments, or as to its rank where there are several similar mortgages on the same crop. Nor does it say anything as to the necessity of recording, or as to the effect of a failure to record. The solitary provision is that such mortgages for supplies shall take priority over older judgments. Under the language of this statute, the mortgage given in July, 1903, was superior to a common-law *fi. fa.* entered on the general execution docket in April, 1899. The plaintiff in *fi. fa.*, however, contends that the Legislature, in using the word "mortgage," meant thereby one that had the usual incidents, including proper execution and due registration. This may be true, even as to crop mortgages, when the rights of subsequent lienholders or bona fide purchasers are involved. But registration looks to the future, and how can the record or failure to record a mortgage executed in July, 1903, affect the holder of a common-law judgment rendered in 1899? He had not loaned his money on the faith of the crop. Recording the mortgage could not warn him, and keeping it off the record did him no harm. The judgment had no lien on the crop before it was planted. The property was brought into existence with the aid of supplies furnished by the mortgagee, which were thus somewhat in the nature of purchase money, cre-

ating the very property on which the plaintiff has levied. The Legislature was dealing with a condition in which persons holding an older *fi. fa.* had a lien on everything owned or subsequently acquired by the defendant. There was no possible way by which the mortgage could be recorded before the lien of the judgment attached. Even if the paper had been signed in the clerk's office, and immediately handed to him for registration, there would have been an instant of time between the execution and filing during which the lien of the judgment would attach. And therefore, whether the paper was recorded on the day it was executed, or months afterwards, would make no difference. Looked at from the standpoint of date and registration, the mortgage would necessarily be younger and therefore inferior to the existing judgment. To meet this situation, the act declared that the crop mortgage should be superior to the older *fi. fa.*, irrespective of its date, and regardless of the time when it was filed in the clerk's office. Besides, assuming that under the definition in Civ. Code, § 2724, the paper did not become a mortgage, as to third persons, until it was recorded, that condition precedent was supplied when it was actually recorded in November, 1903. Under the act, whenever it became a perfect crop mortgage for supplies, it took priority of an older judgment having a lien on the same crop. Compare *Rasin v. Swann*, 79 Ga. 704, 4 S. E. 882; *Thompson-Hiles Co. v. Dodds*, 95 Ga. 754, 22 S. E. 673; *Achey v. Coleman*, 92 Ga. 746, 19 S. E. 710. The decision in *Green v. Franklin*, 86 Ga. 360, 12 S. E. 585, related to a mortgage executed under the Code of 1882, § 1955. The 30 days therein allowed having been abrogated by the act of 1889 (Civ. Code, § 2778), the limitation suggested in *Courson v. Walker*, 94 Ga. 175, 21 S. E. 287, does not modify the decision, which is otherwise directly in point.

There was a contention in the pleadings that the act of 1899 was unconstitutional in so far as it made such mortgages superior to judgments at the date of its approval. That point, however, was not argued in the brief, and was, in effect, abandoned.

Judgment affirmed. All the Justices concurring.

(120 Ga. 422)

MORGAN v. MAYOR, ETC., OF CITY OF COHUTTA.

(Supreme Court of Georgia. June 9, 1904.)

JUSTICE OF THE PEACE—JURY TRIAL—APPEAL
—MUNICIPAL CORPORATIONS—MONEY
ORDER—PLEADING.

1. An appeal to a jury in a justice's court from a judgment against a municipal corporation must be entered in the name of the corporation.

2. Where, therefore, in such case, an individual, W., described as mayor pro tem. of the corporation, recited in the appeal bond, which was signed by W., "Mayor pro tem.," that, being dissatisfied with the judgment, he entered "his" appeal, this was not an appeal by the corpora-

tion, and should have been dismissed, even though the corporation's name appeared in the caption as party to the original case, and W., as mayor pro tem. of the corporation, for the corporation, acknowledged himself bound as principal.

3. An order for money, drawn by a municipal corporation upon its own treasurer, payable upon demand and without condition, is, in effect, a promissory note, and is an "unconditional contract in writing," within the meaning of Civ. Code 1895, § 4134. Where, upon demand, such order is not paid, and suit is brought thereon in a justice's court, the defendant must make its defense at the first term.

4. It is too late, on the trial of an appeal to a jury in a justice's court from a judgment rendered by the magistrate in favor of the plaintiff upon an unconditional contract in writing, for the defendant to file a plea, when it affirmatively appears that no defense was made at or before the first term of the case. *Morgan v. Prior*, 36 S. E. 75, 110 Ga. 791.

5. For the reasons above stated, and also because the verdict of the jury in the justice's court was wholly without evidence to support it, the judge of the superior court erred in overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by W. M. F. Morgan, for use, etc., against the mayor and commissioners of the city of Cohutta. Judgment for defendants, and plaintiff appeals. Reversed.

W. E. Mann and R. J. McCamy, for plaintiff in error. W. M. Jones and W. C. Martin, for defendants in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(120 Ga. 385)

RALEY v. MAYOR, ETC., OF TOWN OF WARRENTON.

(Supreme Court of Georgia. June 9, 1904.)

TOWN OFFICE—ABOLITION—ACTION FOR COMPENSATION—AFFIDAVIT.

1. The original petition set forth no cause of action, and, if a cause of action was set forth in the amendment, it was entirely new and distinct from that attempted to be alleged in the original petition. There was therefore no error in refusing to allow the amendment, or in dismissing the original petition on demurrer.

2. The body of an affidavit began with the words "Personally comes Mrs. Joseph Raley," and was signed "M. N. Raley." Below the signature was the ordinary jurat, and the signature of an officer authorized by law to administer an oath. Held, that the paper was the affidavit of M. N. Raley, who was presumptively the person referred to therein as Mrs. Joseph Raley.

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. G. Lewis, Judge.

Action by Mrs. Joseph Raley against the mayor and commissioners of the town of Warrenton. Judgment for defendants, and plaintiff brings error. Affirmed.

The petition of Joseph Raley against the mayor and commissioners of the town of Warrenton alleged: In pursuance of the au-

thority conferred by the charter of the town, the defendants created the office of deputy or night marshal, in addition to the office of marshal. Petitioner filed his application for one of the marshal's or deputy marshal's positions, and he was by the defendants duly elected deputy or night marshal of the town, and his salary fixed at \$300 per annum. Petitioner construed the action of the defendants as electing him for one year, and accepted the position as a contract for a year. Petitioner entered upon the discharge of his duties, and faithfully performed the same. After having served a few months, petitioner was discharged by the defendants without any charges having been preferred against him, and without any opportunity having been given him to defend himself against any charges. This notwithstanding a section of the code of the town provided that no officer should be discharged until he had been given notice of, and an opportunity to defend himself against, any charges which had been preferred. Petitioner has always been ready and willing to perform his part of the contract, and faithfully discharged the duties of the office as long as he was permitted to do so. He alleges "that by the breach of said contract of employment" he has been damaged in the sum of \$187.50, the amount of his salary from the time he was discharged to the expiration of one year from his appointment. Attached to the petition are exhibits of the proceedings of the defendants, and the section of the town code referred to in the petition. From these it appears that, during a regular session of the defendants, one of the commissioners proposed that two marshals be elected, instead of one, as theretofore, and that they be paid \$600 between them. This motion was carried. The petitioner's application "for one of marshal position for town of Warrenton" was then considered. Petitioner was nominated and elected "for night marshal," and his salary fixed at \$300 per annum. All this took place in the early part of 1901. On June 15, 1901, the defendants met in regular session, and one of the commissioners "moved to dispense with the night marshal, thereby curtailing that expense." This motion was carried. Defendants demurred to the petition on the grounds that it set forth no cause of action; that, having created the office of night marshal, the defendants had a right to abolish it in their discretion; that, the office being created by ordinance, it could be abolished at any time, even though the incumbent was elected for 12 months. In response to the demurrer, the petitioner tendered an amendment, by which he offered to strike from the petition all the allegations thereof to the effect that he held "any office" in the municipality, and by alleging in lieu thereof that "he was employed by defendants as night marshal" for 12 months at a compensation of \$300 per year. The defendants objected to the amendment on the ground

that it set forth a new and distinct cause of action. This objection was sustained, and the amendment disallowed. The court then sustained the demurrer to the original petition and dismissed it. Pending the case in the trial court, the plaintiff died, and his administratrix was made a party in his stead. She has sued out a bill of exceptions complaining of both of the judgments above referred to. Her bill of exceptions was sued out in forma pauperis, and the affidavit made to avoid the payment of costs, after being properly entitled, is as follows:

"Georgia, Warren County. Personally comes Mrs. Joseph Raley, plaintiff in error in a bill of exceptions filed in the above-stated case, and, on oath, says that the estate of Joseph Raley, deceased, is, because of its poverty, unable to pay the costs in said case. Because from her poverty as an individual, she is unable to pay the costs in said case. M. N. Raley.

"Sworn to and subscribed before me this the 10th day of October, 1903. L. D. McGregor, N. P. Warren County, Georgia."

Some question having been raised as to the sufficiency of this affidavit, the point is dealt with in the opinion.

L. D. McGregor and S. H. Sibley, for plaintiff in error. E. P. Davis, for defendants in error.

COBB, J. (after stating the foregoing facts).

1. The charter of the town of Warrenton provides that the municipal authorities may from time to time elect a marshal, who shall remain in office 12 months, unless removed. Acts 1859, p. 212, § 5. One regularly elected to the charter office of marshal of the town of Warrenton cannot, during the term for which he was elected, be legally discharged from that office, unless removed in the manner prescribed by law. See, in this connection, *Shaw v. Mayor and Council of Macon*, 21 Ga. 280. If, however, the municipal authorities of the town of Warrenton create an office which the charter does not provide for, and elect one to the office thus created, they may, at their pleasure, abolish the office, and thus discharge the municipality from liability to the officer, notwithstanding his term as prescribed by the ordinance creating the office has not expired. *City Council of Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172. The proceedings of the municipal authorities shown in the exhibits to the petition can be construed in two ways; that is, creating two offices of marshal, or recognizing the charter office of marshal, and creating in addition thereto the new office of night marshal. If they be construed as providing for two officers, each having the powers and duties of a marshal, then the action was either void, as beyond the charter au-

thority of the defendants, or neither of the offices thus provided for was the charter office of marshal. The charter provided for only one marshal, and recognized no such office as night marshal; and, therefore, if the action of the defendants be construed as referring to such an office, the position to which Raley was elected was a creation of the defendants. Under either view, Raley was never elected to a charter office, and, when the office to which he was elected was abolished, his right to tender his services and demand compensation was at an end. But it is said that the petition as originally framed was not to recover salary due an officer, but was to recover an amount due under a contract of employment between the town authorities and Raley. The petition is not capable of this construction. The words "employment" and "employ" may have been in the petition, but the words "office" and "officer" are more prominent in the allegations, and the averments as a whole leave no other impression than that it was the purpose of the pleader to treat the position which Raley occupied as that of an officer, rather than that of an employé under contract. Giving the petition the construction indicated, it set forth no cause of action. The purpose of the amendment being to recover under a contract of employment, if it set forth any cause of action at all, it was one entirely new and distinct from that attempted to be alleged in the original petition. It may be that the municipal authorities could make a binding contract for a specified time with an individual for the performance of services of the character indicated in the petition. See *Alexander v. City of Americus*, 61 Ga. 36. But upon this question we do not now pass.

2. The signature of the affiant is necessary to the validity of an affidavit in this state. *Hathaway v. Smith*, 117 Ga. 946, 43 S. E. 984, and case cited; *Beach v. Averett*, 106 Ga. 74, 31 S. E. 806, 71 Am. St. Rep. 239. The pauper affidavit, if an affidavit at all, is therefore the affidavit of M. N. Raley. The question therefore is, does it appear sufficiently from the face of the affidavit that the affiant is the plaintiff in error? The plaintiff in error is Mrs. Joseph Raley, and the jurat of the officer who administered the oath is, in effect, a certificate that Mrs. Joseph Raley appeared before him and subscribed this affidavit; and the affiant, M. N. Raley, is thus identified as the same person who is referred to in the body of the affidavit as Mrs. Joseph Raley. See, in this connection, *Loeb v. Smith*, 78 Ga. 504, 3 S. E. 458. The affidavit was sufficient to relieve the plaintiff in error from the payment of costs.

Judgment affirmed. All the Justices concurring.

(68 S. C. 489)

LITTLE v. PRESBYTERIAN CHURCH OF FLORENCE.

(Supreme Court of South Carolina. April 19, 1904.)

CEMETERIES—REMOVAL OF BODIES—INJUNCTION.

1. Though a church which has allowed its members to bury their dead on the church lot for 20 years has dedicated such part of its lot to burial purposes, it will not be enjoined, where the cemetery is much neglected, and the church is about to be removed, and the graves will be left in the very midst of the most active business, from selling the lot and removing the bodies to another place.

Action by Valcour Little against the Presbyterian Church of Florence to enjoin it from removing the body of a deceased member of his family from the cemetery. H. C. McCall and S. T. Burch intervene by petition. Injunction denied.

George Galletly and S. W. G. Shipp, for petitioners. Wilcox & Wilcox and J. P. McNell, contra.

WOODS, J. The Presbyterian Church of Florence wishes to sell its church lot with a view of building its house of worship on a more suitable site. The lot attached to the church was used as a cemetery from about 1861 to 1885. To test the right of the church to sell the property, including the ground used as a cemetery, Valcour Little instituted this friendly proceeding to enjoin the church from removing the remains of his daughter, buried in the cemetery. Subsequently, H. C. McCall and S. T. Burch intervened in earnest hostility to the sale of the land used as a cemetery, or the removal of the bodies of their relatives therefrom.

The referee appointed by this court has taken much testimony relating to the history of the church and cemetery, and their connection with each other, and also as to the reason of the congregation for desiring to sell the property and rebuild elsewhere. We do not think it necessary to go into any extended examination of the title of the church. James McCown had title to the land for the life of Mrs. Ross. From his whole course of conduct in turning over the property to the church, and from the terms of the deed of the remainderman, W. H. Ross, to the church, it was manifest that the property was intended to belong to the Presbyterian Church of Florence. As an incident of this dedication and use by the church, it was, no doubt, contemplated that some of the land should be used as a cemetery, in accordance with the almost universal custom of the time. The privilege of interment was not confined to members of the church or their families, but the church officers exercised some general oversight and control, to the extent of excluding such interments as were objectionable. Subject to ordinary church uses and to this supervision and control, we think the church dedicated the land as a place for the burial of the dead, and in pursuance of this dedica-

tion it was so used for over 20 years. It is important to observe that no lots were sold and no consideration paid for the burial privilege allowed.

The testimony makes it perfectly clear that the location has now become entirely unsuitable for a place of worship on account of the proximity of railroad tracks, over which trains frequently pass during the church service. Without the aid expected from the sale of this property, the congregation would not, at least for a considerable time, be able to build another church. In 1886 interments in this cemetery were forbidden by the municipal authorities, and none have taken place since that time. The church proposes, before surrendering possession of the property to the purchaser, to remove all bodies buried there, and reinter them in a decent and orderly manner in the new cemetery now in general use in the community; and also to remove and re-erect the monuments and gravestones—all at its own expense, unless persons interested prefer to take such action on their own behalf. The question is whether, under these circumstances, the church should be enjoined from selling the property and removing the bodies in the manner proposed.

When a cemetery association or church sells particular lots in a cemetery, the purchaser becomes the owner of the soil, and manifestly his right to its possession protects interments made by him from disturbance. In re Brick Presbyterian Church, 3 Edw. Ch. 155. It is also true, as a general proposition, that, where ground has been dedicated to the public for use as a cemetery, the owner cannot afterward resume possession, or remove the bodies interred therein, although he has received no consideration for its use, and the interments were made merely by his consent. *Beatty et al. v. Kurtz et al.*, 2 Pet. 568, 7 L. Ed. 521; *Wolford v. Cemetery Association* (Minn.) 56 N. W. 58; *Hook v. Joyce* (Ky.) 22 S. W. 651, 21 L. R. A. 96; *Colbert v. Shepherd* (Va.) 16 S. E. 246. This doctrine is somewhat anomalous, and is not to be extended beyond the principle upon which it is founded. That principle is that the most refined and sacred sentiments of humanity cluster around the graves of departed loved ones, and that when these sentiments have become associated and connected with a particular spot of ground by the invitation or consent of the owner, he shall not for any secular purpose disturb them. There is no right of property in a dead body, in the ordinary sense in which the word "property" is used, but the law recognizes a family right, which descends from generation to generation, to protect the bodies of deceased relatives from indignity, and the ground in which they are interred from unnecessary invasion or disturbance. 6 Cyc. 720. It does not follow, however, that there are no circumstances which will warrant a church in changing the location of its house of worship and removing the bodies interred

on its ground. The very delicate question to be decided in each case is whether, having all the circumstances in view, the proposed removal should be regarded an undue intrusion on the tender sensibilities of those interested. In the consideration it should be remembered that in this comparatively new country the dead have often been buried in very unsuitable places, and that removals have often taken place in the exercise of the most tender sentiment, in view of the future forgetfulness and disregard of the old neighborhood graveyards as the country is changed and developed. If such removals by private individuals tend to promote, rather than destroy, reverence for the dead, the court should certainly hesitate to prevent such action by a church, when it seems to the court that such removal would have a like result. The evidence is clear that this cemetery is much neglected, and its condition is not such as to stimulate any of the finer sentiments of respect due to the dead. If the church is removed, it is extremely probable that it will be still more neglected. Nearly all those who are concerned have indicated their purpose to remove their dead to the new cemetery, and some have already done so. The few remaining graves will be left in the very midst of the most active business life. When those who now care for them as sacred shall pass away, and the relationship of future generations to these dead becomes more remote, there is little room to doubt that they will be almost, if not entirely, forgotten, and the land used for other purposes. So far, therefore, from the proposition of the church to sell the property and remove the dead to the city cemetery indicating any disregard of the sacredness of the association, we think, if carried out, it will promote in the highest degree the very high purpose which those who object wish to conserve. This conviction is much strengthened by the fact that most of those who have their dead interred here prefer to have their bodies removed. It is no light thing to disturb the resting place of the dead, but we think, in these exceptional circumstances, it is proper and right to do so.

It can hardly be contended that the interests of the church, in view of the peculiar facts, should be absolutely sacrificed to the wishes of a few of those whose dead have been buried in its land by its permission. The preservation of the solemnity and dignity so essential to public worship makes the removal absolutely necessary. It has been made to appear that this object probably cannot be accomplished without the sale of this property. The church proposes to remove and reinter the dead with respect and decency in a much more suitable place. While we entertain the highest respect and great sympathy for the sentiments of those who object to the removal of their dead, the court cannot, in the exercise of its discretion, stop the development of the church, when we do not think its contemplat-

ed action should be regarded as offending the most delicate sensibilities. This conclusion is well supported by authority. 1 Washburn on Real Property, 35; Windt v. Church, 4 Sandf. Ch. 471; Land Co. v. Jenkins (Ala.) 18 South. 565, 56 Am. St. Rep. 81; Price v. Church, 4 Ohio, 515.

While we have no doubt of the right of the church to sell property dedicated to its use, we do not discuss that question, because it does not appear the petitioners who make it are members of the church and have an interest in its decision.

For the reasons herein stated, the petition for injunction is denied.

(88 S. C. 515)

LEAGUE v. STRADLEY.

(Supreme Court of South Carolina. April 20, 1904.)

NEGLIGENCE—DANGEROUS PREMISES.

1. Where a customer, by invitation of the merchant, places packages behind his counter, and thereafter in getting them falls through a trapdoor, shut at the time when the packages were placed there, but left open by the negligence of the merchant, he is liable for resulting injuries.

Appeal from Common Pleas Circuit Court of Greenville County; Aldrich, Judge.

Action by Hattie K. League against C. D. Stradley. From judgment for plaintiff, defendant appeals. Affirmed.

Haynsworth, Parker & Patterson and B. A. Morgan, for appellant. McCullough & McSwain, for respondent.

POPE, C. J. The plaintiff brought an action against the defendant to recover \$5,000 damages by reason of her fall through a trapdoor in the defendant's store, in Greenville, S. C., on the 20th December, 1902; she having fractured a bone of her left limb, due, she claims, to the carelessness and negligence of the defendant, as proprietor of said store. The jury found a verdict for the plaintiff in the sum of \$500. After entry of judgment on the verdict, the defendant has appealed therefrom. His grounds of appeal are confined to the refusal of the circuit judge to grant the motion of the defendant for a nonsuit at the close of plaintiff's testimony. Such grounds of appeal are as follows:

"(1) It is submitted that the general invitation which a merchant extends to the public applies only to such portions of his premises as are open for the public, and not to those portions behind the counter or those reserved for the merchant and his employés; and it is further submitted that the evidence showed that the place where the plaintiff was injured was behind the counter, a place reserved for the defendant and his clerks, and, there being no evidence of any invitation from the defendant to enter thereon, his honor erred in not granting a nonsuit on these grounds

(2) It is submitted that there was no evidence tending to show that the plaintiff was invited by the defendant to go behind the counter, where she was injured; that all that the testimony could be considered as showing was that in going there the plaintiff was acting by consent or by license of the defendant, and his honor erred in not so holding and not granting a nonsuit. (3) That his honor erred in not holding that where the customer, by the mere consent or acquiescence of the storekeeper, goes behind the counter in a place not intended for the public, she does so at her own risk, and takes the premises as she finds them. (4) It is submitted that there was no evidence tending to show that the defendant knew, or ought to have known, that the trapdoor was open at the time the plaintiff went behind the counter, nor was there any evidence tending to show that he was negligent in this regard, and the circuit judge erred in not so holding and in not granting a nonsuit. (5) The complaint alleged an express invitation to the plaintiff by the defendant to go behind the counter. The action is one for compensatory damages solely. The evidence is that the plaintiff said: 'Mr. Stradley, I have come to call for my packages,' and that the defendant said, 'All right.' The issue of invitation was a vital one. The evidence totally failed to support this allegation, and his honor erred in refusing the nonsuit."

We deem it proper to reproduce in this opinion the complaint itself, which, omitting the caption and formal part, is as follows: "(1) That the plaintiff Hattie K. League is the wife of the plaintiff G. M. A. League, and they reside in the county and state aforesaid, and are the parents of 10 children, all of whom reside with them. (2) That the defendant resides in the county and state aforesaid, and was at the time hereinafter mentioned, and is now, engaged in the sale of dry goods in the city of Greenville, county and state aforesaid. (3) That on the 10th day of December, 1902, the plaintiff, Hattie K. League, by and with the knowledge and consent of the defendant, deposited certain packages of goods, which she had purchased from the defendant and others, in the storeroom of the defendant, in Greenville city, county and state aforesaid, she at that time being a customer of the said defendant. (4) That thereafter, to wit, on the said 19th day of December, 1902, she went into the place of business of the defendant and called for her packages, and was told by the defendant to go and get the same, which she proceeded to do; that she went behind the counter where she had placed the said packages, and by and with the knowledge and consent of the said defendant, and upon his invitation, in the manner aforesaid, and as she went behind the counter where her packages were deposited, she fell through an open trapdoor, which the defendant had, carelessly and negligently, subsequently opened, or permitted to be

opened and let remain open there, without giving this plaintiff any notice or warning with reference thereto, and as to the existence of which she was ignorant, and the said plaintiff fell several feet through the said trapdoor. (5) That after the plaintiff, Hattie K. League, had fallen through said trapdoor, the defendant, hearing her cries and exclamation of pain, came to her assistance, and, instead of having her carried without effort upon her part from where she had fallen, as ordinary care would have dictated, caught hold of her arm, and tried to assist her in that way—the said plaintiff, Hattie K. League, exclaiming that she was unable to walk—and, as the said defendant had hold of her arm and was coaxing her to walk up the said steps, plaintiff felt her left leg give way, and she suffered also great, excruciating physical pain and mental anguish. (6) That as a result of the said injury, which was due to the carelessness and negligence of the defendant in the manner above detailed, the plaintiff, Hattie K. League, was confined to her bed some six weeks, suffered great and excruciating physical pain and mental anguish, and the plaintiff expended large sums of money in trying to cure her, the said Hattie K. League; and the plaintiff Hattie K. League is permanently disabled, so she is informed and believes, in the said left leg, and she is thereby prevented from discharging the ordinary duties of life, being now unable to walk, except by the use of crutches, all to her damage in the sum of \$5,000. Wherefore plaintiff prays for judgment against the defendant for the said sum of \$5,000 and the costs of this action."

The testimony offered by the plaintiff tending to establish these allegations of the complaint: That the plaintiff was the wife of G. M. A. League, and resided in the county of Greenville and state aforesaid, and was the mother of 10 children. That on the 20th day of December, 1902, the plaintiff, with the knowledge and consent of the defendant, deposited in the defendant's store, and at a point behind his counter selected by him, certain packages of goods that she had purchased from the defendant and others, at the same place, behind the counter first chosen by the defendant. That, in the afternoon of the same day, the plaintiff, entering the store of the defendant from a side entrance on Coffee street, in said city, and between 3:30 and 4 o'clock, found the defendant engaged in selling goods to a customer of his, and stated to him, "Mr. Stradley, I have come to call for my packages," and he said "All right." That the storeroom was at the time rather dark; that, in obedience to what the defendant said to her, she went behind the counter and fell through a trapdoor about eight feet long and two feet wide, by which fell the tibia bone of her left leg was fractured. That she had constant medical attention for the period of six weeks immediately thereafter, to wit, the services of

Dr. T. T. Earle and Dr. Goodett. That she is now, although months have elapsed, unable to walk except with the use of her crutches. That her physicians pronounce that the knee will be perfectly stiff. It should have been stated that she suffered great agony while her wounded leg was being treated. And further, that at the time the defendant sold her goods, early in the morning, the defendant stood upon the trapdoor, and that said trapdoor was not opened until a short while before she went in the store to get all of her packages. That the goods were deposited behind the counter, so that in going to get them it was necessary to pass over the spot where the trap was located. Such, in fact, seems to have been the testimony that tended to sustain the allegations of the complaint.

There was no objection offered by the defendant to the form of the complaint. There was no demurrer. Primarily, therefore, it appears that the complaint stated a cause of action. However, if this was so, it does not preclude the granting of the motion of defendant, if there should have been no testimony offered in support of the material allegations of the complaint. The circuit judge, in the interest of fairness, declined to give a résumé of the testimony which tended to support the allegations of the complaint, but contented himself with saying, "I think there is some testimony in support of the allegations of the complaint, and the motion for a nonsuit must be refused."

In the first ground of appeal, the appellant is correct in stating "that the general invitation which a merchant extends to the public applies only to such portions of his premises as are open for the public, and not to those portions behind the counter, or those reserved for the merchant and his employees." But it must be said that where a proprietor of a store notifies his customer to go behind his counter, or into that place usually set aside for the use of the merchant and his employees, he advances beyond the principle in which we have just announced our concurrence. As proprietor, he has a right to make and unmake rules for the government of his premises. Wherever, therefore, as is contended in this case, and to which testimony has been addressed under the very allegations of the complaint itself, the merchant places the plaintiff's goods, who is his customer, in rear of his counter, while she assists him, with his consent, in placing the goods behind the said counter, he to that extent has relaxed the rule announced by the appellant herein, to which we have given our concurrence, and substituted therefor a new rule. If the merchant, knowing that one of his customers, by his consent and at his invitation, places packages of goods behind his counter, it is an accommodation, it is true, and should merit consideration from the customer for such indulgence; but, in addition to all these matters, the customer comes for her goods and applies to him in the language of the

witness: "Mr. Stradley, I have come to call for my packages;" he, being busy at the time in serving a customer, replied, "All right"—it is as far as if he had notified her to go behind his counter; and if the trapdoor was left open by the carelessness or negligence of the defendant, without the knowledge of the plaintiff, and testimony to these facts were adduced, it would present facts which it was necessary for the jury to pass upon. On this we must overrule this ground of exception.

As to the second exception, it seems to us that, in relating the circumstances testified to in our consideration of the first ground of appeal, this ground of exception cannot be sustained. What effect should be given to the language used by the plaintiff and that used by the defendant should be left for the jury, because they have the right to draw inferences naturally clustering about the language actually used.

Now, as to the third exception, we would sustain the position that the mere consent of the proprietor that the customer should, of his or her own motion, go in rear of the counter, entailed no serious responsibility upon the defendant. Yet, where a proprietor has placed the property already paid for by his customer in rear of the counter, and when applied to for said goods, at his consent or implied solicitation, she goes to that very spot selected by him in rear of his counter, at a trapdoor which has been left open without the knowledge of his customer, the circumstances are changed, and a different rule of conduct would be rendered necessary by the defendant.

In regard to the fourth exception, it seems to us that our case of *Freer v. Cameron*, 4 Rich. Law, 228, 55 Am. Dec. 663, is conclusive upon this point; for, in the case just cited, Judge Withers, announcing the judgment of the court, says: "The first ground of appeal questions the liability of defendant, assuming that the evidence makes a case sustainable against some one. In all that occurred between Mrs. Freer and her companion, the only witness in this case, and the defendant's agent or clerk, the latter was acting strictly in the lines of his employment, in capacity of representative of his principals. If, therefore, he was guilty of any negligence at all which was actionable, it must be, upon all reason and authority, such as involves the responsibility of the defendants." We might go further in our quotation from the case just cited, but it will only incur the record, although it does seem that there are many points of similarity between the case now at bar and the case just cited. This exception must be overruled.

Lastly, in relation to the fifth exception, we must agree with the respondent that there was no expressed invitation by the defendant to the plaintiff to go behind his counter, in the complaint, nor does the complaint so allege. An invitation may be implied as well as expressed, and it is the duty of the jury,

In coming to a conclusion on the testimony offered, to say whether the language used by the defendant in its connection involved an invitation to the plaintiff. It is no part of the duty of the circuit judge to determine the effect of oral testimony. The wisdom of the law has confined that duty to the jury. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(68 S. C. 523)

ROBERT BUIST CO. v. LANCASTER MERCANTILE CO.

(Supreme Court of South Carolina. April 20, 1904.)

NEW TRIAL—DISREGARD OF INSTRUCTIONS—CONTRACT OF SALE.

1. Where the instructions are disregarded by the jury, a new trial should be granted.

2. Where a written agreement for the sale of goods is silent as to the freight, the agreement of the parties as to the payment of the freight may be shown by parol.

Appeal from Common Pleas Circuit Court of Lancaster County; Dantzler, Judge.

Action by the Robert Buist Company against the Lancaster Mercantile Company. From judgment for plaintiff, it appeals. Reversed.

R. E. & R. B. Allison, for appellant. Green & Hines, for respondent.

POPE, C. J. The Robert Buist Company, of Philadelphia, Pa., entered into a contract with the Lancaster Mercantile Company, a corporation located at Lancaster, S. C., of which the following is a copy:

"The consolidated order, marked 'A,' above, reads as follows:

"John Mahan. Order No. 192. Lancaster, Oct. 24, 1900. Robert Buist Co., Philadelphia, Pa. Order X sheet.

Onion sets:	Bbls.	Price per bush.
Yellow or red.....	5	2 25
White or silver skin.....	2	2 75
Seed potatoes:	Bbls.	Price.
Houlton Maine Rose.....	50	2 55
Bliss Triumph.....	40	2 75
Breeces Peerless.....	25	2 55
Early Goodrich.....	10	2 55
One bu. red val. beans, at \$40.		

"Signature, Lancaster Mercantile Co., Lancaster, S. C.

"Ship Feb. 1st."

"This order is absolute and not subject to countermand, but subject to any decline occurring on eastern grown stock to date of shipment.' I had to cut to get order. Confirm same if accepted."

The letter marked "B" reads as follows, to wit:

"Philadelphia, Pa., Nov. 2d, 1900. Lancaster Mercantile Co., Lancaster, S. C.—Gentlemen: We are in receipt of your valued order through our Mr. Mahan, which we accept, and will forward at the proper time as agreed. Yours very truly, Robert Buist Co."

Differences sprang up between the parties to the contract, which mainly related to the question as to the payment of freight from Philadelphia, Pa., to Lancaster, S. C., on the merchandise which was embraced in the contract. It so happened that 50 barrels of the seed Irish potatoes, under the contract, were delivered, and when the check for \$97.40, which was the actual cost of the potatoes themselves, was sent to the Robert Buist Company, they returned same because the Robert Buist Company demanded that the Lancaster Mercantile Company should pay \$36, which was the freight on the said 50 barrels of potatoes. It may be said that this was the beginning of their differences. And when the 75 barrels of seed Irish potatoes reached Lancaster, S. C., the Lancaster Mercantile Company refused to accept the same unless it was understood that they should pay no freight charges thereon. Whereupon the Robert Buist Company telegraphed them that they would order the 75 barrels reshipped to Philadelphia, but would hold the Lancaster Mercantile Company responsible for freight both ways, and expenses connected. Accordingly the 75 barrels were reshipped. Although the Robert Buist Company never accepted the check for \$97.40, yet both parties admit that sum to be due. The Robert Buist Company, as plaintiff, brought this action in the court of common pleas for Lancaster against the Lancaster Mercantile Company, as defendant, to recover the sum of \$241.40, which sum embraced \$97.40, admitted by both sides, and also \$36 freight on the first 50 barrels, and also \$108 freight both ways on the 75 barrels. Defendant denied all liability, except for the \$97.40.

At the trial, defendant sought to show that, while no reference is made in the contract as to freight, it was agreed at the time of the contract that the merchandise should be delivered at Lancaster, S. C., without any charge for freight against the defendant. Steady and serious contention was carried on in the effort to introduce testimony on this issue, but the circuit judge held that it was not competent for the defendant to enlarge the written contract, and further held that where a contract is silent in regard to the freight charges on merchandise shipped from one point to another, to wit, from the place of the seller to the place of the buyer, the law holds that the delivery is at the place of the seller, and consequently all costs for freight between the two points is to be paid by the buyer. This he held when testimony was offered, and he so charged the jury; it being his duty, as he stated to the jury, to construe the contract for them, it being in writing. But the jury disregarded this instruction of the presiding judge, and found a verdict for \$97.40 for the plaintiff.

Among other grounds for a new trial, the plaintiff urged a disregard by the jury of the presiding judge's charge upon the law. In the case of Dent v. Bryce, 16 S. C. 14, the

court, through the late Chief Justice Simpson as its organ, declared: "It needs no authority, then, to say that the jury is bound to take the law from the court. This principle applies in every class of cases, except one not necessary now to be considered. And when the law is announced by the court, it is the law of the case until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law, and will in all cases be vacated in the first instance, either sua sponte by the judge, or on motion of the aggrieved party. * * * If the jury could question the charge of the judge, the result would be that in every case the whole case, both law and facts, would go to the jury, under the hope that, whatever might be the charge of the judge at the time, he could be satisfied afterwards that he was in error. This could not be tolerated. It would degrade the judiciary and unhinge the whole system. The argument of the respondent, by which he attempts to draw a distinction between a verdict contrary to the charge of the judge and one contrary to law, though ingenious, fails to meet the case. In fact, that doctrine would open the door to the very evil which a separation of the powers and duties of the court and jury was intended to prevent. So far as the jury is concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them." There are other cases in our Reports which are fully in accord with what we have quoted. The circuit judge having charged the law, and it having been disregarded by the jury, there must of necessity be a new trial.

We think, however, that it was competent for the defendant, as purchaser, to rebut the presumption that he was to pay the freight, and to show by parol testimony that the plaintiff agreed to do so. The written agreement was silent on this subject, and such testimony would not alter or vary the contract as reduced to writing. 21 A. & E. Ency. Law, 1094. Of course, the plaintiff should be allowed to introduce testimony on this subject in reply.

It is therefore ordered and adjudged by this court that the judgment of the circuit court be reversed, and the action remanded to that court for a new trial de novo.

(68 S. C. 540)

STATE ex rel. GUENTHER et al. v.
CHARLESTON LIGHT & WATER CO.

(Supreme Court of South Carolina. April 20, 1904.)

NAVIGABLE STREAM—OBSTRUCTIONS—MANDAMUS—NUISANCE.

1. Mandamus will not be granted to compel the removal of a dam obstructing a navigable stream, where petitioners show no special injury resulting to them other than that common to the general public.

2. A temporary obstruction of a navigable stream while remodeling a lock in a dam, the first one having proved defective, is not such an obstruction as will constitute a nuisance.

Petition, in the original jurisdiction of this court, by Pauline M. Guenther, C. O. Witte, A. M. Lee, Henry A. M. Smith, Henry E. Young, and Paul Grant, for writ of mandamus against the Charleston Light & Water Company. Writ denied.

Buist & Buist, Mitchell & Smith, and Smythe, Lee & Frost, for petitioners. W. O. Miller and P. H. Gadsden, for respondent.

POPE, C. J. The relators above named have applied to this court, in its original jurisdiction, for a writ of mandamus to compel the respondent to open up to navigation Goose creek, a navigable stream in the county of Berkeley, in the state aforesaid, across which, from side to side of said Goose creek, the respondent has placed a dam extending from bank to bank of said stream, thereby closing the same to all vessels, boats, etc.—which occurred early in December, 1903—demands having been made by the relators, who are the riparian owners of lands on each side of said Goose creek from the dam to some distance above said dam, upon the respondent to remove so much of said dam as is essential to the navigation of the waters of said Goose creek, which the respondent has declined to do. In order to correctly apprehend the issues tendered by the petition, as based upon the facts alleged therein, it will be necessary to set forth the petition in terms (omitting the caption). The following is a copy thereof:

"To the Supreme Court of the State of South Carolina: The petition of Pauline M. Guenther, C. O. Witte, A. M. Lee, Henry A. M. Smith, Henry E. Young, and Paul Grant, relators in the above-entitled proceedings, respectfully petitioning this honorable court, shows:

"First. That under and by virtue of article 5, § 4, of the Constitution of the state of South Carolina, and section 11 of the Code of Procedure of said state, the Supreme Court of South Carolina has power to issue writs or orders of mandamus, and other remedial and original writs.

"Second. That under and by virtue of an act of the General Assembly of South Carolina, entitled 'An act to incorporate the Charleston Light and Water Company,' approved the 19th day of February, 1898 [22 St. at Large, p. 984], the Charleston Light and Water Company became incorporated, and is a corporation carrying on business in the state, under the laws of South Carolina, and exercising its franchises thereunder, which act is in terms set out in Exhibit A, and made a part of this petition.

"Third. That on the 23d day of June, 1902 the Honorable Wm. Cary Sanger, Assistant Secretary of War, issued the following approval for respondent's dam, to wit: 'Where-

as, by section 9 of an act of Congress, approved March 3, 1899 [30 Stat. 1151, c. 425 (U. S. Comp. St. 1901, p. 3540)], entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," it is provided that bridges, dams, dikes, or causeways may be built under authority of the Legislature of a state across rivers and other waterways the navigable portion of which lies wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: And whereas, the Charleston Light and Water Company, a corporation existing under the laws of the state of South Carolina, having authority of the Legislature of the state of South Carolina to construct a dam across Goose creek, in said state, has submitted a map of the location and plans of the same, which have been approved by the Chief of Engineers: Now, therefore, this is to certify that the map of location and plans of said dam, which are hereto attached, are hereby approved by the Secretary of War, subject to the following conditions: (1) That the engineer officer of the United States army, in charge of the district within which the dam is to be built, may supervise its construction, in order that said plans shall be complied with. (2) That the prolongation of the canal at both ends shall be dredged to full depth and width till it meets the channel of the creek. Witness my hand this 23d day of June, 1902. Wm. Cary Sanger, Assistant Secretary of War.' That the plans and specifications referred to above by the said Assistant Secretary of War provided for a canal and lock through said proposed dam, and connecting the said stream on either side of said dam, having the following dimensions, to wit, a length of 55 feet, a width of 18 feet, and a depth at low water of 7 feet.

"Fourth. That on or about the — day of January, 1904, the respondent presented to the engineer office of the United States, at Charleston, S. C., new plans and specifications providing for a canal and lock through said proposed dam, and connecting the said stream on either side of said dam, having the following dimensions, to wit, a length of 55 feet, a width of 18 feet, and a depth at low water of 7 feet, which plans and specifications do not materially differ from the former specifications above referred to, except as to the location and construction of the lock and spillway, and which have not yet been approved by the Chief of Engineers and the Secretary of War.

"Fifth. That under a public call made by the captain of United States engineers stationed at Charleston, S. C., for objections, if any, to the aforesaid new proposed plans and specifications, the following propositions were submitted against them on January 11, 1904, to wit: '(1) That the dimensions of the

locks embodied in the specifications submitted to the United States government are too small. (2) That the dam in its present state does not accord with the specifications assented to by the United States government, and blocks all traffic on the river, whereby the corporation has become criminally liable, and may be compelled to remove the said dam.'

"Sixth. That in the county of Berkeley, state of South Carolina, there flows a large navigable stream, known as Goose creek, in which the tide ebbs and flows, and which from time immemorial has been capable of navigation in fact, and has been freely and commonly used for navigation by the public in general, and especially by or in behalf of the riparian proprietors and owners of the lands, plantations, and fields lying upon the borders of said stream. That your relators herein are the owners of large tracts of lands bordering on said stream at points on which the said stream is navigable in fact, and lying above the dam, hereinbefore referred to, which is being erected by the said the Charleston Light & Water Company, through its agents or contractors, and which said stream as aforesaid was and is navigable in fact from the lands of your relators as aforesaid to its mouth, emptying into Cooper river, S. C., a large navigable stream, which in turn empties into Charleston harbor, and thence connects with the Atlantic Ocean; but that said navigation has been obstructed in the past few weeks by the said dam of the said the Charleston Light & Water Company, as will more fully hereafter appear.

"Seventh. That the said the Charleston Light & Water Company, through its agents and contractors, are erecting a dam across the said stream known as Goose creek, in the county of Berkeley, state of South Carolina, at a point next below the lands of all these relators on said stream, and at a point where said stream was navigable in fact; which said dam has and does cut off and prevent the continuous navigation of said stream from above to below said dam, and the opposite, to the detriment of the rights of the public to navigate the said stream, and especially of these relators, upper proprietors or owners on said stream, with regard to the right of navigation for themselves, agents, or servants to and from their said lands bordering on said stream.

"Eighth. That on the 23d day of December, 1903, the agent of these relators, while proceeding in a steamboat from the city of Charleston, S. C., to the said dam aforesaid, for the purpose of navigating the said stream to the said lands of the relators lying upon the same, arrived at the point on said stream where the said dam has been erected below the said lands of your relators, and found the same utterly impassable to navigation by reason of being obstructed by the said dam of the said the Charleston Light & Water Company. That then and there he requested and

demanding a passageway through said dam, but the same was not given, as the said stream was closed at said point by said dam, so that the navigation of the same was obstructed and impassable, and was told by the party in charge of the construction of said dam that such had been the state of affairs for six weeks, and would continue for six weeks more.

"Ninth. That the following correspondence passed between the attorneys of the relators and respondent through letters which were delivered and received, to wit:

"'Charleston, S. C., December 31st, 1903. Mr. Morris Israel, Vice-President of The Charleston Light and Water Co., Charleston, S. C.—Gentlemen: In behalf of Pauline M. Guenther and other riparian proprietors owning lands located above your proposed dam on Goose Creek, we beg leave to respectfully demand that the said dam which now obstructs navigation be forthwith so conducted as to cease said obstruction. Your prompt reply is requested. Yours respectfully, Buist & Buist, Attorneys. Smythe, Lee & Frost, Attorneys. Mitchell & Smith, Attorneys.'

"'Charleston, S. C., Jan. 6, '04. Messrs. Buist & Buist, Smythe, Lee & Frost, and Mitchell & Smith, City—Gentlemen: Yours of the 31st received. In reply I beg to say that this company has made application to the United States engineer at Charleston for approval of plans and location of lock to be constructed on Goose Creek, which lock when constructed it is contemplated will remove all obstacles to navigation. I understand that the engineer will shortly give notice of public hearing on this matter, at which time we will be glad if you will present any objections which you may have to the proposed lock. Yours truly, M. Israel, V. P. Chas. Light and Water Co.'

"Tenth. That the navigation of the said stream as aforesaid still remains obstructed, and relators allege that it will take several months to construct the proposed lock above referred to.

"Eleventh. That, by the erection of said dam obstructing the navigation of the said stream as aforesaid, the said the Charleston Light & Water Company, if possessed of the right to construct a dam across said navigable stream (which relators do not admit), possessed it by reason of its charter and rights thereunder, and that it had violated its alleged charter powers as above set forth, in that it has failed to conduct the said dam across said navigable stream as aforesaid in such manner as shall not obstruct the navigation of the stream.

"Twelfth. That your relators have no other adequate remedy than the writ of mandamus, which is herein petitioned from your honorable court.

"Wherefore these relators pray that a writ of mandamus be issued by this honorable court commanding the Charleston Light & Water Company to forthwith conduct the

said dam across the said navigable stream known as Goose creek so that the said dam shall not obstruct the navigation of said stream."

And Exhibit A, exhibited with said petition:

"An act to incorporate The Charleston Light and Water Company.

"Whereas, the General Assembly of this state has at the present session, by a two-thirds vote of each house on a concurrent resolution, allowed a bill for a special charter of 'The Charleston Light and Water Company' to be introduced:

"Section 1. Be it enacted by the General Assembly of the State of South Carolina, that Samuel Lapham, Charles R. Valk, W. H. Welch, R. G. Rhett, H. F. Bremer, George I. Cunningham, Morris Israel, John C. Simonds, and their associates and successors, shall be, and they are hereby, incorporated and declared a body politic and corporate under the name of 'The Charleston Light and Water Company,' for the purpose of introducing a water and light supply into the city of Charleston for its public purposes, which corporation shall have power to make, use, have and keep a common seal, and the same at will to alter; to make all necessary by-laws, not repugnant to the laws of the land, and to have succession of officers and members conformably to such by-laws; and to sue and be sued, implead and be impleaded, in any court of law or equity in this state; and to have, use and enjoy all other rights and be subject to all other liabilities which are incident to other bodies corporate.

"Sec. 2. The said corporation may purchase and hold all such real and personal estate as may from time to time be required for its purposes, and may dispose of the same in such manner and on such terms as it may deem proper; it shall have full power to lease, sell, donate or convey the same to individuals or other corporations; or in the conduct and management of its business it shall have full power to invest the whole or any part or parts of its funds or property in the capital stock or bonds of and become a stockholder by subscription, either in cash or in property, real and personal, or by purchase of stock in any other corporation formed or to be formed, and to retain or dispose of such stock in whole or in part at pleasure, exercising all the rights and powers of stockholders in such corporations; to lease, construct and operate, or to assist other persons or corporations in such manner as the said corporation may deem desirable in leasing, constructing, owning and operating water works, gas, oil, electric or other lighting, heating and power plants, and at its pleasure to incorporate the same; to issue bonds from time to time, in such amounts as it may deem proper for the payment of money borrowed or for its indebtedness, and to secure the same by mortgage or mortgages on the whole or any part of its property.

"Sec. 3. The said company shall have full power and authority to take, hold and convey water from any point from any river, creek, springs or other sources within sixty-five miles of the city of Charleston, into and through the said city, with the consent of the city council of Charleston first had and obtained, and shall have full power and authority to make canals, build dams, erect locks, lay conduits or tunnels for the conveyance of said water, through, under or along any highway or railroad track or tracks in the country adjacent; or any street or streets, lane or lanes, alley or alleys of the city of Charleston, for the purpose of conveying and distributing said water; and the canals, locks, dams, conduits or tunnels from time to time to renew or repair, and for such purpose to dig, break up and open at their own expense all and any part of highways, streets, lanes and alleys and of the middle or side pavements thereof, leaving at all times a sufficient passage for carriages, horses and foot passengers, and restoring forthwith to their former condition all such highways, streets, lanes and alleys, and the pavements thereof, as may at any time be taken up, opened or dug; and as aforesaid, the said corporation may, by purchase or otherwise, take and hold any land necessary for the establishment of their works, and also all private rights of way, water courses or other easements which may be on or along the route through which such canals, locks, dams, conduits or tunnels shall pass, and may conduct such canals, locks, dams, conduits or tunnels over or through any public road, river, creek, water course or waters that may be on the route, but in such manner as shall not obstruct the passage of the public road or navigation of the stream.

"Sec. 4. The said corporation shall also have full power to do all acts necessary to open, construct and operate such system or systems of water works, electric, gas, oil or other lighting, heating or power plants as it may deem advisable, and to extend and enlarge the same from time to time as it may deem necessary; and so far as its water works are concerned, it shall be at liberty to draw water from such source or sources of water as may be most convenient; and to establish reservoirs, fountains and hydrants in such parts of the streets, lanes and alleys of the city of Charleston, with the consent of the city council of Charleston, first had and obtained, to be connected with the works, as they may think proper; and it shall be a misdemeanor, punishable by fine or imprisonment, or both, for any person in any way to defile or pollute the waters in any such source, water supply, canal, conduit or tunnel used, or to be used, by said company, or to obstruct or in any way damage the same, or divert the water therefrom, without permission from the said corporation, or to carry off without permission, break or injure any pipe, cock, valve, machinery or other property that may

be used in connection with said water supply, or take water from any hydrant, cock or other fixtures connected with said water works, without permission from the said corporation, or for any person having charge or control of any hydrant or water pipe connected with said water works to allow or permit any other person to take, draw or use water from the same without permission from the said corporation, or for any person, by false key or otherwise, after the water shall have been shut off from the premises by said corporation, to cause or suffer the said premises to be again supplied with water from said water cocks without permission from the said corporation.

"Sec. 5. The said corporation, being for public purposes, shall have the right to condemn such property, rights of way or water sources as may be necessary to enable said company, or the corporation organized by it, or with its assistance, to successfully construct, erect and operate the said canals, locks, dams, conduits or tunnels, water works, electric, gas, oil or other lighting, heating and power plants, on payment to the owner or owners thereof of just compensation, such property, rights of way or water sources to be condemned and such condemnation to be determined in the manner now provided by law for the condemnation of lands and rights of way by railroad corporations.

"Sec. 6. The capital stock of the corporation shall consist of five hundred shares of one hundred dollars each, and may be organized by the said corporators, or a majority of them, upon the bona fide subscription of not less than fifty per cent. thereof and the payment of not less than twenty per cent. of the amount so subscribed to the corporators above named or their duly appointed treasurer: provided, however, that a majority of the board of directors of the said corporation shall have the power, from time to time, and as occasion may require, to increase the said capital stock to any extent not exceeding three million dollars, whenever they deem proper to do so; and the said corporation shall, by its by-laws, provide for the manner of raising and distributing such additional capital stock. Each stockholder shall be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation upon the stock owned by them.

"Sec. 7. Each stockholder shall have one vote for each share of the capital stock of the said corporation he may own or represent at all the elections and all meetings of the company; and the said corporation shall have the authority in its by-laws to make such regulations as may be deemed proper for representation by proxy of such stockholders as may be absent at such elections and meetings.

"Sec. 8. The capital stock of the said corporation shall be deemed personal property, and the said corporation shall have authority in its by-laws to make all such regulations

as may be deemed necessary and proper for the issuing and transfer of such stock, for collecting and enforcing by sale or otherwise, all subscriptions made thereto.

"Sec. 9. That if any person or persons shall wantonly, negligently or maliciously divert the water, or any part thereof, of any ponds, streams or water sources which shall be taken by said company in pursuance of the provisions of this act, or shall corrupt the same, or render it impure or offensive by mingling other substances with it, or by washing or swimming in it, or by erecting any privy or nuisance near it, or by any other means whatever, or shall injure or destroy any dam, lock, aqueduct, pipe, wire, conduit, tunnel, hydrant, machinery or any other property held, owned or used by the said company, its lessees or assigns, by the authority and for the purposes of this act, any such person or persons shall forfeit and pay the said company, its lessees and assigns, treble the amount of damages sustained by such injury, to be recovered in any court of competent jurisdiction; and any such person or persons shall moreover be deemed guilty of a misdemeanor, and may on indictment and conviction thereof be punished by fine not exceeding five hundred dollars, and imprisonment not exceeding one year, at the discretion of the court.

"Sec. 10. That any such action or complaint by said company, its lessees or assigns, against any person or persons whomsoever on account of or grounded on a trespass or injury done to the said work, or any dam, lock, aqueduct, pipe, wire, conduit, tunnel, hydrant, machinery or other property of said company, or appertaining to the same, shall in every instance be held and deemed as transitory in its nature, and may be brought, sustained and tried in any court of this state having jurisdiction in such like case; and nothing in this act providing for special remedies of the said company, its lessees or assigns, shall be construed to deprive them of the right or impair the same of bringing any suit, in law or equity, to which they would otherwise be entitled.

"Approved the 19th day of February, A. D. 1898." (22 St. at Large, pp. 934-939.)

On the 14th day of January an order was passed by this court requiring the respondent on the 22d day of January, 1904, to make a return to said petition. Accordingly, on the said 22d day of January, 1904, the respondent made its full return; and on the date fixed for hearing, after said return had been submitted to the court, the respondent interposed its demurrer to the complaint, which was as follows (omitting the caption):

"The defendant, the Charleston Light & Water Company, demurs to the petition herein, upon the ground that said petition does not state facts sufficient to constitute a cause of action, and that it appears upon the face thereof that the relators are not entitled to the relief prayed for, in that: First. It appears from the allegations of the said peti-

tion that the petitioners are not entitled to a writ of mandamus, but that their only remedy is by indictment. Second. In that said petition does not allege any peculiar or special damage suffered by the petitioners."

The consideration of the demurrer will render unnecessary the reproduction in this opinion of the respondent's return to the rule. The province in law of a writ in mandamus is to afford redress where a party has a right to have anything done and has no other specific means of compelling its performance. The writ is also applicable in certain cases where a duty is imposed by statute for the benefit of an individual. Thus it lies to compel a railway company to comply with the provisions of its charter for the benefit of private persons, e. g., to build a bridge, open a road, etc. *R. & L. Law Dictionary*, p. 787. Or, as is said in *State v. Appleby*, 25 S. C. 100, "Mandamus only issues when there is a specific legal right or a positive duty to be performed and there is no other appropriate remedy." To the same effect, *State v. Hagood*, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841; *State v. Knight*, 31 S. C. 81, 9 S. E. 692; *State v. Burnside*, 33 S. C. 276, 11 S. E. 787; *Ex parte Mackey*, 15 S. C. 322. In the last case cited this court said: "It is sometimes said that mandamus is not a writ of right, but lies in the discretion of the court, and in granting or refusing it the court should be governed by what seems to be necessary and proper to be done in the premises for the purpose of justice. If this means that it is in the absolute discretion of the judge to grant or refuse it, there could be no appealable error in the order of the judge refusing it, for to say that a matter is within the discretion of the judge is but another mode of saying that it is beyond control. But we understand the discretion here spoken of to be that defined by Lord Mansfield in *Rex v. Wilkes*: 'Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular.'"

The object of the writ in this case, as before stated, is to remove an obstacle in this navigable stream, which by law is open to the use of every person desiring to navigate it. A navigable stream is but a highway open to the use of all. The law is well settled in this state, in regard to highways; that an obstacle therein, unless the same cause special or peculiar injury to a particular individual, is only an invasion of the rights of the public. If the rights of the public are affected, redress of this wrong must be by indictment. If a special or peculiar injury is wrought to any individual, a writ of action or an application for a writ of mandamus will lie at the instance of said special individual. This is no new question in this state. There are many cases in our reports which so assert the law to be; for instance,

Carey v. Brooks, 1 Hill, 365; Steamboat Company v. Railroad Company, 30 S. C. 539, 9 S. E. 650, 4 L. R. A. 209, 14 Am. St. Rep. 923; Steamboat Company v. Railroad Company, 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688. In Steamboat Company v. Railroad Company, supra, the late Chief Justice McIver, as the organ of this court, said: "There can be no doubt that the Congaree, being a navigable river, is a public highway, the obstruction of which constitutes a public nuisance, the remedy for which is by indictment; and that remedy, it seems, has already been applied in the case of this obstruction. State v. South Carolina Railway Company, 28 S. C. 23 [4 S. E. 796]. It is, however, true that an individual who has sustained any particular or special injury over and above that sustained by the public generally, as the direct result of such obstruction, may also sustain a civil action to recover damages for such injury; * * * while it seems to be very generally, if not universally, conceded, that, in order to sustain such an action as this the plaintiff must allege and prove some special, particular, or peculiar injury beyond that sustained by the public generally. * * * Without going here into a detailed examination of the cases in England and other states, many of which we have examined, it seems to us that the true rule to be deduced from them is that the injury must be particular—as several of the cases express it, 'special or peculiar'—must result directly from the obstruction, and not as a secondary consequence thereof, and must differ in kind, and not merely in degree or extent, from that which the general public sustains. This rule is fully supported by what few authorities we have in this state upon the subject."

Now, coming to the question presented by the case at bar, we must say that there is no special or peculiar injury alleged in the complaint as existing to any one or all of the relators as to put himself or herself within the rule we have already announced. Any remedy, therefore, is not theirs specially, but that of the general public.

There is another view presented by the respondent: That the failure of the respondent to have a lock inserted in the dam, so as to allow full navigation of the waters of Goose creek, is but a temporary condition. The respondent had a lock inserted in their dam, but being defectively constructed, although approved by the United States government, it failed to give the public the advantage which was expected from it, and a new lock is being constructed as expeditiously as the respondents can do so. So this case does not fall within the rules governing permanent obstructions, but, on the contrary, belongs to that class of cases, such as obstructions in the highway, where material is placed in said highway in order to have a building erected alongside of the highway.

The views we have herein presented neg-

ative the rights of the relators to the relief prayed for. It is therefore the judgment of this court that the writ of mandamus shall not issue, and that the petition is dismissed.

(68 S. C. 539)

Ex parte GOLDSMITH.

FURMAN UNIVERSITY v. HUFF et al.
(Supreme Court of South Carolina. April 20, 1904.)

HOMESTEAD — ABANDONMENT — JUDGMENT — ENFORCEMENT.

1. An owner of land executed a bond in 1880 on land on which he and his family were living, and moved off the same in 1887, and sold the land, taking purchase-money mortgages therefor. A portion of the land was thereafter reconveyed to him, but neither he nor his family again resided thereon. Held that, on foreclosure of a mortgage executed by him, his widow could not claim homestead in the balance of the proceeds as against a judgment on the bond.

2. Though a judgment cannot be enforced by execution, 20 years not having elapsed since its rendition, it may be proved against the estate of the judgment debtor.

Appeal from Common Pleas Circuit Court of Greenville; Purdy, Judge.

Action by the Furman University against Mary C. Huff and others. William Goldsmith, Jr., intervened, and from decree rendered appealed. Modified.

Haynsworth, Parker & Paterson, for appellant. McCullough & McSwain and Cothran, Dean & Cothran, for respondents.

POPE, C. J. The action has already ripened into a judgment in favor of the Furman University. All the lands covered by the mortgage have been sold, and by agreement of counsel the proceeds of such sale are retained by the court, as if said lands had not been converted into cash. There remaining \$1,500 or \$1,600 in cash, which will be sufficient to pay the dower adjudged in this action to be paid Mrs. Mary C. Huff as dowress, and still leave a balance, the question of homestead of \$1,000, claimed by Mrs. Mary C. Huff, awaits adjudication. This question was submitted to his honor Judge Purdy under the following agreed statements of facts, to wit:

"This is an action to foreclose a mortgage owned by plaintiff, and the interests of the parties hereto are set forth in the complaint and the respective answers. Mary C. Huff, the widow of the deceased mortgagor, by her answer, among other things, claims homestead as such widow, and also one-sixth of the selling price of the land as her dower. Inasmuch as the plaintiff's mortgage debt will be paid anyway, it is not interested in the widow's claim for dower and homestead, subject to the determination of the only remaining question in the case, which grows out of these facts: On the 23d day of January, 1880, F. L. Huff made a bond, as guardian for an infant, to the judge of probate for this

county, and J. A. Stone and Jas. W. Huff, the deceased mortgagor, signed the same as sureties. In 1888 proceedings were commenced in the probate court against F. L. Huff for an accounting as guardian, and judgment was rendered against him for the sum of \$696.50. Afterwards action was instituted in the court of common pleas by the probate judge on the bond against Jas. W. Huff, who accepted service, and let judgment go by default on the 25th day of September, 1889, for \$732.80. This judgment was duly assigned to Julius C. Smith, as administrator of the estate of J. A. Stone, and he now seeks to hold the estate of Jas. Huff liable for one-half the amount of said judgment, with interest on same, amounting to \$366.40, with interest from September 25, 1889. The records of both courts have been introduced, and may be referred to for more definite information. Jas. W. Huff, the deceased mortgagor, and surety aforesaid, was married on April 9, 1878, and immediately removed to the place which was sold in this action, and in which the homestead is claimed, and after that time resided continuously on said place until the fall of 1887, when he removed away about five miles, but did not acquire any other land, and did not own any other land at the time of his death. The wife he married in 1878 survives him, and is now claiming homestead. This land was conveyed to Jas. W. Huff by his mother, Louisa A. Huff, on December 29, 1873, as will appear by reference to the complaint. The land was mortgaged by Jas. W. Huff in 1886 as 600 acres, more or less, and in the fall of 1887 he sold it off as 616 acres, in several tracts, as appear by list attached, for which purchase-money mortgages were taken, which had not been paid when suit was instituted herein; and in 1897 sixty-five acres were reconveyed to Jas. W. Huff, and in 1899 216 acres were reconveyed to Huff. The question presented is whether Mary C. Huff, the widow, is entitled to claim, as against petitioner's debt, the fund as exempt under the homestead laws. If not, then the decree should direct payment of petitioner's debt out of any surplus remaining after payment of plaintiff's debt. The foregoing is to be used by the circuit judge in formulating his decree. April 16, 1908. Haynsworth, Parker & Patterson, Attorneys for Petitioner. McCullough & McSwain, Cothran & Cothran, Attorneys for Mary C. Huff, Widow of Jas. W. Huff."

Then follows the list of bonds and mortgages from the parties who had purchased lands from James W. Huff under deeds from him, and who executed to him mortgages for the purchase money.

His honor Judge Purdy, by his decree, held, amongst other things, that Mrs. Mary C. Huff was entitled to her homestead of \$1,000. Within due time, exceptions were filed to so much of said decree as allowed this homestead exemption of \$1,000, as follows:

"(1) In holding that Mary C. Huff is entitled to a homestead exemption in the funds now in hand to the extent of \$1,000.

"(2) In adopting the views set out in the argument of the attorneys for Mary C. Huff, it being submitted that said views are erroneous, as follows: (a) In holding that J. W. Huff, by removing from the mortgaged tract of land, and selling off the same to various persons and taking back purchase-money mortgages, did little more than make a lease of the premises to the various grantees, and in treating said lands as though they were merely rented by the said J. W. Huff, whereas it should have been held that such transaction or transactions amounted to an abandonment of said lands as homestead or place of residence, or as being appurtenant to the homestead. (b) In holding that the right of homestead in the said lands was not subsequently divested by any act of the said J. W. Huff; it being submitted that his removal therefrom in the fall of 1887, and his sale of the said lands, divested his legal title, and was an abandonment of the said land as a residence or homestead, and that this terminated the right of the said J. W. Huff and of his widow to claim the same as exempt under the homestead law, and his honor erred in not so holding. (c) He erred in holding that J. W. Huff, after the sale by him in the fall of 1887, continued to rent these lands; this holding being against the agreed statement of facts. (d) In holding that the purchase-money mortgages vested in J. W. Huff 'the highest equitable interest in said lands,' it being submitted that J. W. Huff, by virtue of these mortgages, had no title in the said lands, but only a lien thereon, and his honor erred in not so holding. (e) In holding that the right to have the said lands exempt as a homestead was not afterwards lost. It is submitted that, when the said land was abandoned as a family homestead, the right to thereafter claim the same as exempt ceased. (f) In holding that the obligation of the contract would not be impaired by the allowance of the homestead in the proceeds of sale; it being submitted that, under the homestead laws of force at the date of the contract, the said proceeds of sale are not exempt, and to allow the same would be an impairment of the obligation of the contract. (g) In holding that article 1, § 20, of the Constitution of 1868, placed no limitation on the nature of the property or on its conditions in the allowance of the exemption; it being submitted that this section should be construed in connection with article 2, § 32, and that the exemption in lands would apply only as to the family homestead and lands appurtenant thereto. (h) In holding that the act of 1872, p. 231, gave the widow the right to claim exemption in land not a part of the family homestead; it being submitted that, under the terms of this act of the Constitution of 1868, she is entitled to an exemption in such

lands only as constituted the family homestead or residence, or as appurtenant to it. (i) In holding that the liability of J. W. Huff as surety did not accrue until judgment was rendered against the principal, in 1888, whereas he should have held that the obligation of the contract was of the date of the administration bond, to wit, January 23, 1880. (j) In not holding that the question of exemption as against the claim of Julius C. Smith as administrator [now of Wm. Goldsmith, as administrator d. b. n. of J. A. Stone, deceased] must be determined under the homestead law as it stood on January 23, 1880, the date of the bond.

"(3) He erred in not holding that J. W. Huff had in 1887 abandoned said lands as a homestead, and that he never thereafter adopted them as a homestead.

"(4) He erred in not holding that the said lands having been abandoned in 1887 as a family homestead, and never having been thereafter adopted as a family homestead by either the said J. W. Huff or his widow, she is not entitled to claim an exemption in said lands, or in the proceeds of sale thereof.

"(5) He erred in holding that the proceeds of those portions of said tract not reconveyed to him were exempt as a homestead in lands; it being submitted that J. W. Huff had only a lien on said portions by virtue of his mortgages, and that under the homestead law as it stood on January 23, 1880, there was no exemption in either money or mortgages, and that he therefore erred in not directing the application of the proceeds of sale of said portions to the payment of the claim of Julius C. Smith as administrator."

The respondent gave notice of motion to sustain the circuit decree upon the following grounds:

"You will take notice that in case the Supreme Court be unable to sustain the conclusion of the circuit judge, R. O. Purdy, we will move the court to sustain same upon the additional grounds, as follows:

"That upon the second, third, and fourth paragraphs of the answer of respondent to the petition herein, Julius C. Smith has no right to intervene in this action; that the judgment which is the basis of his claim has no active energy; is but an ordinary indebtedness liquidated; that he has no lien upon the subject-matter of this action; has not pursued the proper course to satisfy his indebtedness; and that the said circuit judge erred in not dismissing said petition, and erred in hearing same, and erred in refusing to dismiss same, and erred in not holding that petitioner is and has not pursued the proper course, and in not holding that he has no standing in this case, and no right to intervene herein as he has sought to do.

"That, at the time of the conveyance of James W. Huff of the land described in the complaint, he was entitled to homestead therein, and that by his deeds his homestead exemption has passed to his grantees, and that up-

on the reconveyance to James W. Huff, after the year 1896, of 281 acres of said land, his right of homestead and that of his surviving widow attached to said 281 acres of land, under the law then and now existing, and that, under the Constitution of 1895, the mortgage must be paid, so far as possible, out of the premises sold under the order of the court herein, to which the homestead exemption did not extend, and said mortgage debt cannot first exhaust the proceeds of the sale of the said 281 acres of land conveyed to James W. Huff after 1895."

We will now proceed to dispose of the questions raised by the appeal. At the risk of repetition, we will state what we understand to be undisputed facts: (a) By referring to the statement agreed to by the attorneys on each side of the controversy, the circuit judge was to formulate his decree, so far as the homestead was concerned, in answer to the following question: "Whether Mary C. Huff, the widow, is entitled to claim, as against petitioner's debt, the fund as exempt under the homestead laws? If not, then the decree should direct payment of petitioner's debt out of any surplus remaining after the payment of plaintiff's debt." (b) Mary C. Huff, as the wife of James W. Huff, lived with her said husband, James W. Huff, upon the 616 acres of land, as a place of residence, from the year 1878 to the fall of the year 1887, when the said husband and wife removed from said 616 acres of land, and took up a home at a distance of five miles from said 616 acres of land, which latter home they have never changed, but they did not purchase their new home. And the said James W. Huff in the fall of the year 1887 sold and conveyed by deed every portion of said 616 acres of land, and the said wife renounced her dower on each of the deeds to the 616 acres of land in favor of the respective purchasers thereof. (c) James W. Huff mortgaged for his own debt the whole of said 616 acres of land to Furman University on the — day of —, 1880. (d) James W. Huff became surety on the guardianship bond of F. L. Huff on the 23d January, 1880, in the penalty of two thousand dollars. His principal, the guardian, made default in the discharge of his duties as such guardian, and by proper proceedings the amount of such default was ascertained to be \$716.80. The holder of said bond sued the said James W. Huff as said surety on said bond, and obtained judgment against him on the 25th day of September, 1889. One J. A. Stone was a co-surety with James W. Huff on said guardianship bond, and, he (Stone) having died intestate, Julius C. Smith became his administrator, and, as such administrator, paid to the holder of the guardianship bond the amount of the judgment against James W. Huff, and had said judgment duly assigned to him as said administrator, which said judgment is now held by the petitioner, William Goldsmith, the younger, as the successor of the

said Julius C. Smith, who has departed this life, and the petitioner now claims one-half of the \$716.80.

We are now prepared, so far as the facts are concerned, to go forward with the determination of the question, is there a homestead for Mrs. Mary C. Huff? If there is a homestead, it must have existed prior to the 23d day of January, 1880, but it may be asked, why is that date adopted? Under the Constitution of the United States, every state of the United States is forbidden to pass any law impairing a contract in existence at the time of the enactment of any such law. For the present we will say we assume that the contract of the guardian for whom James W. Huff became surety on the 23d day of January, 1880, operates from that date. Hence no legislation of this state after that date would be constitutional. What was the homestead law of this state in existence on the 23d day of January, 1880? First. The Constitution of this state, adopted in the year 1868, in section 20 of article 1, provided: " * * And a reasonable amount of property as a homestead shall be exempted from seizure or sale for payment of any debts or liabilities, except for the payment of such obligations as are provided for in this Constitution." Second. The Constitution of this state, in section 32 of article 2, provided: "The family homestead of the head of each family residing in this state, such homestead consisting of dwelling house, outbuilding and land appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy or sale on any mesne or final process issued from any court. To secure the full enjoyment of said homestead exemption to the person entitled thereto, or to the head of any family, the personal property of such person of the following character, to wit: household furniture, beds and bedding, family library, arms, carts, wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value in the aggregate sum of five hundred dollars, shall be subject to like exemption as said homestead, and there shall be exemption in addition thereto all necessary wearing apparel: provided, that no property shall be exempt from attachment, levy or sale, for taxes or for payment of obligations contracted for the purchase of said homestead or the erection of improvements thereon: provided, further, that the yearly products of said homestead shall not be exempt from attachment, levy or sale for the payment of obligations contracted in the production of the same. It shall be the duty of the General Assembly at their first session to enforce the provisions of this section by suitable legislation."

There can be no longer any doubt that these two sections must be construed together, for, as was said in *Norton v. Bradham*, 21 S. C. 379: "It will be observed that these two provisions are placed in different

articles—one in the article designated 'Declaration of Rights,' while the other is in the article designated 'Legislative Department.' As might have been expected, therefore, the former is confined to a simple declaration of the general right of exemption, and its concluding words manifestly point to some other provision of the Constitution where the general right thus declared is to be specifically defined and qualified. The latter, however, is specific in its terms, and declares to the lawmaking power what shall be the specific character and qualifications of the right which had been previously declared in general terms. We think, therefore, that, in considering the question of the limits of legislative power upon this subject, it would be erroneous to confine our attention to the provisions of article 1, § 20, but, on the contrary, that section should be regarded as a mere general declaration of a right which is subsequently defined and limited by the provisions of article 2, § 32. If the framers of the Constitution had contented themselves simply with the insertion of section 20 of article 1, then, clearly, the Legislature would have had the power to enact any law upon the subject not inconsistent with the general right thus guaranteed. They could have fixed the amount and character of property to be exempted, as well as the mode of proceeding by which such claim should be asserted. But when the people, in their sovereign capacity, acting through a convention, went on, and, by section 32 of article 2, prescribed what should be the nature and character of the homestead and personal property exempted, describing what it should be, the particular kind of property, its amount and value, and to whose benefit it should inure, all these matters were placed beyond the domain of legislative power, and nothing was left for the General Assembly to do, except what was prescribed in the last clause of the section—pass the laws necessary and suitable 'to enforce the provisions of this section.' Hence, whenever the Legislature undertakes to interpolate other provisions than those prescribed in that section, instead of simply confining themselves, as directed by the organic law, to the enactment of laws suitable for carrying into effect the provisions there prescribed, they are invading a province already fully occupied by the Constitution, and transcending the limitation placed upon their powers by that instrument."

Thus it will be seen that this court has spoken, and requires that these two sections shall be construed together. *Norton v. Bradham*, supra, also declares: "The debt upon which the judgment in favor of respondents was recovered having been contracted prior to the constitutional amendment of 1880, it is quite clear that the question made by this appeal must be determined by the law as it stood previous to the adoption of that amendment. *Gunn v. Barry*, 15 Wall.

610, 21 L. Ed. 212; *Cochrane v. Darcy*, 5 S. C. 125." See, also, *De La Howe v. Harper*, 5 S. C. 472; *Sloan v. Hunter*, 65 S. C. 237, 43 S. E. 789, where Mr. Justice Gary, as the organ of the court, declares: "The rule is well settled in this state that the right of homestead is to be determined by the laws of force when the debt was contracted." Also 15 A. & E. Encyclopædia of Law, p. 634, where it is said: "The date of the execution of the contract, and not that of the breach of it, governs in respect to the priority of the creditors over that of the homestead."

Thus it is manifest that the provisions of our Constitution and acts of the Legislature of the General Assembly in pursuance thereof are to govern, where such legislation is prior to the 23d of January, 1880, and also that the date of the 23d of January, 1880, when the bond was signed, fixed the limit beyond which the homesteader cannot claim. But in the next place the circuit judge, in his decree, seems to have fallen into the error of supposing that there was any doubt that when James W. Huff, in the year 1887, left the 616 acres of land, and settled with his family at a distance of five miles therefrom, having sold and conveyed by deed all of the 616 acres of land in the same year (1887), he thereby abandoned his right of homestead in said lands. To our minds it is clear that the homestead was thus then abandoned, and there is nothing in the case going to show that he or Mrs. Mary C. Huff, his wife, ever again took possession of said lands to reside thereon. By our decisions, the law in existence governing homesteads on the 23d of January, 1880, guarantied to no person a homestead in lands, except where resided upon, and the land appurtenant to said residence. *Chafee v. Rainey*, 21 S. C. 19; *Rollings v. Evans*, 23 S. C. 328; *Chalmers v. Turnipseed*, 21 S. C. 137; *Trimmier v. Winsmith*, 41 S. C. 116, 19 S. E. 283.

Again, we do not see how Mrs. Mary C. Huff can hope to obtain a homestead exemption, when the mortgages are considered. This question was flatly decided against her contention in *Union Bank v. Northrop*, 19 S. C. 476. It is thus apparent that we must sustain all the exceptions of the appellant.

We will not consider respondent's notice of motion to sustain the circuit decree. While we admit that the answer of Mrs. Mary C. Huff to the petition herein does set up certain rights as against said petitioner, yet, when she saw proper, through her attorneys, to sign the agreement which has been hereinbefore set forth, a portion of which we quoted in the beginning of our consideration of the appeal, we must hold that she abandoned all said claims, and based her defense upon her claim to homestead, and really consented that a decree should go against her if said claim of homestead should be rejected. But if we are at liberty to consider the questions she now seeks to

raise against the right of the petitioner to have one-half of his judgment paid out of the funds now in court, we could not sustain the same, for, granted that the judgment cannot be enforced by execution, having lost its active energy, still 20 years have not elapsed since the rendition of the judgment, and, under the laws of this state regulating the payment of claims against the estate of an intestate, such judgment would operate as a judgment against such estate. This motion of respondent must be overruled.

It follows from what we have hereinbefore said that the decree of the circuit judge must be so modified that the claim of homestead to Mrs. Mary C. Huff is denied, and that the judgment presented by the petitioner as established must be paid. In all other respects the circuit decree is affirmed.

It is the judgment of this court that the judgment of the circuit court be modified as hereinbefore required, and, after such modification shall have been made, such decree shall be affirmed.

(38 S. C. 568)

OLIVER et al. v. SOUTH CAROLINA INTERSTATE & WEST INDIAN EXPOSITION CO.

(Supreme Court of South Carolina. April 21, 1904.)

RECEIVERS—COUNSEL—COMPENSATION.

1. A previous agreement of parties or an order of the court that a receiver should employ counsel without compensation is not binding on the court in equity, and, whenever it may determine that counsel should be compensated for preserving a fund in court, it may direct a fee to be paid receiver's counsel out of such fund in disregard of the agreement.

Pope, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Charleston County; Purdy, Judge.

Action by Henry Oliver and others against the South Carolina Interstate & West Indian Exposition Company. From an order of the circuit court, plaintiff Oliver appeals. Modified.

T. Moultrie Mordecai and J. P. K. Bryan, for appellant. M. Rutledge Rivers, for respondent.

GARY, A. J. This action is in the nature of a creditors' bill brought by Henry Oliver, the American Lucol Company, and the Darlington Electric Fountain & Supply Company in behalf of themselves and other creditors who might come in. The object of the action was to obtain the appointment of a receiver for the defendant insolvent company, and the collection and distribution of the assets among the creditors under the direction of the court.

The appeal is from the following order:

"In view of the stipulation entered into soon after the commencement of the litigation

tion in this matter, a serious question has arisen as to the allowance of counsel fees to the counsel engaged in this cause. The counsel engaged in behalf of the receivers having declined to act further in the matter, the receivers found themselves in a position in which they had to employ counsel. They were trustees accountable for the carrying out in a proper manner the matter confided to their trust. They deemed it necessary to have counsel to assist them in this undertaking. Being without counsel in this changed state of affairs, if they had applied, they would have been permitted to have employed counsel and to have compensated such counsel. It is a fundamental rule that where trustees act bona fide for the purpose of carrying out their trust, and do any act or acts for the benefit of those interested, the court will sanction such act. In my opinion, the receiver acted wisely in employing counsel, and such counsel should be paid. This matter has not been contested before me by a great majority of the creditors, who coincide with the views herein expressed; but the position is contested by the counsel for Mr. Wagener, not because the work has not been done, and faithfully done, by the counsel now seeking compensation, but for the reason that, for the protection of the interests of his client, he thinks he should object, in view of the stipulation entered into as before stated. The matter being contested, I will not attempt to refer it entirely to the master, but will seek his aid in obtaining testimony, so that the court may fix the proper fee for the attorney for the receivers, and may have before it testimony as to fees for the other counsel. It is therefore ordered that it be referred to G. H. Sass, Esq., one of the masters for said county, to take testimony as to the amount that should be allowed to M. Rutledge Rivers, Esq., as counsel for the receivers, and to take testimony as to the nature and value of the services rendered by the other counsel respectively engaged in the case. As to the said M. Rutledge Rivers, representing the receivers, I hold that he is entitled to compensation, for the reasons hereinbefore stated, leaving the amount to be fixed by future order of this court upon the coming in of the master's report, and as to the other counsel engaged in the case, upon the coming in of the master's report, leaving the question then to be determined as to whether they are entitled to compensation, and, if so, the amount of the same. At such reference, of course, all the counsel engaged in the cause will be notified, and then the stipulation entered into and all other such matters as those objecting deem material may be put in evidence and brought to the attention of the court."

The appellant's exceptions are as follows:

"(1) That the presiding judge erred in holding that M. Rutledge Rivers, Esq., receiver's counsel, was entitled to compensation to be paid out of the funds herein.

"(2) That the presiding judge erred in referring it to the master to ascertain and report what amount should be allowed M. Rutledge Rivers, Esq., as his compensation.

"(3) That the record in this case disclosing the fact that the entire scheme of these proceedings was that neither receivers nor counsel, whether representing parties or receivers, should be paid fees from the funds realized in this case, the presiding judge erred in allowing compensation to one attorney in the case, without also allowing compensation to other attorneys whose services had been rendered in the creation and preservation of the fund, and especially to the counsel for the plaintiffs, who had filed this proceeding to raise a fund for the payment of the creditors of said company, and who, as plaintiffs, had the carriage of the cause."

Waiving the objection that the objection raising the question whether the appellant should not be required to contribute out of his pro rata of the fund in court toward the payment of Mr. Rivers' fee is too general for consideration, because it fails to point out specifically wherein there was error, it nevertheless cannot be sustained. The agreement entered into before the receiver was appointed could not have the effect of limiting the powers of the court of equity so as to prevent it from exercising full control over the property which it took in charge. Nor did the first order, providing that counsel employed by the receiver should not have compensation, prevent the court from passing a subsequent order allowing compensation when it became necessary to preserve the fund in its keeping.

The question raised by the third exception is not properly before this court for consideration, as it has not yet been determined by the circuit court, but, as it may save the trouble and expense of another appeal, we will not decline to dispose of it. The services of the other attorneys were not rendered in preserving the fund in the hands of the court, and this question is not governed by the principle applicable to the fee of Mr. Rivers.

It is the judgment of the court that the order of the circuit court be modified.

POPE, O. J. (dissenting). This action is in the nature of a creditors' bill brought by Henry Oliver, the American Lucol Company, and the Darlington Electric Fountain & Supply Company, in behalf of themselves and other creditors who might come in. The object of the action was to obtain the appointment of a receiver for the defendant insolvent company, and the collection and distribution of the assets among its creditors under the direction of the court. It was agreed among counsel that no counsel fees should be charged or claimed against the fund to be raised in said cause. This agreement was as follows:

"Duryea & Oliver vs. South Carolina In-

terstate and West Indian Exposition Company. Charleston, S. C., May 17, 1902. Wm. Mosely Fitch, Esq., Messrs. T. M. Mordecai and others, Plaintiffs' Attorneys—Dear Sirs: I agree to hold in trust all receipts of the Exposition Company hereafter accruing since the filing of the above bill, including the First National Bank deposit, paying therefrom only actual current operating expenses, and if there be a balance after such expenses are paid, and also the two-thirds gross gate receipts are also paid, I will hold such balance subject to order of Court in both the Duryea and Potter and Oliver cases; and if I shall pay out an excess by reason thereof, I am to be a preferred creditor therefor, and except as to any funds to be appropriated by the city council, any amount heretofore paid by me out of my own funds for United States government amount to be repaid me out of the first money so appropriated as such amounts.

"The board of directors to be receivers after June 1, 1902, without bond, and neither receivers nor any lawyer in case to charge or take fee in these cases above mentioned.

"May 17, 1902. [Signed] F. W. Wagener.

"The within is agreed to. [Signed] W. M. Fitch, Attorneys, Duryea & Potter, T. M. Mordecai, Bulst & Bulst, J. P. K. Bryan."

The order appointing receivers made the same provision as to receivers and the counsel for receivers. The order is as follows:

"On hearing read the verified complaint herein, and after due consideration thereof, it appearing to the court that receivers should be appointed, it is ordered:

"First. That the president and directors of said company, to wit, F. W. Wagener, W. H. Welch, F. K. Cary, J. L. David, John F. Ficken, C. S. Gadsden, J. C. Hemphill, Wiley Jones, and Samuel Lapham, be, and they are hereby, appointed receivers, without compensation and bond, of all and singular the property and assets of the said South Carolina Interstate & West Indian Exposition Company, the defendant herein, with the usual powers of receivers, and with leave to apply to this court for any further orders which may be desired for the purpose of more effectually carrying out the intention of this order.

"Second. That said receivers do forthwith take possession of all of the property and assets, and thereupon cause to be prepared and filed in this court forthwith a sufficient and proper inventory and list of the same, and a schedule of present employes and salaries, and their recommendation as to the smallest possible force to operate this receivership.

"Third. That the said receivers be allowed to employ counsel, but without compensation.

"Fourth. That except as herein provided, and until the further order of this court, the said South Carolina Interstate & West Indian Exposition Company, its agents, servants, officers, and attorneys, are hereby re-

strained and enjoined from parting with or disposing of any of its property or assets, excepting to deliver the same to the receivers hereinbefore appointed.

"Fifth. That all of the defendants herein and all other creditors of the said South Carolina Interstate & West Indian Exposition Company be, and are hereby, each severally and respectively enjoined from prosecuting any action in this court, or taking part in any other cause instituted or to be instituted in this court in the present proceedings.

"Sixth. That a copy of this order be forthwith served upon each of the receivers herein appointed, each of whom shall within five days severally file in this court their written acceptance of such appointment; otherwise such appointment to be void.

"It is further ordered that the stipulation in writing heretofore made in this case be forthwith filed of record.

"9 June, 1902.

"Geo. W. Gage, Circuit Judge.

"We consent to the above-named order, and to its being made at chambers and without the county of Charleston. T. Moultrie Mordecai, Bulst & Bulst, Ficken, Hughes & Ficken, W. M. Fitch, J. P. K. Bryan."

The receivers subsequently reported as follows:

"The undersigned, as receivers, ask leave to file herewith a supplementary inventory containing additional items of property of the exposition company not included in the first inventory filed herein. They also ask leave to report that, under special authority given in a former order of this honorable court, they have appointed M. Rutledge Rivers, Esq., as the counsel and legal adviser of the receivers. The undersigned would further report that the Southern Railway Company hold a claim against the exposition company for the sum of \$563.20, which the United States Treasury Department is ready to pay out of the special appropriation of \$90,000. This appropriation is payable directly to the exposition company as a reimbursement for advances made to claimants. Heretofore, however, the directors of said company, instead of advancing the amount of the claim, have given a power of attorney to the railway company to collect such claim directly from the government. It is now requested that the receivers execute such power of attorney, and this request is respectfully submitted for the consideration of the court, and for such order in the premises as may be proper. Respectfully submitted. J. L. David, W. H. Welch, Jno. F. Ficken, Receivers."

On the 26th of September, 1903, the receivers reported as follows:

"The undersigned, receivers of the above-named exposition company, respectfully report:

"(1) That since their appointment they have continuously performed the exacting

and laborious duties of their office, expending thereon much time and labor.

"(2) That among other things requiring their care and attention were many matters rendering it incumbent on them, and absolutely necessary, to secure the aid and services of counsel for a proper disposal thereof. And this court, recognizing that counsel would probably be needed, provided in the order appointing the undersigned as receivers that counsel might be employed, but withheld the means of procuring same, by directing that said employment should be without compensation.

"(3) That the receivers were unable to obtain counsel upon such terms, and, soon after assuming their office, found that they could not conduct the affairs of their responsible position without counsel; that claims were filed requiring contest before the master, actions had been commenced and were pending; claims were outstanding in favor of the exposition company that had to be sued. Various and complex legal questions were continually arising, to be considered and acted upon, and that it was impossible for the receivers either to keep informed about the affairs of the exposition company, or properly to guard the interests of the creditors, without having a representative in court.

"(4) That they thereupon sought the services of Mr. M. Rutledge Rivers, and employed him as their counsel, with the understanding that they would report to the court the difficulties they had experienced, and the utter impracticability of the aforesaid provision of the order appointing them, in withholding compensation from their legal representative, and, further, that they would urge upon the court, in view of the above-stated condition of affairs, the propriety and justice of allowing proper compensation for their counsel.

"(5) That Mr. Rivers has for the past year zealously and efficiently attended to the duties of his office as attorney for the receivers, and, as a matter of justice to him, they heartily and cheerfully request the court to grant him such compensation for his services as may be meet and proper.

"All of which is respectfully submitted.
[Signed] Jno. F. Ficken, W. H. Welch, J. L. David, C. S. Gadsden, J. C. Hemphill.
Dated July 11, 1903. Filed September 26, 1903."

Whereupon the court made the order appealed from, set out in the main opinion.

It is quite evident that the purpose at the outset was to avoid the charges for counsel fees, receivers' compensation, and compensation for the receivers' solicitor. No doubt, the object of the enterprise was so beneficent in its scope, affecting, as it did, not only the city of Charleston, but the whole state of South Carolina as well, that the misfortunes that attended the exposition itself caused all parties to this action to bend every energy, without compensation there-

for, to the collection and distribution of the assets of the exposition among its creditors. At the beginning counsel for the plaintiffs stipulated that they would not demand or expect compensation. The board of directors of the exposition, who were made receivers, so stipulated, and the court so ordered in regard to the attorney or attorneys for the receivers. The first report of the court stated that the receivers had chosen Mr. M. Rutledge Rivers, of the Charleston bar, as their counsel, and no mention was at that time made of compensation for such attorney. A year afterwards, however, realizing the immense labor and most valuable services of Mr. Rivers as counsel for the receivers, such receivers, in their report of the 26th of September, 1903, sought the interposition of the court in behalf of their attorney. Their words, as appear by such report, which has already been herein incorporated, speak most loudly and appealingly for compensation on behalf of their attorney, Mr. Rivers. It has always seemed to us to be most unwise in practice to expect valuable service of attorneys in carrying into execution trusts such as herein involved, and action gratuitously on the part of the said attorney to be most unwise and just. Still, parties, when they come into court, have the right to make stipulations and agreements which will be carried out by the court. Any change in the conditions which thereafter arise should only be made where it is the unanimous wish of parties originally affected thereby.

Judge Gage's order of the 9th of June, 1902, hereinbefore set out in full, was the chart, so to speak, by which the court in this cause should be governed. So, therefore, to our minds, it seems that the plaintiff (appellant), Mr. Henry Oliver, has a right to call upon the courts to enforce the agreements hereinbefore recited. His position is the same as of a party to a consent decree. No party bound thereby could upset it. *Jones & Parker v. Webb*, 8 S. C. 202. "A judgment by consent of parties is in the nature of contract between them, and cannot be set aside, when fraud or mistake is not alleged, merely because of some irregularity of procedure." But this is a court of equity. All the creditors of the South Carolina Interstate & West Indian Exposition Company are parties to this record, and, if they see proper to waive the stipulations as to payment of counsel fees, they have a right to do so; and the court of equity will facilitate in every respect their desire that full justice shall be done to their attorney, who has so assiduously and ably preserved their interests as affected by this cause. This court is pleased to recall the following statement:

"The undersigned, all of whom represent the creditors of the above-named exposition company, desire to submit to this court in this cause the following statement, which was submitted to the court below by counsel in behalf of the attorney for receivers:

We understand that in the inception of the cause, when a receivership was first appointed, the agreement set out on page 4 of the printed case had been entered into. This was not entered into by any of the undersigned. With the exception of Jno. F. Ficken, Esq., and his firm of Ficken, Hughes & Ficken, none of the undersigned were engaged in the cause, nor were they interested in the same until subsequently, when it was found necessary to liquidate and settle up the entire affairs of the exposition company, and all its creditors were called in. In doing this, it became absolutely necessary to thoroughly sift and adjust a very large number of claims against the company, so as to exclude from sharing in its assets claims not properly entitled so to do. The doing of this cast upon the receivers of the company and their counsel the performance of a great amount of work, which we are satisfied was not had in contemplation either by the parties or the court when the original stipulation was made. To our knowledge, Mr. M. Rutledge Rivers, who was appointed counsel for the receivers, performed in this behalf most meritorious services to all the parties interested in the fund for distribution to the creditors of the said exposition company. He performed the work of sifting the accounts against the company, going over the claims of the creditors, putting in shape the testimony against such of those claims as were resisted by the receivers or any creditor, and attended faithfully and continuously before the master upon the taking of the testimony and the argument of such claims as were resisted, as well as performing the work set forth in the report of the receivers, at folio 17 of the printed case. All the creditors of the company in this way have been benefited by the services which Mr. Rivers someritoriously rendered to the fund, and all creditors interested therein. For this reason, we think it only fair and proper that he should receive a fair remuneration for his labor. The circumstances under which he acted are entirely different from those that existed when the stipulation was made, and he was not a party to said stipulation. On behalf of the creditors represented by us, we therefore desire to state to the court that we admit that a fair compensation to be paid to Mr. Rivers is fairly and equitably a just charge upon the fund, inasmuch as the parties interested therein have benefited by his services. Ficken, Hughes & Ficken. Jno. F. Ficken. Nathan & Sinkler. Smythe, Lee & Frost. Jos. W. Barnwell, for Trustees under Mortgage. Wm. Henry Parker, Jr. George H. Moffett. B. A. Hagood. Legare & Holman. Mitchell & Smith. Asher D. Cohen. Miller & Whaley. W. Huger Fitzsimons.

"We, the undersigned, who signed the stipulation above referred to, concur in the foregoing statement. Buist & Buist."

This handsome conduct in Mr. Rivers' be-

half demands that this court shall modify the order of reference made by Judge Purdy, by directing that it be referred to the master, G. H. Sass, Esq., to ascertain and report a reasonable counsel fee to be paid out of the funds in court belonging to all parties, except Henry Oliver; for I have already held that Mr. Oliver is to be freed from payment of any part of the counsel fees for the receivers out of his funds in court. But it is my duty to hold that there are no other fees to be paid to any parties, for such fees cannot be paid under the stipulation made by the plaintiffs and defendants at the commencement of this action. The circuit judge was in error in referring it to the master to ascertain if fees other than Mr. Rivers' should be paid. The circuit decree is therefore erroneous in referring it to the master to ascertain what fee shall be paid to plaintiffs' attorneys. The majority of the court differ from me as to the fee to be ascertained for Mr. Rivers, holding that he is entitled to a fee to be paid by all.

(55 W. Va. 652)

EAKIN et al. v. TAYLOR et al.

(Supreme Court of Appeals of West Virginia.

April 22, 1904.)

EQUITY — JURISDICTION — TITLE TO LANDS — REMEDY AT LAW.

1. Point 1 of syllabus in case of Freer v. Davis, 43 S. E. 164, 52 W. Va. 1, 94 Am. St. Rep. 896, reaffirmed.

(Syllabus by the Court.)

Appeal from Circuit Court, Calhoun County; Warren Miller, Judge.

Bill by Justus Eakin and others against Tasril Taylor and others. Verdict for defendants, and plaintiffs appeal. Modified.

T. P. Jacobs and E. B. Snodgrass, for appellants. Linn & Hamilton, for appellees.

McWHORTER, J. On the 8th day of August, 1902, Justus Eakin, D. H. Cox, Thomas Mills, and E. E. L. Snodgrass presented their bill to the judge of the circuit court of Calhoun county praying for the cancellation of a lease made by Tasril Taylor to the Lowther Oil Company as a cloud upon their title to 100 acres of land on Yellow creek, in the county of Calhoun, and to enjoin the Lowther Oil Company and the Eureka Pipe Line Company from paying over to or delivering to said Taylor any portion of the oil produced from said tract, and that said Taylor be required to account to plaintiffs; that the transfer of money or funds from said Taylor to his son, Amnon Taylor, be canceled, and the said Amnon Taylor be required to account to them for the same, and the Calhoun County Bank be enjoined from paying over to said Amnon Taylor in any manner any funds due his account in said bank derived from the sale of oil and placed in his hands by his father Tasril Taylor; and praying for process against all of said parties defendants.

Plaintiffs alleged in their bill: That they were the owners, among other things, of a tract of 100 acres of land described in the bill by metes and bounds, on Yellow creek, in that part of Calhoun county being formerly Lewis county, which was granted to John Walden in 1844. That Walden died intestate, leaving surviving him two sons, Gilbert Walden and ——— Walden, and possibly a widow. That some time after the death of John Walden his son ——— Walden, and brother of Gilbert, died intestate, unmarried, and without issue, leaving said Gilbert Walden as the only son and heir at law of said John Walden, deceased, and of his deceased brother, whereby the said Gilbert Walden became and was the sole tenant in fee-simple absolute to said tract of land. By deed dated the 4th day of May, 1901, said Gilbert Walden, being sole and unmarried, conveyed with covenant of general warranty to plaintiffs all the right, title, and interest and claim which his father, John Walden, ever had in and to, among other things, said tract of 100 acres of land, and filed with their bill what purported to be a copy of the patent to John Walden for the said 100 acres of land, marked "Exhibit A." Also as "Exhibit B" they filed what they termed a copy of the said deed of May 4, 1901, from Gilbert Walden to themselves, and alleged that Tasril Taylor had entered upon said tract of land without their consent, and was in the possession thereof, claiming the same against plaintiffs, and excluded them from the possession of the same. He had professed, as plaintiffs were informed, to execute an oil and gas lease upon said tract of land to the Lowther Oil Company, or to some one who had assigned such lease to the said oil company. That in pursuance of such pretended lease said oil company had entered upon and drilled and operated the same for the production of oil and gas, and had produced the same in paying quantities, and were paying over a certain portion thereof to said Taylor. That said entry upon the land by Taylor and the Lowther Oil Company was without the plaintiffs' knowledge and consent, and that the taking of oil and gas from said land under said so-called lease constituted, as to plaintiffs, an irreparable damage to said tract of land, and the taking of such oil and gas operated as a waste. That large quantities of oil had been taken out by said company, and the royalty paid, and was being paid, to said Taylor, and that said Taylor for the purpose of avoiding any liability to plaintiffs transferred the proceeds of sale of such royalty oil to other and different parties. That, as they were informed, a large portion of such money derived from the sale of royalty oil had been so transferred with the purpose to wrong, cheat, and defraud plaintiffs, to his son, Amnon Taylor, and that he kept the same on deposit in the Calhoun County Bank. That plaintiffs were willing that said oil company might develop

said tract of land for oil and gas purposes under a lease or contract with them to pay the royalty oil to them, but were not willing that they should operate it under the Taylor lease, and to pay the royalty to him. That the oil so developed and produced from said tract of land was being run into the lines of the Eureka Pipe Line Company, and transported beyond the limits and boundaries of the state, and they had no means of knowing accurately the amount of said product. The defendant filed his demurrer to the bill, and his answer, in which he denied all the material allegations thereof, and alleged that plaintiffs had full notice of his claim and possession before they received any deed for the land claimed by them, and filed with his answer a contract in writing, signed by G. D. Camden for himself and J. Walden, dated December 10, 1870, agreeing to sell to him, for the sum of \$250, of which the sum of \$100 had been paid, and the residue to be paid at times mentioned—October 1, 1871, and October 1, 1872; under which agreement defendant had taken possession of said land, and had been in said possession ever since, and under which purchase he was still claiming, and which agreement was entered of record in the clerk's office of the county court of Calhoun county, and which defendant avers in his answer was seen on the record and discussed by plaintiffs, whereby they had full notice of defendant's claim. He also filed a letter or power of attorney made by John Walden to Gideon D. Camden, dated November 6, 1865, which was duly acknowledged and entered of record April 25, 1872, in the same clerk's office, which power of attorney authorized said Camden to sell the interest of said John Walden in the lands owned by him, and to make special or general warranty deeds therefor; and the defendant relied upon the gross laches and negligence of plaintiffs, and those under whom they claimed, in asserting demand for said land, and relief upon the staleness of such demand, and that, if any equity ever did appertain to them, it was lost; and prayed for a dissolution of the injunction and dismissal of plaintiffs' bill, and decree for costs. The plaintiffs took and filed in the cause the deposition of Gilbert Walden. On the 10th day of October, 1902, the following final decree was entered in the cause: "This cause coming on this day to be heard upon the bill of complaint of the plaintiffs and the exhibits therewith filed upon each of which exhibits there are indorsed certain exceptions by the defendant Tasril Taylor, and, the grounds of such exceptions being ascertained to be true by inspection, the court doth sustain said exceptions; upon the answer of the defendant Tasril Taylor, and the exhibits therewith filed, the signature of G. D. Camden to Exhibit B. being proved in open court by the oath of R. G. Linn; upon the bill taken for confessed as to the other defendants therein named;

upon process which appears to have been executed for the time required by law; and upon the cause regularly proceeded in at rules and set for hearing as to them, and upon the bill now here taken for confessed as to all the defendants except Tasril Taylor; upon an attested copy of a certain writing under seal, dated on the 26th day of August, 1876, executed by John Walden to E. E. Gray, deputy sheriff of Fauquier county, Virginia, certified by L. H. Trippett, clerk of the county court of Calhoun county, wherein the same was duly recorded on the 19th day of September, 1876, when said writing was this day produced and filed as evidence on behalf of the defendant Tasril Taylor, and a certain agreement in writing executed by John Walden and G. D. Camden under their respective seals, bearing date on the 4th day of August, 1843, which was likewise produced at the bar of the court and filed herein by the said defendant Tasril Taylor, and which the said Tasril Taylor is permitted to withdraw from the files of this cause upon leaving an attested copy and upon the deposition of Gilbert Walden taken and filed on behalf of the plaintiffs; and upon the motion of the defendant Tasril Taylor this day made to dissolve the injunction heretofore awarded in this cause, and was argued by counsel. Upon consideration whereof it is adjudged, ordered, and decreed that the injunction heretofore awarded in this cause be, and the same is hereby, dissolved, and that the plaintiffs' bill in this cause be dismissed, and that the plaintiffs do pay to the defendant Tasril Taylor his costs by him about his defense in this behalf expended."

The plaintiffs have a clear and adequate remedy at law, and fail to show any equity against the defendant Tasril Taylor. This proceeding on the part of plaintiffs is an action of ejectment under the garb of a suit in equity alleging fraud on the part of defendant, as well as irreparable damages by the removing of the oil from the premises, in order to get equity jurisdiction. All the rights of plaintiffs are dependent upon their legal title, which has never been established by law. They do not show that an action had been commenced or contemplated for the recovery of the possession of the land which is conceded to be in the possession of defendant at least under claim of title. This case comes clearly under the rulings of this court in the case of *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 104, 94 Am. St. Rep. 895, where it is held (Syl., point 1): "A court of equity has no jurisdiction to settle the title and boundary of lands between adverse claimants when the plaintiff has no equity against the party claiming adversely to him."

The decree of the circuit court of Calhoun county should be modified so as to reserve the right of plaintiffs to bring this action at law if they be so advised, and with such modifications the decree is affirmed.

(103 Va. 841)

AMERICAN SURETY CO. OF NEW YORK v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

CORPORATIONS — CHARTER FEE — LICENSE — STATUTES — CONSTRUCTION — CORPORATIONS EXEMPT FROM OBLIGATION OF STATUTE.

1. Code 1887, § 1104, as amended by Act May 15, 1903, providing that a corporation which has already paid a fee or tax for authority to transact business in the state shall not again be liable for such fee before securing a license from the State Corporation Commission, contemplates the charter fee required by Acts 1902-1904, p. 360, and does not refer to the annual license tax.

2. Const. art. 12, § 156a, provides that, subject to the provisions of the Constitution, and to such regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which all licenses to foreign corporations shall issue, and through which shall be carried out all the provisions of the Constitution for the regulation and control of such corporations. Code 1887, § 1104, as amended by Acts 1902-1904, p. 360, provides that every incorporated company doing business in the state must pay a charter fee. *Held*, that every corporation which has not paid a fee is required to do so, all prior enactments relieving any corporation or class of corporations from the payment of the fee being repealed.

Appeal from State Corporation Commission.

Appeal by the American Surety Company of New York from a decision of the State Corporation Commission imposing a fine on appellant for transacting business without having obtained the license required by law. Affirmed.

Wyndham R. Meredith, for appellant.
William A. Anderson, Atty. Gen., for the Commonwealth.

KEITH, P. This is an appeal from a decision of the State Corporation Commission imposing a fine upon appellant for transacting business in the state of Virginia without having obtained a license in accordance with section 1104 of the Code of 1887, as amended by an act of Assembly approved May 15, 1903. That section provides that "every incorporated company doing business in this state shall have an office in the state, at which all claims against such company due residents of the state may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this state (and hereinafter designated as a foreign corporation) shall, before doing business in this state, present to the State Corporation Commission (a) a written power of attorney, executed in duplicate, appointing some person residing in this state its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation, and (c) a certificate of the Auditor of Public Accounts,

showing the payment into the treasury of the fee required by law to be paid by such corporation; and shall obtain from said Corporation Commission a license to transact business in the state. If it shall be made to appear to the State Corporation Commission that said corporation has complied with the law relative to the licensing of a foreign corporation of the character of the applicant corporation, then said Corporation Commission shall issue to said corporation a license to transact business in the state." There are other provisions of this section which need not be, at present, adverted to.

This law is broad and comprehensive in its terms. It applies to every incorporated company doing business in the state, and, upon its face, embraces foreign as well as domestic corporations.

The appellant, having been served with notice by the State Corporation Commission to appear and show cause why a fine should not be imposed upon it for doing business without having complied with the section just quoted, appeared and answered, resting its defense upon two grounds: First, that sections 1104 and 1105, as amended, were not intended to apply to it, but that it was governed by a special law, found, as originally passed, in Acts 1893-94, pp. 758, 764, cc. 661, 662, and amended at the session of 1895-96 (Acts 1895-96, pp. 284, 423, cc. 248, 406); and, second, that it had tendered to the Auditor the specific license tax of \$200 imposed upon it for the year 1904, and that section 1104 has reference to this license fee, and not to the charter fee required in sections 37-40, inclusive, found at pages 178-180, Acts Assem. 1902-1904; and, further, that, even though a charter fee was by law required of it, it comes within the exception found in section 40, *supra*, which provides that "nothing contained in this section, or the three preceding sections, shall be construed to impose a fee for a charter or for authority to transact business in this state, upon any company which has already paid the fee or tax heretofore imposed by law upon its charter or for authority to transact its business in this state."

Dealing with the last defense first, it seems clear that the fee required by section 1104 is what is known as a "charter fee." This appears from the concluding portion of that section: "Any foreign corporation which has heretofore paid the fee required by law to entitle it to transact business in this state, and has otherwise complied with the laws heretofore existing relative thereto, shall not, on application for license to transact business in this state, be required to pay such fee again, nor to file a copy of the charter with the Secretary of the Commonwealth, if a copy thereof is already on file in his office." It seems too plain for argument that this has reference to a charge which is paid once for all, and not to the license tax which is paid

each and every year. Nor does the appellant, in any event, come within the exception, for it nowhere appears that it has at any time paid this charter fee. Its statement upon this subject is cautiously made. Referring to section 1104, as amended, appellant says in its petition to the Corporation Commission for license to do business in the state for the year 1904 that "it only required those foreign corporations which have always been governed by section 1104 to pay the charter fee where such corporations are attempting to do business without ever complying with that section, or with the law relating to charter fees. All such foreign corporations are by the act of May 15, 1903, required to now pay this charter fee. The act leaves untouched that class of foreign corporations which were not governed by section 1104, as is the case with surety companies, and your petitioner in particular. In other words, if a right to transact business in this state has once been granted on the payment of a charter fee and an annual license tax, or on the payment of a license tax only, the state cannot, or at least does not intend to, now attach the requirement of the payment of a charter fee to the foreign corporation which has already obtained and been granted the right to do business in this state." This is certainly not an averment that it had paid the charter fee. Its whole insistence, indeed, is that it was never liable for the charter fee, but that it had been permitted to do business without the payment of such fee, and was therefore entitled to continue its business upon the same terms. There is neither allegation nor proof of the payment of the charter fee, and therefore appellant is not within the terms of the exception to the operation of sections 37-40.

The case of appellant must stand or fall by its first contention. Is it controlled by the law applicable to corporations in general, whether foreign or domestic, or is there a special law which applies to that particular class of corporations to which appellant belongs?

The Constitution of Virginia (section 156a, art. 12) provides that, "subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this state to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this state." By section 1104, as found in the Acts of 1902-1904, at page 360, and which has already been quoted, every incorporated com-

pany doing business in this state is required to pay a charter fee. The amount of that charter fee is fixed by sections 37-40, already referred to, and the penalty for doing business without complying with the law is imposed by section 1105.

Whatever may have been the interpretation of the law as it existed before the adoption of the Constitution now in force, and the passage of the laws in pursuance thereof, including section 1104 as amended, there seems no room for question that appellant, in common with every incorporated company doing business in this state, must pay a charter fee, or bring itself within the operation of the exception. It would serve no useful purpose to inquire whether, by a true construction of the statutes upon the subject in force prior to the adoption of the Constitution, the appellant was liable to pay the tax, and escaped by the oversight or inadvertence of those charged with the execution of the laws, or whether the Legislature had seen fit to place such companies upon a more favorable footing than all other corporations doing business in the state, for, whether this company has hitherto escaped by inadvertence, or in accordance with the intent of the Legislature, there is nothing in the nature of a contract, nothing in the nature of an estoppel upon the state to interfere with its unquestioned power of taxation. Therefore, whatever opinion might be entertained with reference to the laws as they heretofore existed, the Constitution and laws as they now stand unmistakably place all corporations upon a footing of equality, and all are required to pay a charter fee as the condition precedent to doing business in this state, with a proviso that this charter fee shall not be exacted of those corporations by which this fee has been at any time paid. The Corporation Commission, which is the department specially charged with the duty of granting licenses to do business in this state to foreign corporations, has given this matter careful consideration; has found that the laws do not discriminate in favor of appellant; that it is not within any exception; that it was doing business in violation of the law; and has imposed upon it the minimum penalty for its offense. We discover no error in its ruling, and it is therefore affirmed.

(102 Va. 314)

HORTENSTINE v. VIRGINIA-CAROLINA RY. CO.

(Supreme Court of Appeals of Virginia. June 23, 1904.)

RAILROADS — INJURY TO TRESPASSER — NEGLIGENCE — PLEADING — RATE OF SPEED — SIGNALS.

1. A declaration for injuries caused by the negligence of the defendant must show that from the relation existing between the plaintiff and defendant a legal duty was owing from the

latter to the former, the failure to discharge which caused the injury.

2. In an action by trespasser upon a railroad track to recover for injuries, the declaration must aver that after the railroad company discovered his peril it could in the exercise of ordinary care have avoided injury to him.

3. A railroad company owes to trespassers and licensees no duty of providing reasonably safe and proper appliances.

4. A railroad company owes to a trespasser upon its track no duty in regard to the rate of speed or schedule time upon which it shall run its trains.

5. Section 2900, of the Code of 1887, preserving to any person injured by a violation of the statute the right to maintain an action for injury, was designed only to preserve such right where it existed at common law, and not to give a right of action where none existed.

6. The statute requiring a railroad company to sound the whistle of its engine before reaching a crossing was not made for trespassers nor licensees, and it owes no such duty to them.

7. In actions for tort the declaration must state sufficient facts to enable the court to say upon demurrer whether, if the facts stated are proved, plaintiff would be entitled to recover.

Error to Circuit Court, Washington County.

Action by J. W. Hortenstine, administrator of W. P. Richards, against the Virginia-Carolina Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Neal and L. P. Summers, for plaintiff in error. White & Penn, for defendant in error.

CARDWELL, J. This action was brought in the circuit court of the county of Washington by the administrator of W. P. Richards, deceased, against the Virginia-Carolina Railway Company, to recover damages for the death of plaintiff's intestate, caused, as alleged, by the negligence of the defendant company. The declaration contains seven counts, and the defendant company demurred to it and to each count thereof, which demurrers were sustained, and a final judgment rendered in favor of the defendant company. To this judgment this writ of error was awarded.

Substantially, the allegation of the first count in the declaration is that the defendant company was possessed of certain engines and cars, used and employed in carrying passengers and freight along the line of its railway in Washington county, Va., and that on the 10th day of November, 1901, the defendant company conducted itself so negligently and unskillfully in the operation of its said business as to inflict upon the plaintiff's intestate severe bodily injuries, by reason whereof he died. It is insisted that this count measures up to the requirements of a declaration in such actions, as laid down in *B. & O. R. R. Co. v. Sherman's Adm'r*, 30 Grat. 602, and approved in *N. & W. R. R. Co. v. Harman's Adm'r*, 83 Va. 553, 8 S. E. 251, *Seaboard, etc., R. R. Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773, and *Birch-*

head v. C. & O. Ry. Co., 95 Va. 648, 29 S. E. 678, since by these authorities it is sufficient to set forth the cause of action in general terms, and aver that the injury was inflicted by the wrongful act, neglect, and default of the defendant.

In *B. & O. R. R. Co. v. Whittington's Adm'r*, 30 Grat. 805, the same judges who decided the case of *B. & O. R. R. Co. v. Sherman's Adm'r*, evinced an apprehension that they had gone further in that case than in principle they should have gone. The only material difference between the declarations in the two cases is that in the last named the place where the alleged negligent act was committed is designated, while in the first named it is not; and the first count in the declaration in the case at bar is in form and substance the second count in the declaration in the *Whittington Case*, where in the opinion by Staples, J., sustaining a demurrer to that count, it is said: "Now, whether the plaintiff's intestate was at the time a passenger on the train and received his injuries as such, or whether he was an employé of the company and was injured while engaged in its service, or whether he was a stranger crossing the track of the company's road, or whether he was on the track at all, or in the cars, or at the station, or in what manner he was injured, the declaration does not inform us. It was impossible for the defendants to learn from this declaration the grounds upon which plaintiff was proceeding. The declaration amounted to an averment, simply, that the plaintiff's intestate was injured by the negligence of the defendants in the operation of their business in using and employing their engines on their railway." And then, after stating the object of a declaration, which is too well understood to be repeated here, the learned judge continues: "It is very true that in actions for torts it is frequently sufficient to describe the injury generally, without setting out the particulars of the defendant's misconduct. In such cases great latitude of statement is allowed. But this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof. * * * The learned counsel for the plaintiff insists that, if greater particularity is required in stating the cause of action, the plaintiff is liable to be defeated on the trial by a variance between the allegations and the proofs. A declaration can, however, subserve no good purpose unless it be sufficiently specific to inform the adverse party of the ground of complaint. If it is deficient in that particular, it may as well be dispensed with altogether. The plaintiff is presumed to have some knowledge of the facts upon which his action is founded. If he is in doubt as to the precise nature of the evidence, he may frame his declaration with different counts, varying his statements to meet every possible phase of the testimony."

The language just quoted applies with all of its force to the first count of the declaration here under consideration, and is inapplicable to the declaration in the *Sherman Case* only in one particular, viz., the fact that the declaration in the last-named case states that *Sherman*, the person injured, was "on the track" of the defendant at the time of his injury, while the first count in the declaration at bar utterly fails to designate where plaintiff's intestate was when he received the alleged injuries from which he died; and in this failure, at least, to designate the place, it is different from the declaration in the *Sherman Case*, and conforms to that in the *Whittington Case*.

The second count states that on the day of the alleged accident plaintiff's intestate was on a certain pump or hand car which was then and there being used on the said railroad, with the knowledge and consent of the defendant company, etc.

As remarked by counsel for the defendant company in the argument here, "This may be said of every railroad company in the state, as they all have hand cars, which are being used daily on their roads. But the duties which these companies owe to persons upon these hand cars is determined by the capacity in which they are there." In what capacity, and by what right, was plaintiff's intestate on this particular hand car on the day of the accident? Was he there as an employé of the defendant company, engaged in its business? Or was he a stranger, who was there, assuming all the attendant risks, without the knowledge and consent of the defendant company, and to whom it owed no duty, except not willfully or intentionally to injure him after discovering his peril? As to these matters the declaration is silent. While the declaration states that plaintiff's intestate was upon the hand car, it fails to state where the hand car was at the time of the accident, or that it was on the track at that time. Stress is laid in the argument for the plaintiff upon the averment that the hand car, on the day stated, was being used on the railroad with the consent of the defendant company, but the declaration nowhere states that plaintiff's intestate was on the hand car with either the knowledge or the consent of the defendant company. Consent is either expressed or implied, and it is not claimed that the consent of the defendant company to the use of the hand car was express; and, if the plaintiff intended to rely upon an implied consent, it was but fair to the defendant company that the facts to be relied on to warrant an implied consent be stated in the declaration. The relation which actually existed between the plaintiff's intestate and the defendant company at the time of the alleged injury may have been one or several, out of which different measures of duty from the defendant company would arise, and unless

the duty owing, and which the defendant company failed to discharge, was a legal duty, it would not be liable for the injury. The duty must be owing to the party injured, and the declaration must show this, otherwise it is clearly demurrable. *N. & W. R. R. Co. v. Wood*, 99 Va. 156, 37 S. E. 846, *Carson Lime Co. v. Rutherford*, 102 Va. —, 46 S. E. 304.

In the first-named case (which was similar in many respects to the case at bar) the opinion by Buchanan, J., says: "It has been held in several cases by this court that it was not necessary in cases like this to aver in terms the relation which existed between the plaintiff and defendant at the time of the injury (though that is clearly the better practice), but that it is sufficient if such averments are made as to the circumstances under which the plaintiff was injured as will show the existence of the duty which it is averred has been neglected, and which neglect has caused plaintiff's injury." In other words, the declaration must show that from the relation existing between the plaintiff and the defendant a legal duty was owing from the latter to the former, the failure to discharge which caused the injury for which the action is brought, or make such averments as to the circumstances under which the plaintiff was injured as will show the existence of the duty which it is claimed has been neglected, and which neglect has caused the plaintiff's injury.

The third count in the declaration under discussion differs from the second in two particulars: (1) In the addition that on the day named, etc., plaintiff's intestate had been hurt and placed or laid on the hand car, and (2) in the omission to state that the hand car was out and being run on the defendant company's track with its consent; and this omission is material. The fact that the plaintiff's intestate had been hurt and placed on the hand car cannot enlarge the responsibility sought to be laid at the door of the defendant company, unless this fact was known to the company, and it is not averred that it was so known. It might be true that the defendant company had knowledge that the hand car was out on the day named, but at the same time it might also be true that this hand car had been taken without the company's consent, and run out on its track by reckless parties as a prank or for their amusement. If the latter were shown to be the fact, these parties were trespassers pure and simple, who were not only endangering their own lives, but the lives of all parties engaged in the business of the company in running its engines and cars, as well as passengers who may have been upon its trains, and the defendant company would have owed them only the duty it would, under the law, owe to any other trespasser upon its track. It would not have been the duty of the company to keep a constant lookout

for these trespassers. If so, this lookout must have been at every foot of the progress of the train, as the company could not have anticipated that it would run upon the hand car at one point rather than another. Under the circumstances stated, the defendant company could not be held responsible for the alleged injury to plaintiff's intestate, unless it was shown that, after it discovered his peril, it could, in the exercise of ordinary care, have avoided the injury. This third count of the declaration making no such averment, it is clearly demurrable.

The negligence charged in the fourth count is that it was the duty of the defendant company to have its engines equipped with ordinary and proper appliances, so that said engines could and would be under the immediate control of the engineer, whereby the said engines should not be run upon and against plaintiff's intestate, etc.

Conceding the existence of this rule, the only statement in the count that the appliances were not safe and proper is by way of recital, and not by a positive averment. Nor is there sufficient averment that the failure to have safe and proper appliances was the cause of the accident, nor that the engineer could, with proper appliances and the use of the same, have stopped the engine in question after discovering plaintiff's intestate upon the track. Had the averments, however, been sufficient to show a failure on the part of the defendant company to discharge the alleged duty, still the declaration would have been fatally defective, because it stated no fact which showed that the duty was owing from the defendant company to the plaintiff's intestate. As between a railroad company and parties bearing a certain relation to it, such as passengers and employes, there exists the duty of providing reasonably safe and proper appliances. But there exists no such duty as to trespassers, or even a bare licensee, and such a party cannot complain though the appliances be ever so unsafe. *N. & W. R. R. Co. v. Wood*, supra, and authorities there cited.

In support of this count, counsel for the plaintiff cite the cases of *Richmond Ry. & Elec. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 58 Am. St. Rep. 839, and *Thompson v. Salt L. R. T. Co. (Utah)* 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621, but all that need be said of these cases is that they are wholly unlike the case under consideration, since the accident in each occurred on the streets of a city, where pedestrians had equal rights with the railroad companies. The principles which govern that class of cases have been very fully and clearly set out in the opinion of this court by Buchanan, J., in *Bass' Adm'r v. N. Ry.*, etc., Co., 100 Va. 1, 40 S. E. 100.

The fifth count of the declaration under consideration proceeds upon the idea that it was the duty of the defendant company not

to run its engines at such an unusual rate of speed, or at a time different from the schedule of any train running in the same direction, and passing the point at which the alleged accident happened, or, if so run, it was the duty of the defendant company to have given notice of the change of running said engine, so that it should not be run upon plaintiff's intestate, etc.

When commenting upon such regulations as are referred to in this fifth count, Moncure, P., in *B. & O. Ry. Co. v. Sherman's Adm'r*, supra, says: "They are adopted for the convenience and safety of the defendant and those who travel upon the road as passengers in the cars of the defendant, or those who cross the road at a place where they have a legal right to cross, and not for those who may choose to walk upon the road for their own convenience or pleasure." To the same effect is *N. & W. Ry. Co. v. Wood*, supra.

In support of the fifth count several cases are cited, and we will review them, as far as we deem it necessary, in the order cited. As to the first (*B. & O. R. Co. v. Whittington's Adm'r*), it need only be said that the party injured was an employé of the defendant company. In the second (*Roberts v. A. & F. R. Co.*, 83 Va. 314, 2 S. E. 518), the party injured was a traveler upon the highway, just about to cross the railroad track at a highway crossing, and the court rightly held it to be "negligence to run an unscheduled train at an extraordinary speed across a public highway, without signaling its approach by bell and whistle." The principles laid down in that case, as well as in the case just before it mentioned, are wholly inapplicable to the case at bar, where the party injured was where he had no right to be, or was, at most, a bare licensee. A wholly different rule as to the duty of the railroad company to the parties injured applied to the two cases named from that applicable to the case at bar. The third case cited is *L. & W. R. Co. v. Hall* (Ga.) 85 S. E. 159. In that case the ruling was not upon the sufficiency of the declaration, but only upon the refusal of the lower court to direct a verdict in favor of the defendant, and upon an instruction given. The sufficiency of the declaration seems not to have been called in question. The fourth and last case cited is *Ashworth v. Southern Ry. Co.* (Ga.) 43 S. E. 36. That case is clearly in accord with the decisions in this state as to the duty which a railroad company owes to a trespasser upon or about its property. True, it held that the rule in such cases does not relieve the company under all circumstances from anticipating the presence of a trespasser upon its property, and from taking proper precautions to prevent injury to him. The real point decided was that the petition (declaration) set forth facts which brought the case under an exception to the general rule,

and should not have been dismissed on a general demurrer. It has no bearing whatever upon the sufficiency of the declaration in this case.

The sixth count in the declaration under discussion proceeds upon the idea that it was the duty of the defendant company to abstain from running its engine on the day of the injury to plaintiff's intestate, that day being Sunday, and that the running of its engine on that day was a violation of the statute—section 3801, Code 1887—whereby a right of action accrued to the plaintiff to recover damages of the defendant company by reason of section 2900 of the Code; in other words, that the defendant company is liable for the injury to plaintiff's intestate, simply because the injury was by reason of the company's engine being run on Sunday. The declaration does not state that the day named was Sunday, but merely states that it was the duty of the defendant company to abstain from running its engine on that day, and that it was so run, etc., in violation of the laws of the commonwealth. Section 3801, prohibiting the running of the engines and trains of a railroad company on Sunday in this state, contains several exceptions, and, granting that the court should take judicial notice of the fact that the 10th day of November, 1901, was Sunday, and conceding, further, for the sake of argument, that the bare violation of the statute gave the plaintiff a right of action, his declaration is still bad on demurrer, as it does not state that the defendant company, in the running of its engine and train on the day named, and which inflicted the injury to plaintiff's intestate, did not come within the exceptions contained in the statute. Section 2900 of the Code confers no new or enlarged right upon a party injured as a result of the violation of a statute. A party suing for an injury arising from an act of a defendant in violation of a statute, claiming damages, and not merely the penalty prescribed in the act, would have to allege and prove the same facts which he would have to allege and prove if the act of negligence complained of was not in violation of a statute, since the purpose of section 2900 of the Code was merely to preserve to the person injured the right to maintain his action for the injury he may have sustained by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty imposed under a penal statute. *Connelly v. W. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919.

The authorities cited in support of the sixth count of plaintiff's declaration, as far as we have been able to examine them, do not sustain his contention.

The seventh count of the declaration sets out the liability of the defendant company as arising out of its failure to sound the whistle of its engine, as required by statute, before

reaching the crossing, near which the alleged injury to plaintiff's intestate occurred. What was said with reference to appliances, speed of train, etc., above applies here. The statute was not intended to protect all persons indiscriminately, but only those upon the highway, or who are lawfully at or near a crossing of a railroad in pursuit of their legitimate business, and intending to cross the railroad, and was not made for trespassers, or even licensees. *B. & O. R. R. Co. v. Sherman's Adm'r*, supra; *N. & W. Ry. Co. v. Wood*, supra. If the view contended for by counsel for the plaintiff were correct, viz., that the duty imposed by the statute refers to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing of engines at that place, still the declaration is fatally defective in not stating that the plaintiff's intestate was lawfully at the place of his injury, or in failing to show, from facts or circumstances stated, that he was lawfully there. No rule of pleading is better settled in this state than that a declaration must inform the defendant of the nature of the demand made upon him.

If it could be said that the first count in this declaration states that plaintiff's intestate was upon the track of the defendant company at the time of the accident, then, under the facts stated in this count, and in the third, fourth, fifth, sixth, and seventh, he was unquestionably a trespasser. And if the second count stated specifically that he had taken the hand car, or was upon it, with the knowledge and consent of the defendant company, this would be sufficient to show, so far as that count is concerned, that he was not upon the track as a trespasser, but it would not be sufficient to show that he was there with any greater rights than a bare licensee. Whether plaintiff's intestate was a trespasser or a mere licensee at the time of the accident, each count in the declaration is defective, in that it does not aver that the defendant company intentionally or willfully injured him, or that, after it saw or knew of his peril, it could have avoided

injuring him. *N. & W. Ry. Co. v. Wood*, supra.

This declaration is but an illustration of the extent to which the rule having its origin in *B. & O. R. R. Co. v. Sherman's Adm'r*, supra, has led the bar of this state into relying upon loose and insufficient pleading in actions of this nature. Though not unmindful that that rule has been followed or reluctantly approved by this court in the cases cited by counsel for the plaintiff, we have pointed out that the apprehension of the judges who sat in the case in which the rule had its origin, that the case had gone too far, was soon evinced in *B. & O. R. R. Co. v. Whittington*, supra. In *N. & W. Ry. Co. v. Joyner's Adm'r*, supra, the court seemed to feel constrained to approve the rule, but in truth there was no occasion to either follow or approve it, as the opinion clearly shows that the declaration in that case stated a good cause of action independent of the rule. And in *Birckhead v. O. & O. Ry. Co.*, supra, it is apparent that the rule was sanctioned with reluctance. Be that as it may, the court, upon mature consideration, has reached the conclusion that in actions for a tort the declaration must state sufficient facts to enable the court to say upon demurrer whether, if the facts stated are proved, the plaintiff would be entitled to recover; and in so far as the rule originating in the case of *B. & O. R. R. Co. v. Sherman's Adm'r*, supra, impinges upon this conclusion, it is not approved, and will not be hereafter followed. This conclusion is in accordance with the established rule everywhere but in Virginia, with perhaps a few exceptions. It is imposing no hardship on a plaintiff, is but fairness to the defendant, and will at the same time, in many instances, save valuable time to the trial courts and jurors in going through trials, often of days' duration, to reach the same conclusion.

It follows that we are of opinion that there is no error in the judgment of the circuit court of Washington county, complained of in this case, and therefore it must be affirmed.

(102 Va. 361)

HICKS v. CITY OF BRISTOL.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENT—CHARTER—REPEAL BY CONSTITUTION.

1. The Constitution which went into effect June 10, 1902, provides in section 170 that no city shall impose any tax or assessment on abutting landowners for public improvements, except for sidewalks and improving and paving existing alleys, or for the use of sewers. Section 117 provides that every city having at the time of the adoption of the Constitution a municipal charter may retain the same, except in so far as it shall be repealed or amended by the General Assembly, but provides that every such charter is amended so as to conform to the limitation and powers contained in the Constitution. Section 3 of the schedule of the Constitution provides that, except as modified by the Constitution, all actions and causes of action of bodies corporate or politic shall continue, and section 4 of the schedule provides that all taxes accrued or accruing to any political subdivision of the commonwealth, under laws in force, shall inure to the use of such subdivision. A city charter at the time of the taking effect of the Constitution authorized the city to pave its streets, and to determine what portion of the expense should be assessed on real estate benefited, and provided for a board of assessors to make such determination. *Held*, that even conceding that the phrase "all taxes," as used in the schedule to the Constitution, was broad enough to include a local assessment for paving a street, an assessment which had not been made at the time that the Constitution took effect was invalid.

Appeal from Circuit Court of City of Bristol.

Action by the city of Bristol against one Hicks. Judgment in favor of plaintiff, and defendant appeals. Reversed.

Geo. E. Penn, John W. Price, J. S. Ashworth, and Bullitt & Kelley, for appellant. S. V. Fulkerson, Peters & Lavender, and I. C. Byars, for appellee.

BUCHANAN, J. The question involved in this case is the validity of a local assessment made upon abutting lands for paving a portion of one of the streets of the city of Bristol.

The legality of the assessment is attacked upon two grounds: First: That the assessment is in violation of article 170 of the Constitution; second, that, if the assessment be not unconstitutional, the irregularities in the proceedings making it are fatal to its validity.

By section 72 of its charter (Acts Assem. 1890-1900, pp. 627, 640, c. 611), the city of Bristol was given the power, among other things, to pave its streets, and to determine what portion, if any, of the whole expense should be paid from the treasury of the city, and what portion thereof should be assessed upon the real estate which, in the opinion of the city council, would be benefited by such improvements. It was further provid-

ed that, if the council should determine at any time to make such improvements, it might order them to be made, and after the work had been completed the judge of the corporation court of the city should appoint a board of assessors to go upon the premises and levy a local assessment upon each piece of the abutting lands or lots to meet the expenses of the improvements in front of or along such real estate, as would be in proportion and according to the benefits accruing to the same by reason of the improvement for the payment of which the assessment was made. The pavement in question was completed some months prior to July 10, 1902, the time when the present Constitution of the state went into effect, paid for by the city, and assessors appointed by the corporation court to assess the benefits, if any, accruing to the abutting property owners by reason of the paving. The assessors were directed to perform their duties in accordance with a prior order of the court entered January 23, 1901. That order provided that, before levying or making the assessment required, the assessors should give notice to each of such abutting owners of the time and place they would meet, and that, after due service of the notice required, they should go upon the premises and levy a local assessment separately against each of the abutting lots of land, which would be in proportion to the benefits accruing to each lot by reason of the paving, and, where no benefits had accrued, no assessment was to be made.

On the 15th of July, 1902, the assessors gave notice, or attempted to do so (the sufficiency of the notice is denied by the plaintiffs in error), that they would meet on the 31st of that month at a certain hour and place, and proceed to levy the local assessment which they were required to make. This they did, and reported their action to the corporation court, and filed their report in the clerk's office of that court on the 3d day of November, 1902.

By the provisions of the same section (72) of the charter, any person or corporation who felt aggrieved by the report had the right to file exceptions to it. The court, after the report had been filed 10 days, could act upon it. If no exceptions were filed to the report, the court was required to confirm it, and order the assessment to be paid by the abutting owners of the lots, as their interests in the same should appear, to the treasurer of the city, within such time and on such terms as the city council might direct. If exceptions were filed to the report, the court was required to hear and determine such exceptions, and upon any question involved to hear evidence, with the right to increase or decrease the assessments if it appeared that they were not levied in proportion to the benefits to the abutting lots, and to make any correction therein which might seem equitable and just, or to recommit the report for

cause. That section further provided that such assessments, when the report of the assessors was confirmed, should be a lien on the abutting lands or lots.

Exceptions were filed to the report. On the 19th of February, 1903, the court overruled the exceptions of the plaintiffs in error, and confirmed the report as to them, declared the sum assessed against each lot to be a lien thereon, and ordered the owners of the lots to pay the same, with interest thereon from November 3, 1902, in 10 annual installments; the first being payable November 4, 1903.

By section 170 of the Constitution which went into effect July 10, 1902, it is provided that "no city or town shall impose any tax or assessment upon abutting land owners for street or other public local improvements, except for making and improving the walkways upon existing streets, and improving and paving the existing alleys and for their construction, or for the use of sewers; and the same when imposed shall not be in excess of the peculiar benefits resulting therefrom to such abutting land owners."

The power to impose local assessments for paving streets was expressly prohibited by section 170 of the Constitution, and by section 117 of that instrument it is provided that each of the cities and towns of the state having at the time of the adoption of the Constitution a municipal charter may retain the same, except in so far as it shall be repealed or amended by the General Assembly, "provided that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution." The effect of the provisions contained in sections 170 and 117 of the Constitution was to repeal the charter of the city of Bristol, so far as it authorized a local assessment for street paving.

"The repeal of a tax law," says Cooley on Taxation (2d Ed.) p. 21, "puts an end to all right to proceed to a levy of taxes under it, even in cases already commenced, unless the right is reserved in the repealing statute, and statutory remedies for the enforcement of a tax are gone when the statute is repealed without a saving."

The same result must follow where the

authority of municipal corporations to impose a local assessment for a particular purpose has been repealed.

It is insisted that sections 3 and 4 of the schedule to the Constitution saved to the city the power to make the assessments in question.

The portion of section 3 relied on is as follows: "Except as modified by this Constitution, all writs, actions, and causes of action, prosecutions, rights of individuals, of bodies corporate or politic, and of the state, shall continue."

The only saving in the provision quoted which could by possibility, as it seems to us, have any application to the taxing power of the city, is that which declares that the "rights of * * * bodies corporate or politic * * * shall continue." Whatever may be the scope of that provision, it is clear, we think, that it was not intended to continue a right which was expressly taken away by the Constitution.

The saving relied on in section 4 of the schedule is as follows: "All taxes, fines, penalties, forfeitures, and escheats, accrued or accruing to the commonwealth, or to any political sub-division thereof, under the present Constitution, or under the laws now in force, shall, under this Constitution, enure to the use of the commonwealth, or of such sub-division thereof."

Conceding that the term "all taxes," as used in that section, is broad enough to include local assessments, the local assessments in question had neither accrued, nor were they accruing, when the Constitution went into effect. At that time they had not been assessed, and could not be without further exercise of a power which the city no longer had since the provision in its charter which conferred the power had been repealed by the Constitution.

Having reached the conclusion that the local assessments in question were invalid because in violation of the Constitution, it is unnecessary to consider the questions raised as to the regularity of the proceedings by which the assessments were made.

We are of opinion, therefore, to reverse the judgment of the circuit court, and will enter such judgment as the circuit court ought to have entered, dismissing the proceedings against the plaintiffs in error.

(102 Va. 387)

VIRGINIA & S. W. RY. CO. v. CLOWERS' ADM'X.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

RAILROADS—MASTER AND SERVANT—FELLOW SERVANTS—CONSTITUTIONAL RULE—LOCOMOTIVE ENGINEER AND TELEGRAPH OPERATOR.

1. Const. § 162, in effect relaxing the stringency of existing precedents as to fellow servants, in the interests of employes of railroad companies, is not to be strictly construed, but the true method of construction is to discover the intention of the framers of the Constitution.

2. Const. § 162, declares that a servant employed by a railroad company, and engaged in any work in the operation of an engine, shall be entitled to recover for injuries sustained because of the negligence of any one charged with dispatching trains or transmitting telegraphic or telephonic orders therefor. *Held*, that a railroad company is liable to a locomotive engineer for injuries caused by the failure of a telegraph operator to transmit an order sent out from the train dispatcher's office in regard to the movement of trains.

Error to Corporation Court of Bristol.

Action by W. B. Clowers' administratrix against the Virginia & Southwestern Railway Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Bullitt & Kelley and D. D. Hull, for plaintiff in error. H. G. Peters, W. F. Rhea, and E. Lee Twinkle, for defendant in error.

WHITTLE, J. This is an action of trespass on the case, brought by the administratrix of W. B. Clowers against the Virginia & Southwestern Railway Company, to recover damages for the alleged negligent killing of plaintiff's intestate by the defendant company. The jury rendered a verdict in favor of the plaintiff for \$5,000, the judgment upon which is the subject of review.

It is conceded that plaintiff's intestate, who was a locomotive engineer in the employment of the defendant company, lost his life in a collision between two of the trains of that company, occasioned by the failure of its telegraph operator at Big Stone Gap to transmit or deliver an order sent out from the train dispatcher's office at Bristol to the conductor of one of the colliding trains. The single question therefore presented for decision is, were the telegraph operator and the engineer fellow servants, in contemplation of section 162 of the Constitution of Virginia?

The trial court instructed the jury that "if they believed from the evidence that the operator of the defendant company failed to deliver the message to the conductor on the train coming from Big Stone Gap to Bristol, and that by reason thereof the accident resulted which caused the death of plaintiff's intestate, then they should find for the plaintiff."

The instruction, it will be observed, was equivalent to telling the jury that plaintiff's intestate and the telegraph operator were

not fellow servants, within the meaning of section 162. Counsel admit that prior to the promulgation of the Constitution, July 10, 1902, the parties would have been declared fellow servants, under the decisions of this court, and there could not have been a recovery against the company upon the facts of this case. The controlling question, then, is whether or not the telegraph operator falls within any of the exceptions of section 162, taking him out of the category of fellow servant of plaintiff's intestate.

The section reads as follows:

"The doctrine of fellow-servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master, that a servant would have (at the time when this Constitution goes into effect), if such acts or omissions were those of the master himself in the performance of a non-assignable duty: provided, that the injury, so suffered by such railroad employee, result from the negligence of an officer, or agent, of the company of a higher grade of service than himself, or from that of a person, employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate work of the co-employee through, or by, whose act or omission he is injured; or that it result from the negligence of a co-employee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or non-assignable duty. The physical construction, repair or maintenance of the roadway, track or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning or operation of trains, cars or engines, shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any ma-

chinery, ways, appliances or structures, shall be no defence to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a co-employee while in the performance as vice-principal, of a non-assignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort or relatives (or any trustee, curator, committee or guardian of such consort or relatives), of any rights or remedies that he or they may have by the law of the land, at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the General Assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend the rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads or of employees of any person, firm or corporation."

The defendant company insists that inasmuch as the foregoing section tends to increase the common-law liability of railroad companies, it ought to be strictly construed, and that, when so construed, it leaves unchanged the relations which previously existed between these employees. Whatever may be said of the soundness of that proposition with respect to the construction of statutes in derogation of the common law, the rule has no application to remedial provisions of a Constitution ordained for the obvious purpose of relaxing the stringency of existing precedents in the interest of employees engaged in the dangerous occupation of constructing, maintaining, and operating railroads. The constitutional convention, in its wisdom, has deemed it salutary and just to employees to modify the common-law fellow-servant doctrine so as to meet the exigencies arising from changed conditions in modern railroading. Under such circumstances it is the duty of the courts to give effect to that policy, rather than to defeat it by resort to narrow and technical rules of construction. The true purpose of construction is, at least, to discover the intention of the framers of the Constitution, and to promote the objects for the attainment of which that instrument was ordained; and, to that end, a fair interpretation must be given to the language employed, construing

the words in their ordinary and popular acceptance, unless it clearly appears that they were intended to be used in some other sense. When language is plain and its meaning obvious, there is no room for construction. The popular rule for the exposition of a Constitution is thus stated by Judge Cooley in his work on Constitutional Limitations:

"It is also a very reasonable rule that a state Constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the Constitution, or that the latter is to be warped and perverted in its meaning, in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes. It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly—a maxim which we fear is sometimes perverted to the overthrow of the legislative intent—but there can seldom be either propriety or safety in applying this maxim to Constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive, and the real question is what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." Cooley on Const. Lim. (7th Ed.) p. 94.

In light of these principles, this court has no difficulty in expounding that part of section 162 applicable to the case in judgment. The clause, in terms, abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of a co-employee "charged with dispatching trains or transmitting telegraphic or telephonic orders therefor." The object of train dispatching is to place in the hands of conductors who manage the trains of the company proper and safe orders for their guidance. The source of such orders is the office of the train dispatcher, from which they emanate, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is in transitu from the time

it leaves the one until it reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination. There can be no reason for holding, under the language of this provision, that a train dispatcher is not a fellow servant of the trainmen to be affected by the order, but that a telegraph operator, through whom the order is to be transmitted to the conductor, and the trainmen are fellow servants. Each constitutes part of a conduit through which the order is transmitted from its source to its destination, and the omission of either to discharge his important function defeats that object. The purpose of the provision is to hold the company responsible for the consequences of the negligence of its agents in dispatching trains or transmitting orders, and there is nothing in the language employed to justify the contention of the company that no operator on the line, except the dispatcher in the train dispatcher's office, is charged with the duty of dispatching trains or transmitting telegraphic orders therefor.

If "transmitting orders" for the movement of trains were synonymous with "dispatching trains," then there would have been no necessity for the use of both terms in the connection in which they occur. Nor is any authority adduced in support of the proposition that "transmitting" an order is to be construed to mean transmitting it by telegraph only. To subject the provision to that restricted interpretation would not only do violence to the language used, but would also defeat the manifest object of the framers of the Constitution. The clause means what the words import, and includes all agents of the company whose duty it is to transmit telegraphic or telephonic orders for the movement of trains to the conductors of such trains, no matter what instrumentalities may be employed to accomplish that purpose. It would be a vain thing for the framers of the Constitution to protect trainmen against the negligence of a train dispatcher, and leave them exposed to the carelessness of other agents of the company, through whom the train dispatcher's orders must be transmitted before reaching their final destination.

The judgment complained of is plainly right, and it must be affirmed.

(102 Va. 875)

WHEBY et al. v. MOIR et al.

(Supreme Court of Appeals of Virginia. June 18, 1904.)

FRAUDULENT CONVEYANCES—GROUNDS OF INVALIDITY—EVIDENCE—SUFFICIENCY—APPEAL—JURISDICTION.

1. To set aside a sale as fraudulent as to creditors, it must be alleged and proved that the sale was made with intent to defraud, of which intent the buyer had knowledge.

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 10, 498.

2. Evidence in a suit to set aside a sale of a stock of merchandise and other goods as fraudulent towards creditors examined, and held insufficient to charge the buyer with knowledge of the seller's fraudulent intent.

3. Where, in a suit to set aside a conveyance as fraudulent as to creditors, the various sums decreed against the purchaser in favor of several creditors exceed in the aggregate the amount necessary to confer jurisdiction on the Supreme Court of Appeals, the appeal by the purchaser will not be dismissed because the sum due to the parties summoned as appellees is less than \$500, where there is a general appearance by counsel for appellees; and, in the absence of such general appearance, the court will direct process to issue against the parties not served.

Appeal from Corporation Court of Roanoke.

Suit by one Moir and others against Jabborien E. Wheby and another. From a decree for plaintiffs, defendant J. E. Wheby appeals. Reversed.

Edward Lyle and S. H. Hoge, for appellant. H. T. Hall, for appellees.

KEITH, P. The appellees filed their bill in the corporation court of the city of Roanoke, in which they alleged that Charles Wheby had for some time past been conducting a general merchandise store in that city; that they had extended credit to him upon the faith of goods contained in his store; and that on June 18, 1902, he and his wife executed a deed of bargain and sale to one Jabborien Elias Wheby of all their stock of merchandise and other goods and chattels. The alleged consideration for this deed was the sum of \$1,053.39, cash in hand, the receipt of which was acknowledged. The bill alleges that the said conveyance of June 18, 1902, is fraudulent, and that no part of the consideration mentioned was paid; that it was executed for the purpose of hindering, delaying, and defrauding the creditors of Charles Wheby, and especially the complainants, in the collection of their debts—a fraud of which the said Jabborien Elias Wheby had knowledge and in which he participated.

The defendants answered, and admitted the purchase and sale of the stock of merchandise, goods, and chattels; alleged that it was for a valuable consideration paid in cash; and denied that it was made for the purpose of hindering, delaying, and defrauding the creditors of Charles Wheby in the collection of their debts, but, on the contrary, alleged that the several articles enumerated in said conveyance were sold in good faith for a valuable consideration, and without fraudulent intent.

Numerous depositions were taken, and the case came on to be heard before the corporation court, which decreed that the sale of the stock of goods referred to in the bill be set aside and annulled, as made with intent to hinder and delay the creditors of Charles Wheby. From that decree the purchaser, Jabborien Elias Wheby, obtained an appeal.

It is settled by the decisions of this court that, where fraud is relied upon to set aside a conveyance, it must be plainly averred and distinctly proved. In this case it was necessary to aver and prove that Charles Wheby executed the bill of sale of the merchandise and other goods and chattels which passed by his deed of the 18th of June, 1902, with intent to hinder, delay, and defraud his creditors, of which intent the vendee, Jabborien Elias Wheby, had knowledge.

It may be conceded that Charles Wheby, the vendor, was actuated by the intention to defraud his creditors, but the proof is wholly insufficient to bring home knowledge of such purpose to his vendee. The vendor and vendee are brothers, and form part of a colony of Syrians living in the city of Roanoke, most of whom appear to be engaged in merchandising. Jabborien was a peddler. He seems to have been industrious and frugal. The percentage of profit from the business in which he was engaged is believed to have been large. His expenses were insignificant. The evidence which he adduces is to be found in the testimony of those with whom he had business transactions. They are people of his own race and nation, whose manners, habits, customs, and methods of business are very different from ours. They speak our language imperfectly, and appear to understand it with difficulty. It cannot be denied that these circumstances place them somewhat at a disadvantage. It is true that this may work both ways, and that, while it may render it more difficult for them to establish the truth of a transaction, if it be a fair one, it, on the other hand, renders more difficult the discovery of fraud, where it has been perpetrated. They come before this court, however, attended by all the presumptions of innocence. We cannot assume their guilt because they are strangers, nor condemn them as dishonest because they are ignorant of our language, our customs, and our laws.

The proof is that the whole of the purchase money was paid in cash in the presence of witnesses, and the individuals are named from whom Jabborien Wheby collected the several sums which, added together, made up the price he paid for the goods. There is no evidence that he knew that Charles Wheby was indebted, or that he entertained the purpose of defrauding his creditors. There are slight circumstances of suspicion. They appear to have taken unusual precautions with reference to the execution of the conveyance, and the inventory and transfer of the possession of the goods which passed under it, and it is argued that men engaged in an honest transaction do not anticipate the accusation of fraud. It is true that "the wicked flee when no man pursueth," but, on the other hand, the absence of witnesses might have subjected them to the imputation that there was something to conceal. In our opinion, the testimony falls far

short of that probative force which is necessary to establish a fraud.

Upon the merits of the case, therefore, we are of opinion that the hustings court erred in setting aside as fraudulent the deed of June 18, 1902.

It is claimed on the part of appellees that the case is not properly before this court, because the sum due to the parties who have been summoned as appellees is less than \$500, which was necessary to give this court jurisdiction at the date when the appeal in this case was allowed.

The decree appealed from is copied into the petition for appeal. It appears from an inspection of that decree that the several sums decreed against the appellant aggregated more than \$500, and it is conceded that, under the decisions of this court, it had jurisdiction to entertain this appeal if the process had been issued against all of the creditors named in the decree appealed from. When the petition and record were presented to the judge of this court, and the appeal awarded, its effect was to bring up for review the entire record, so that any error to the prejudice of appellant might be corrected, and, if it were necessary to protect appellant in the enjoyment of this right, we would now direct process to issue against those parties upon whom it has not been heretofore served, in order that what is at most an omission on the part of the clerk might be corrected; but counsel, by entering a general appearance for appellees, have obviated the necessity for this, all of the appellees having identical interests in this controversy.

We think the motion to dismiss should be overruled, and, this court proceeding to enter such decree as the hustings court ought to have entered, it is ordered that the decree complained of be reversed, and the bill of complainants be dismissed, with costs to the appellant.

RAMEY v. COUNTS.

(102 Va. 902)

(Supreme Court of Appeals of Virginia. June 28, 1904.)

INJUNCTION—CUTTING OF TIMBER—POSSESSION OF PLAINTIFF.

1. Upon an application for an injunction to restrain a defendant from trespassing upon land or cutting timber therefrom, the plaintiff must either allege that he is in possession, or allege a state of facts that he is entitled to the injunction without being in possession, or that he has pending an action to recover possession, or is about to institute such an action, in which last case the court will enjoin until the right of possession is determined.

Appeal from Circuit Court, Wise County.

Bill by B. C. Ramey against R. L. Counts. Decree for defendant, and plaintiff appeals. Affirmed.

Bond & Bunce, for appellant. Alderson & Alderson and Bullitt & Kelley, for appellee.

HARRISON, J. The bill in this case alleges that the appellant, B. C. Ramey, is the owner in fee simple of a valuable tract of land in Wise county, containing about six or eight acres; that said land is covered with very valuable timber, and that recently the appellee, R. L. Counts, had gone on the land, and was then cutting and removing the timber therefrom; that he had already removed timber to the value of at least \$250; and that, unless he was enjoined and restrained from cutting and removing timber from the said land, irreparable injury would result to the appellant. Following these brief allegations, the prayer of the bill is that the appellee and his agents and employes be enjoined and restrained from further going upon said land, or cutting and removing the timber therefrom, that judgment be given against the appellee for the value of the timber already removed, and that all such general relief be granted as to equity might seem proper.

In accordance with the prayer of the bill, an injunction was granted on the 5th of March, 1903, enjoining and restraining the appellee, his agents and employes, from going upon the tract of land mentioned in the bill, and from cutting and removing the timber, or otherwise trespassing thereon, until the further order of the court. Thereupon the appellee filed his demurrer to the bill, assigning, among others, the following grounds in support thereof: That the bill does not allege that the complainant is in possession of the land, and does not allege that he has brought an action of ejectment or other possessory action to obtain possession of the same, and does not allege that the defendant is not in possession thereof. On the 9th of April, 1903, the cause was heard upon the bill and demurrer, upon consideration whereof the court sustained the demurrer, and dissolved the injunction theretofore granted.

The sole question presented by this appeal is, did the circuit court err in sustaining the demurrer to the bill?

The bill is very meager with respect to the allegations usually made in such cases. Practically the only allegation is that appellant is the fee-simple owner of the land, and that irreparable injury will be done him unless the appellee is enjoined.

Upon an application for an injunction to restrain a defendant from going upon land or cutting timber thereon, the plaintiff must either allege that he is in possession, or allege a state of facts showing that he is entitled to the injunction without being in possession. Or he must allege that he has pending an action to recover possession, or is about to institute an action to recover such possession, in which latter case the court will enjoin until the right of possession is determined. *Daniell's Ch. Pr.* p. 1632; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895; *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276.

The rule that the plaintiff must allege possession in a case like this can work no delay or hardship, for if he is not in possession, and has the right of possession, he can immediately institute his action of ejectment to recover the possession, and, under the authorities, base his right to an injunction upon the pendency of that proceeding in which the right of possession is to be determined.

Without undertaking to consider all of the grounds of demurrer relied on, we are of opinion that the failure of the appellant to allege that he was in possession of the land, or to allege any special circumstances showing his right to an injunction without being in possession, was sufficient to sustain the action of the lower court, and for this reason the decree appealed from must be affirmed.

(102 Va. 890)

RATLIFF v. RATLIFF et al.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

CHANCERY PRACTICE—BILL OF INTERPLEADER—WITNESS—COMPETENCY—DESCENT OF REALTY—FRAUDULENT CONVEYANCE—CURTESY.

1. One who has been induced by a party to convey land to him which on the face of the contract belonged to others, and is threatened with suit in consequence of this act, may, in a suit to enforce his vendor's lien, convene all parties in interest, and have their respective rights determined and the deed reformed.

2. A witness otherwise incompetent is made competent for all purposes if called by the other party to the litigation.

3. An equitable interest in real estate descends just as a legal estate.

4. One who has conveyed land to another to defraud his creditors is estopped from denying the validity of the conveyance.

5. A husband is not entitled to curtesy in the statutory separate estate of his wife, which he has created for her benefit without reservation of his marital rights.

Keith, P., and Cardwell, J., dissenting.

Appeal from Circuit Court, Washington County.

Action by John B. Hamilton against M. S. Ratliff and others. From the decree, M. S. Ratliff appeals. Reversed.

Daniel Trigg and L. P. Summers, for appellant. White & Penn and M. H. Honaker, for appellees.

HARRISON, J. In the fall of 1886 John B. Hamilton executed to Lucinda Ratliff and John R. Ratliff, one of her sons, a title bond for a tract of land near Abingdon, Va., in consideration of \$6,500, of which \$3,000 was paid in cash; the residue being evidenced by the joint bonds of the vendees. On the 11th of January, 1887, for reasons satisfactory to the parties, this title bond and deferred purchase-money bonds were surrendered to Hamilton, an additional \$1,000 paid on the purchase, and a new title bond executed by Hamilton to Lucinda Ratliff and Floyd A. Ratliff, another son, which acknowledges the

receipt of \$4,000 in cash; it being provided that the residue of the purchase money should be paid in four equal annual installments, evidenced by the notes of Lucinda and Floyd A. Ratliff, and providing that the vendor should execute a good and sufficient deed as soon as the land was run off and the notes delivered. The grantee, Lucinda Ratliff, died in the fall of 1887, leaving her husband, M. S. Ratliff, and 11 children surviving her. On the 9th of February, 1891, Floyd A. Ratliff assigned to his father, M. S. Ratliff, all interest that he might have under and by virtue of the contract or title bond; the consideration for this assignment being that the assignee should pay the balance of purchase money then due on the land, amounting to \$1,816. This assignment expressly provides that it shall not apply to the interest of the assignor in the land as one of the heirs of his mother, Lucinda Ratliff.

On September 4, 1896, John B. Hamilton, the vendor in the title bond, without the knowledge or authority of the heirs of Lucinda Ratliff, conveyed the land in question to M. S. Ratliff, the husband and father of the vendees named in the title bond, reserving a vendor's lien for a small balance of purchase money, amounting to \$362.46. After this deed was recorded, Hamilton, being informed that the heirs of Lucinda Ratliff would contest his right to make the deed to their father, M. S. Ratliff, filed his original bill, seeking to enforce the payment of the balance of the purchase money due to him, and convening all the parties, in order that the deed might be reformed in accordance with their respective rights. Subsequently an amended bill was filed, bringing in additional parties and repeating the allegations of the original bill. To these bills M. S. Ratliff filed his demurrer and answer; denying in general terms that the land was sold to Lucinda Ratliff, and insisting that all the negotiations leading up to the purchase were alone with him, and that the entire purchase money was paid by him from his own resources. Subsequently J. M., J. R., and F. A. Ratliff, three of the adult heirs of Lucinda Ratliff, filed their answers, asking that they be treated as cross-bills, in which they assert that the land in question was bought and paid for by their mother, Lucinda Ratliff, and that the deed from Hamilton to M. S. Ratliff was without authority, and praying that it be set aside and the heirs of Lucinda Ratliff restored to their rights under the title bond. M. S. Ratliff filed his demurrer and answer to these cross-bills, reiterating the position taken in his answer to the original and amended bills—that the land was bought and paid for with his own means and belonged to him.

The circuit court held that M. S. Ratliff could not defeat the rights of the heirs of Lucinda Ratliff under the title bond of January 11, 1887, and that the deed from Hamilton to M. S. Ratliff was without authority and

must be set aside. The court further held that M. S. Ratliff was entitled to the interest bought by him from F. A. Ratliff under the assignment mentioned of February 9, 1891, the nature and extent of which were fully known to him; that under this assignment he was entitled to an undivided interest in the land, in the proportion that \$1,816, the balance of purchase money which he then agreed to pay, bore to \$6,500, the whole purchase money agreed to be paid for said land. From this decree M. S. Ratliff has appealed.

The first assignment of error is to the action of the court in overruling the demurrer of appellant to the original and amended bills.

John B. Hamilton had, upon the inducement of the appellant, made him a deed to land which on the face of his contract belonged to other parties. He was threatened with suit in consequence of this act, and we are of opinion that, in a suit to enforce payment of his vendor's lien, he had a right to convene all parties in interest, and to ask a court of equity to determine their respective rights in the land, and, if necessary, to set aside the deed he had made, and direct to whom the land should be conveyed. The bill, in addition to seeking a satisfaction of the balance of the purchase money, was in the nature of a bill of interpleader, convening adverse claimants in order that the complainant, who occupied the position of a disinterested stakeholder, might be saved harmless. We are therefore of opinion that the demurrers to the original and amended bills, and also to the cross-bills, were properly overruled.

A further assignment of error is to the action of the court in not excluding the testimony of John R. and F. A. Ratliff.

John R. Ratliff was not a party to the contract or title bond which is the subject of dispute. This contract was with Lucinda Ratliff and F. A. Ratliff. Besides, M. S. Ratliff, an adverse party, having been examined for himself, John R. was thereby made competent, if otherwise incompetent. As to F. A. Ratliff, if he were incompetent, having been called as a witness by M. S. Ratliff, he was made competent for all purposes.

The fifth and sixth assignments of error seem to assert the proposition that even though Lucinda Ratliff may have been entitled to the land in question, or a part thereof, still, as she died without having the legal title thereto, her interest was not descendible to her heirs. This position is without merit. An equitable interest in real estate descends just as a legal estate.

The remaining assignments of error call in question the respective rights of the parties in and to the land in controversy.

It appears from the record that prior to the purchase of the land in question the appellant and his family lived in Tazewell county, and that he and his wife, between them, owned in Tazewell and Buchanan counties con-

siderable real estate, the title to the greater part of which was in his wife. Although the title to these lands was in Lucinda Ratliff, the appellant insists that, as a matter of fact, they belonged to him. His explanation of the title to these lands being in his wife, and of the title bond for the Hamilton land being in her name, is stated in his deposition as follows: "Me and Gordon Rife had been in the mercantile business and failed, and we compromised with our creditors, and give a deed of trust on our property—each one on our separate properties. Each one was to pay his half of the indebtedness, and, upon doing so, was to be released from the other. It was recorded in Buchanan county. The courthouse was burned, and those papers was burned; and I paid my part of the indebtedness, and Mr. Rife never paid any of his, and for that reason I was afraid that I would have to pay unjust money, and that was the reason why I had that bond drawn the way I did." In answer to a subsequent question with respect to the Buchanan lands, he says: "I had them conveyed to my wife because I was afraid I would have some of Gordon Rife's debts to pay." Lucinda Ratliff derived part of the lands in Tazewell county from her father's estate. It is very clear from the pleadings and evidence in the cause on behalf of the appellant that such of said lands as she held the title to at his instance and request were conveyed to the wife for a fraudulent purpose. The appellant cannot now rely upon his own wrong to defeat the title of the wife to the Tazewell and Buchanan lands, which had been conveyed to her. He would, in effect, be asking the court to interfere, and by its decree to relieve him from the consequences of his own fraud. This a court of equity will never do. The authorities speak with one voice on this subject. *Harris v. Harris*, Ex'r, 23 Grat. 737; *Garner v. Second Nat. Bank*, etc., 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218.

Section 2458 of the Code (1887) provides that "every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons, or from what they are or may be entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be void." This section, as well as the unvarying decisions of this court, however, declares that, as between the parties, such a writing shall be binding and valid. *Harris v. Harris*, supra.

So that the lands in Tazewell and Buchanan counties which had been conveyed to Lucinda Ratliff at the instance and request of the appellant belonged to her, and her heirs are entitled to an interest in the Hamilton land to the extent that it was paid for with the proceeds of the sale of their mother's land in Tazewell and Buchanan counties, whether derived from her father, or conveyed to her at the instance and request of the appellant.

Lucinda Ratliff and F. A. Ratliff were co-

tenants under the title bond of January 11, 1887, executed by Hamilton for the land in question; each being, as between themselves, bound for one-half of the purchase money. Under the assignment by F. A. Ratliff of February, 1891, the appellant took his assignor's shoes, and became a tenant in common with the heirs of Lucinda Ratliff, and is entitled to an interest in the land to the extent that he has paid the purchase money. *Grove v. Grove*, 100 Va. 556, 42 S. E. 312. It was therefore error in the court to limit the interest of the appellant to the extent of the unpaid purchase money due at the date of the assignment.

It is impossible to determine from the record what proportion of the purchase money for the land in controversy was paid with the proceeds of the sale of the real estate, the title to which was in Lucinda Ratliff. It is evident that the first payment of \$3,000 came from that source, for it was evidenced by the check of the purchasers of her land, which was payable to Lucinda Ratliff, and by her indorsed to John B. Hamilton, her vendor. It is also quite clear that \$632.16 of the second payment of \$1,000 came from that source, for it was a check of the same purchasers of her land, and went to the credit of John B. Hamilton in bank on the same day that the cash payment of \$1,000 was made. Further than this, however, we are unable to go without danger of doing injustice. The case must be referred to a commissioner, to ascertain what part of the land in controversy was paid for from the proceeds of the sale of the real estate of Lucinda Ratliff, and what proportion was paid for by the appellant, taking any additional evidence that may be necessary to facilitate the inquiry, and upon the coming in of that report the court can determine and fix the interest in the land of each of the parties to this controversy.

There are two assignments of cross-error under rule 9. The first of these is disposed of by the views already expressed. The second is that the court erred in holding that the appellant was entitled to curtesy in that portion of the land which belonged to the heirs of Lucinda Ratliff.

The lands in Tazewell and Buchanan counties, the title to which was in Lucinda Ratliff, constituted a separate statutory estate, except the land derived from her father; and, when the proceeds of those lands was reinvested under the title bond executed by Hamilton to Mrs. Ratliff, the lands thus acquired continued to be her separate statutory estate. This court has held that a husband is not entitled to curtesy in the equitable separate estate of his wife which he has created for her benefit; that he is excluded by the nature of the transaction. *Jones v. Jones*, Ex'r, 96 Va. 749, 32 S. E. 463. We are of opinion that the reasons given in the case cited for excluding the husband from curtesy in the equitable separate estate

which he has created with equal force deny his right to curtesy in lands that he has conveyed or caused to be conveyed to her without reservation of his marital rights, where such lands constitute, as in the case at bar, statutory separate estate. See note to *Jones v. Jones' Ex'r*, supra, found in 4 Va. Law Reg. 821, 822, by the author of *Burk's Separate Estates*. We are therefore of opinion that the appellant was not entitled to curtesy in such of the Tazewell and Buchanan lands as were conveyed to Lucinda Ratliff by her husband, or by others at his instance and request, and hence is not entitled to curtesy in that part of the Hamilton lands paid for with the proceeds of such lands.

For these reasons the decree complained of must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

CARDWELL, J. (dissenting). The doctrine that a litigant will not be heard to assert his own wrong to defeat a right claimed by another, or to defend a right he claims against the right claimed by another, has, in my judgment, no application to this case. If, in point of fact, M. S. Ratliff intended to perpetrate a fraud upon his creditors in putting the title to the lands in question here, or those in Tazewell and Buchanan counties, in his wife, Lucinda Ratliff, which were sold in her lifetime, and the proceeds of which sales went into the purchase of the lands here in question, and his wife knew of his wrongful intent and participated in it, then she is, with respect to the transactions, equally guilty, and the maxim, "In pari delicto potior est conditio defendentis," applies to her. If, on the other hand, she was ignorant of his wrongful purpose, but did not in fact furnish any portion of the purchase money, she and those claiming under her are mere volunteers. As such, they are in the attitude of plaintiffs seeking specific performance of a contract—a relief which is never granted except to a plaintiff who stands upon a contract supported by a valuable consideration. In this case the legal title is in the husband, and rightly in him, to the extent that the consideration emanated from him. He asks nothing except to be let alone. Neither courts of law nor equity have jurisdiction to punish the actors in a fraudulent transaction by force of the maxim invoked in the opinion of the court. All that the courts can do is to withhold all aid in the enforcement of such contracts. Here the husband asks nothing at the hands of the court, but stands upon his legal right as the holder of the legal title, and that position should prevail until it is assailed by some one with a better equity. A volunteer has not only no better equity, but he has no equity whatever. I think the inquiry directed by the court is too narrow. The transactions should be probed to the bottom, and all the

facts brought to light. Let it be made to appear who paid for the Tazewell and Buchanan lands, and then, with full knowledge of the entire case from its inception, the court will be in a position to balance the equities between the parties, and with confidence determine their respective rights.

From so much of the opinion of the court, therefore, as narrows the inquiry to be made upon the case going back to the circuit court so as to exclude inquiry as to who in fact paid the purchase money for the Tazewell and Buchanan lands, I dissent.

KEITH, P., concura.

(102 Va. 305)

PARDEE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 23, 1904.)

TAXATION—MINERAL LAND.

1. Under the act approved May 13, 1903, providing for special and separate assessment of taxes on mineral land, the same are to be assessed as of the 1st day of February, in accordance with the general scheme of the statutes regulating taxation.

Error to Circuit Court, Wise County.

Application by Calvin Pardee to correct an assessment on certain mineral land. Decree for defendant, and plaintiff brings error. Reversed.

R. T. Irvine and Bullitt & Kelley, for plaintiff in error. W. W. G. Dotson, for the Commonwealth.

WHITTLE, J. This was an application by appellant, Calvin Pardee, to the circuit court of Wise county, under section 3 of an act of the General Assembly, approved May 13, 1903, entitled "An act to provide for the special and separate assessment of taxes on mineral lands and on the improvements, fixtures, and machinery thereon," to correct an erroneous assessment of improvements on certain mineral land of appellant situated in that county.

It appears that prior to December, 1902, the land in question was unimproved, but at that time appellant commenced the erection of a coal and coke plant upon the property, and had expended thereon, up to and including the month of July, 1903, the following amounts:

In December, 1902.....	\$ 2,215 15
In January, 1903.....	2,506 35
In February, 1903.....	4,293 90
In March, 1903.....	7,533 44
In April, 1903.....	19,041 07
In May, 1903.....	24,100 96
In June, 1903.....	10,001 83
In July, 1903.....	21,724 15

Total \$91,416 85

It also appears that similar improvements in that county are assessed at from 60 to 70 per cent. of the money actually expended upon them.

The circuit court, by the order complained

of, sustained the action of the commissioner of the revenue in assessing these improvements for the year 1903 at \$80,000.

The contention of appellant is that, according to the proper construction of the act in question, he was only assessable for that year with \$4,721.50, the aggregate amount invested in improvements up to and including February 1st, at which date the ownership of property, both real and personal, is ascertained, and the value of improvements determined, for taxation under the general revenue law of the commonwealth.

The act was passed in pursuance of section 172 of the Constitution, and section 1 reads:

"Be it enacted by the General Assembly of Virginia as follows: The several commissioners of the revenue in this state shall, on or before the first day of August, 1903, and every second year thereafter on or before the fifteenth day of May, specially and separately assess at the fair cash value all mineral lands, and the improvements, fixtures, and machinery thereon, within their respective districts, and shall enter the same on the land books of their respective districts separately from other lands charged thereon, and shall extend the taxes upon said lands, improvements, fixtures and machinery, assessed as aforesaid, at the rate fixed by law upon tangible property." Acts 1902-03-04, p. 320.

It will be observed that, whereas this statute provides for biennial assessments of mineral lands, other lands are only assessed every fifth year. Code 1887, § 437; Acts 1902-03-04, p. 610. While the provision for more frequent assessments of that species of property is doubtless due to the circumstance that mineral lands are at present in process of development and rapidly enhancing in value, there is nothing in the enactment calling for a construction which would result in the establishment of one period of the tax year for ascertaining the ownership and value of mineral property, and a different period for determining the same facts with respect to other property. Such an interpretation could serve no wise purpose, but would tend to introduce elements of uncertainty and inequality into a system which, according to the spirit of the Constitution, should be homogeneous and uniform. In some instances the construction adopted by the commissioner and approved by the court would leave the question as to whether one person or another should be chargeable with taxes on property for any particular year to the caprice of the commissioner. Thus, where land had changed ownership between February 1, and August 1, 1903 (May 1st in subsequent years), the commissioner could impose the burden on the vendor or vendee, at his election.

Again, in the case at bar, it was the duty of the commissioner to assess the cash in the hands of appellant on February 1, 1903. Subsequently that same money was expended in improving appellant's mineral land, and

on July 25th the commissioner assessed the improvements also. Unless the language of the act is imperative, a construction leading to such results ought not to be adopted. According to the uniform interpretation placed upon the revenue laws of this state, February 1st, the day which separates one tax year from another, has been fixed upon as the time for ascertaining the ownership and value of property for taxation, and a departure from that rule can only result in confusion and inconvenience.

The order appealed from is therefore erroneous, and must be reversed, and the case remanded for further proceedings to be had therein in conformity with this opinion.

(102 Va. 352)

ASHWORTH et al. v. TRAMMELL.

(Supreme Court of Appeals of Virginia. June 16, 1904.)

ESTOPPEL—SET-OFF—DECREE—FINAL—DEBTOR'S RIGHT TO SATISFY—COSTS—INTEREST.

1. Circumstances which do not mislead one to his prejudice do not create an estoppel in his favor.

2. A losing party is properly required to pay the costs of the litigation.

3. A purchaser of judgments against a person who died subsequent to the date of their rendition is not entitled to have them allowed against a demand due from the purchaser to the decedent arising out of a purchase of property, and secured by a lien thereon.

4. A decree confirming a sale of property to enforce a lien of a deed of trust to the creditor therein, as purchaser, which adjudged that the cash payment should be paid to prior lienors, which, after providing for costs, credited the balance of the price on the debt of the creditor in the deed, which gave a decree against the debtor for the residue, which appointed a commissioner to convey the land to the purchaser, which directed a writ of possession to issue, and which extended to the debtor the privilege of filing an upset bid in 30 days, is a final decree, speaking from the day of its rendition, subject to become inoperative on the debtor availing himself of the privilege given him.

5. As a general rule, interest will not be allowed on amounts recovered as costs.

6. A decree adjudging that a debtor is indebted to the amount therein stated, and directing a sale of property subject to a lien for that amount, which is suspended for 60 days to allow time for an appeal therefrom, gives the debtor 60 days in which to satisfy the demand of his creditor and thus obviate a sale of the property.

Appeal from Corporation Court of Bristol.

Suit by one Trammell against M. J. Ashworth and others. From a decree for complainant, defendants appeal. Modified.

John W. Price and A. H. Blanchard, for appellants. H. G. Peters, W. H. Sutherland, A. B. Whitaker, and Bailey & Byars, for appellee.

KEITH, P. This is a sequel to the case of Trammell v. Ashworth et al., which was decided by this court in June, 1901, and is reported in 99 Va. 646, 39 S. E. 593. The cause was remanded to the corporation court

of the city of Bristol to ascertain the liens upon certain real estate, and to its decree upon that subject this appeal was allowed.

The first error assigned is to the lien reported in favor of the administratrix of Rives Walker for the sum of \$316. This debt had its origin in a note given for the purchase of property by Mrs. M. J. Ashworth to Rives Walker, who assigned one-half of it to William H. Trammell to pay a debt due him of \$350. There was an arrangement between Trammell and M. J. Ashworth, the debtor, with respect to one-half of this note; but there is no evidence that the balance due Walker after the payment of his note to Trammell had ever been paid by any one, and the commissioner was fully justified in finding it to be a valid and subsisting obligation.

The circumstances relied upon by M. J. Ashworth as creating an estoppel with respect to the collection of that half of this demand which was not actually paid by her is wholly without merit, as she has been in no degree misled to her prejudice.

Nor is there any merit in the contention that there is no pleading by Walker or his administratrix upon which relief can be given them with respect to this debt. Rives Walker offered to file an amended and supplemental answer and cross-bill, but the court very properly declined to allow him to do so, because under the pleadings and decrees in the cause as it stood, all the rights of Walker or his administratrix could be settled and reported upon by the commissioner.

Nor is there any merit in the contention of M. J. Ashworth with respect to the imposition of costs. She was the losing party, and was properly required to pay the cost of the litigation.

It is assigned as error that certain judgments against Rives Walker which had been assigned to M. J. Ashworth were not allowed her as set-offs against the judgment in favor of Rives Walker reported in this cause.

When a party relies upon this plea, the set-off must be in such a condition and of such a character as that the court may appropriate it to the demand. Now, when these judgments were assigned, Rives Walker was dead, and his estate had passed into the hands of his administratrix. His creditors were only entitled to be paid upon a settlement of the estate, and that could not be done in this suit. Nor would it be reasonable or just to delay the parties to this litigation, to await the termination of an independent suit brought for the administration of Rives Walker's estate, and for the ascertainment of the amount which his creditors, upon a settlement, would be entitled to recover against his administratrix. The idea of having such a settlement in this suit cannot for a moment be entertained. The inconvenience and delay would be intolerable.

In *Robnett's Adm'r v. Mitchell et al.*, 101 Va. 762, 45 S. E. 287, it was held that where

a creditor comes in under an order for an account of debts against a decedent's estate, and proves a debt upon which a third person is jointly bound with the decedent, such third person is not a necessary party to the suit, as no relief is there sought against him, and it is not the practice of the courts, nor is it the policy of the law, to encumber suits for the administration of assets of decedent's estates with collateral issues affecting the adjustment of equities between persons having no privity with many of the other creditors. In that case the court refused to require a joint debtor to be made a party, because of the delay and inconvenience which would result from that practice.

In *Wytheville Crystal Ice, etc., Co. v. Frick Co.*, 98 Va. 141, 30 S. E. 491, quoted with approval in the case just cited, it is said: "If these persons were made defendants, any liens on their lands would have to be ascertained, which, upon the same principle, would compel the making of any other persons parties defendants who were defendants to judgments constituting liens on their lands, thereby adding new parties from time to time without end, at the expense and delay of the creditor, and to the great prejudice of his rights."

These decisions are cited as being in some degree analogous to the case under consideration, and as illustrating the inconvenience, delay, and injustice which would inevitably result if this court were to require the parties to wait for a settlement of the estate of Rives Walker, in order to furnish appellant the proof of set-off. There was no error in refusing to permit the judgments against Rives Walker's estate to be set off against the demand in this cause made by his administratrix.

Among the debts reported is one in favor of the National Mutual Building & Loan Association for \$372.31, with interest from May 10, 1898. It appears there was a bill pending in the circuit court of Washington county, brought by the building and loan association against M. J. Ashworth, to enforce the lien of a deed of trust. The property covered by this deed was sold, and the proceeds applied to the payment of the debt secured, leaving a balance over and above due by M. J. Ashworth of \$372.31. The circuit court of Washington county confirmed the sale to the trust creditor, decreed that the cash payment should be paid to the prior lienors, and, after providing for costs, credited the balance of the purchase price on the debt of the purchaser, and gave a decree against M. J. Ashworth for the residue, appointed a commissioner to convey the land to the purchaser, and directed a writ of possession to issue, with the privilege extended to M. J. Ashworth to file an upset bid within 30 days. That decree was final. It disposed of all matters in controversy, and left nothing to be decided by the court. As a matter of grace to M. J. Ashworth it gave her 30 days within which

to file an upset bid. Had she availed herself of that privilege, the case would have been reopened and the decree would have been inoperative; but this she did not do, and the decree against her speaks from the date of its rendition, on the 10th of May, 1898. It therefore has priority over the judgment in the name of Kendrick against Ashworth, which was rendered on the 10th day of June, 1898.

Among the judgments reported is one in favor of the National Mutual Building & Loan Association against M. J. Ashworth for \$210.91, with interest from July 18, 1895. The exception with respect to this judgment is to the allowance of interest upon it. The principal of the judgment is for the costs adjudged against M. J. Ashworth in this court, and we are of opinion that it was error to allow interest upon it.

Said Judge Roane in *McRea v. Brown*, 2 Munf. 46: "The general principle is that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, as an increase of damages by the court. This doctrine is to be found in 3 Blackstone's Com. 399. I presume it was on the ground of this general principle that this court reversed the judgment in the case of *Hudson v. Johnson*, which gave damages on the costs, for, as costs are in the nature of damages, and damages and interest are considered in some sense as the same, it might seem that the judgment gave, in effect, interest upon interest, or compound interest, which has been always highly discountenanced by the courts and the Legislature."

In *Baum v. Reed*, 74 Pa. 322, Justice Agnew, of the Supreme Court of Pennsylvania, said: "It is certainly the settled general rule in this state that costs do not bear interest. The best evidence of this is the universal practice of indorsing executions. On the *fi. fa.* or other writ the debt is stated, followed by the date from which interest is to be computed, and then come the costs, without date of interest. Such is the mode of indorsement, no matter how many years have elapsed from the entry of the judgment. Even after a revival of the judgment the same practice is pursued; the first costs being marked as on the original, and the second as on the *scire facias*."

There are cases in which interest will be allowed upon costs. An instance of this kind will be found in *Shipman v. Fletcher's Adm'r*, 95 Va. 585, 29 S. E. 325. But under the circumstances of this case, we are of opinion that interest should not have been computed.

The decree appealed from does not, in terms, give the defendant a day in which to pay the sums decreed against her, but directs the property to be sold. At the instance of the defendants, however, the operation of this decree was suspended for 60 days to al-

low them time to present a petition for an appeal. Doubtless, if they had asked for a suspension, in order that they might have opportunity to raise the money and pay the debts, it would have been gladly afforded the defendants, and would have obviated the necessity for the suspension granted them in order to make application to this court. The court might well have thought that, having suspended the operation of the decree for 60 days, it was unnecessary to say that the defendant might within the 60 days pay the debt. The effect was the same. The decree during the time of its suspension remained a dead letter, and, whether given in the one form or the other, gave to the defendant the same benefit and afforded her the same opportunity to satisfy the demands of her creditors, and to obviate the necessity for a sale. To reverse the decree upon this ground would indeed be to stick in the bark.

As we have discovered no error in the decree appealed from, except with respect to the allowance of interest upon the judgment for costs, we shall amend it in that respect; and, it appearing that the appellees have substantially prevailed in this court, the decree will be affirmed, with costs.

(102 Va. 896)

HENINGER v. PEERY et al.

(Supreme Court of Appeals of Virginia. June 23, 1904.)

HIGHWAYS — ESTABLISHMENT — OBJECTION — BURDEN OF PROOF — COMPENSATION TO LANDOWNER — DAMAGES.

1. Where landowners are summoned under Code 1887, § 949, relative to the establishment of public roads, and providing that, on the favorable report of the viewers, if the court be in favor of establishing the road, it shall award process to summon proprietors to show cause against the establishment of the road, the burden of proof is on the landowners to overcome the *prima facie* case made by the report of the viewers.

2. Where, on proceedings for the establishment of a public road, it appears that it will be free and common to all citizens, it is a public road, notwithstanding it will be a greater benefit to the applicant than to the public generally.

3. Under Code 1887, § 1078, relative to the establishment of public roads, and providing that a landowner whose land is taken shall receive compensation for the land taken, and for the damage to the residue beyond the peculiar benefits to be derived in respect to the residue, the benefits are to be confined to such as are direct and peculiar to the landowner, as distinguished from those benefits shared by him in common with other citizens.

4. Code 1887, § 1078, provides that, on the laying out of a public road, a landowner whose land is condemned shall receive just compensation for the land taken, and for the damage to the residue of the tract beyond the peculiar benefits to be derived in respect to such residue. *Held*, that where the object of a road over the lands of an individual was to enable others to reach mountain lands for grazing purposes, and the road extended no farther than the grazing

lands, and afforded the landowner no outlet in that direction, and the necessities of his own land were already provided for by a private road, the allowance to him of damages in a sum not sufficient to enable him to protect his property by the erection of fences along the sides of the public road—he having, over his protest, been subjected to the inconvenience of a pent or gated road—was erroneous.

Error to Circuit Court, Bland County.

Proceedings instituted by Thomas E. Peery and others for the establishment of a public road through the lands of Samuel T. Heninger. A judgment of the circuit court affirmed an order of the county court establishing the road, and Heninger brings error. Reversed.

S. W. Williams and J. H. Fulton, for plaintiff in error. A. A. Phlegar, for defendants in error.

WHITTLE, J. This is a writ of error and supersedeas to an order of the circuit court of Bland county affirming an order of the county court of that county establishing a public road through the lands of plaintiff in error, Samuel T. Heninger.

It appears that the defendant in error Thomas E. Peery, one of the original applicants for the road, is the owner of 822 acres of land on Chestnut Ridge, in that county, which, with several adjoining tracts, is entirely isolated from any public road; the proprietors being dependent upon the sufferance of other landowners for ingress and egress to and from their respective properties. Peery had been accustomed to drive his cattle over the lands of Heninger to his own land, but in the year 1898 the latter prosecuted, and procured a fine to be imposed upon, an employé of Peery for trespassing upon his premises in the manner indicated. Thereupon Peery and others, who were thus debarred from the only practicable approach to their lands, instituted these proceedings for the establishment of the road in controversy. Viewers were appointed from time to time, all of whom reported favorably to opening the proposed road; but, with the exception of the last report, approved and confirmed by the order complained of, all these reports were quashed.

From the confirmed report it appears that the road will extend 568¾ poles through the lands of Heninger, 208¼ poles of which distance is traversed by a private road constructed and maintained by him for his own convenience and at his own expense. The viewers further report that if the road should be established as provided by statute—that is to say, 30 feet wide and without gates—Heninger would, in their judgment, be damaged to the amount of \$250, but that a road 15 feet wide, with gates at all necessary points, would meet the present necessities of the public as well as the applicants; and, if such a road or gated way be established, the

damage to Heninger would, in their judgment, be \$100, for the land taken and necessary gates, but that the remainder of the land would not be damaged in excess of the benefits accruing to Heninger from the establishment of the road.

While a number of errors are alleged in the proceeding, the three following are all that the court deems it necessary to notice:

1. The first assignment is to the action of the trial court in requiring Heninger to introduce his evidence in the first instance.

It is a rule of practice of universal application that the litigant upon whom the burden of proof rests must open the evidence. In this case the report of the viewers had satisfied the court that the road ought to be established, unless cause was shown to the contrary; otherwise it would have been unnecessary to summon the landowners, as provided by section 949 of the Code of 1887. By express terms of the statute, the contestant is summoned to show cause against the report; and, if none be shown, and no evidence is adduced, nothing further remains for the applicant to do, and the report is confirmed and the road established. This necessarily brings the contestant within the influence of the rule adverted to, and casts upon him the burden of overcoming by satisfactory proof the prima facie case made by the adverse report of the viewers. The question is controlled by the case of Mitchell v. Thornton, 21 Grat. 104. See, also, Cranford Paving Co. v. Baum, 97 Va. 503, 24 S. E. 906. The first assignment is therefore without merit.

2. Upon the second assignment it is contended that the case involves the condemnation of private property for private use, which, of course, is not permissible.

The circumstance that the road will be of greater benefit to the applicants than to the public generally is not the criterion in such case. Indeed, that fact might be affirmed of all mere "neighborhood roads." "The test is not simply how many do actually use them, but how many may have a free and unrestricted right in common to use them." Elliott on Roads & Streets, § 192. "If it is free and common to all citizens, then, no matter whether it is or is not of great length, or whether it leads to or from a city, village, or hamlet, or whether it is much or little used, it is a public road." Id. § 11.

As was said in Lewis v. Washington, 5 Grat. 265: "No limitation to the power of the county court to establish a road is to be found in the degree of accommodation which it may afford to the public at large. That is a matter which addresses itself, not to the authority, but the discretion, of the court."

A cognate question to the one involved has recently received the consideration of this court in the case of Zircle v. Southern Ry. Co., 102 Va. —, 45 S. E. 802.

3. The third and last assignment assails

the report on the grounds that the compensation allowed the contestant is inadequate, and the method of arriving at the amount fixed was illegal.

Under the Virginia statute two elements enter into the question of remuneration to a party whose private property is condemned for a public road, namely, just compensation for the land actually taken, and also a fair recompense for damage to the residue of the tract beyond the peculiar benefits to be derived in respect to the residue of the land from the road to be established. Va. Code 1887, § 1078. But the benefits contemplated by the statute to be considered in reduction of damages in condemnation proceedings are confined to such as are direct and peculiar to the owner of the land, as distinguished from those which are shared by him in common with other citizens. *Mitchell v. Thornton*, supra; *Ry. Co. v. Foreman*, 24 W. Va. 673.

Subjected to that test, it is apparent from a careful consideration of the record that Heninger has not received adequate compensation for the injury that will be inflicted upon him by the sequestration of his property for public use. The object of the road is to enable Peery and others to reach their mountain lands, chiefly for grazing purposes. The road extends no farther, and affords no outlet to Heninger in that direction. The necessities of his own land are already provided for by the private road. So far, therefore, from deriving peculiar benefits from the establishment of the proposed road, it is ob-

vious that it must entail upon him serious injury and inconvenience. Confessedly, he has not been allowed a sum sufficient to enable him to protect his property by the erection of fences along the sides of the public road, but, over his protest, he has been subjected to the inconvenience of a pent or gated road (a perpetual menace to the security of his crops and stock), and has been improved out of all compensation in damages for the infliction of this manifest injury to his property upon the erroneous and unsustained theory that he will be the recipient of direct and peculiar benefits from the construction of the road. The court recognizes the expediency and wisdom of the rule that great weight is to be allowed to the report of the commissioners to assess damages in condemnation proceedings. *Cranford Paving Co. v. Baum*, supra. Nevertheless, where it plainly appears that the report is based upon a false premise, and the commissioners have omitted an essential element affecting the amount of compensation to which the landowner is entitled, it will not hesitate to quash the report for that reason, and appoint a new commission to reassess the damages.

The report in the case in judgment is amenable to the objection indicated, and on that ground the order confirming it is erroneous, and must be reversed and annulled, and the case remanded to the circuit court of Bland county for further proceedings to be had therein not in conflict with this opinion.

MEMORANDUM DECISIONS.

CRUMLEY v. STATE. (Supreme Court of Georgia. May 10, 1904.) Error from City Court of Americus; C. R. Crisp, Judge. James Crumley was convicted of a crime, and brings error. Affirmed. J. R. Williams, for plaintiff in error. J. A. Ausley, Jr., Sol., for the State.

EVANS, J. No error of law is alleged to have been committed, and the evidence was sufficient to authorize the verdict, which is approved by the trial judge. The judgment overruling the motion for a new trial is affirmed. All the Justices concurring.

(135 N. C. 230)

BATTERY PARK BANK v. MADISON COUNTY COM'RS. (Supreme Court of North Carolina. May 3, 1904.) Appeal from Superior Court, Madison County; E. B. Jones, Judge. Action by the Battery Park Bank against the commissioners of Madison county. From a judgment for plaintiff, defendants appeal. Reversed. T. S. Rollins and Gudger & McElroy, for appellants. Frank Carter and H. C. Chedester, for appellee.

CLARK, C. J. The facts in this case are substantially the same as in *Jones v. Commissioners*, 47 S. E. 753; the only difference being that the plaintiff here alleges that he holds \$722 of the scrip issued by the county for necessary expenses, and for which he wishes county bonds, and in *Jones v. Commissioners* the plaintiff held bonds which are not yet due, but which he wished refunded in new bonds. Whatever distinction this may make in the rights of the plaintiff, if any, our decision in *Jones v. Commissioners* is not based upon such difference, but upon the fact that chapter 289, Laws 1903, is not mandatory, and places the issuance of bonds in the discretion of the board of county commissioners, who are merely "authorized and empowered" to make such issue. For the reasons given in that case, the judgment herein, which peremptorily orders bonds issued to the plaintiff, is likewise reversed.

CONNOR, J. (dissenting). This is a controversy submitted without action, under section 567 of the Code, upon an agreed state of facts. The plaintiff is a corporation. The county of Madison is indebted to divers and sundry persons, including the plaintiff, in a sum aggregating \$70,000 or thereabouts, as nearly as the parties can ascertain, said indebtedness consisting (1) of bonds of said county issued under and by virtue of chapter 398, p. 696, Pub. Laws 1887, and not yet due, amounting to \$25,000 or thereabout, and (2) of the present floating debt of said county, incurred for the necessary expenses thereof prior to January 1, 1903, all of which is past due and bears interest at the rate of 6 per cent. per annum, amounting to about \$45,000; this last-named item including an indebtedness to the plaintiff of \$722.93, as nearly as the parties can ascertain, of which sum \$500 is principal, and bears interest from the date hereof until paid at the rate of 6 per cent. per annum. The aforesaid debt and claim of the plaintiff against said county has been duly presented to and passed upon by the special board of audit created by section 7, c. 289, Pub. Laws 1903, and by said board has been duly proved, declared, and reported to be a valid, subsisting obligation of said county, and to be past due, and to have been contracted for the necessary expenses of said county prior to January 1,

1903. The General Assembly of North Carolina at its session of 1903 passed an act entitled "An act to liquidate and settle the outstanding indebtedness of Madison county, and to authorize the issue of a series of bonds for the purpose of paying off the floating debt, old bonds, etc., contracted for the necessary expenses of said county." Pub. Laws 1903, p. 490, c. 289. At a special session held on April 20, 1903, the defendant board of commissioners made the following order, as the same appears on the minutes of said board: "Whereas, the General Assembly of North Carolina for the year 1903 passed an act authorizing the board of commissioners of Madison county to issue bonds in an amount not exceeding \$75,000 to pay off all the debt of said county contracted prior to the first day of January, 1903, for the necessary expenses of said county: Therefore be it resolved by the board that this county issue its bonds to an amount sufficient to pay off the said debt, not to exceed \$75,000, and to issue the amount audited as found by the auditing board. It is further ordered that notice be issued to all creditors of said county to present their claims for audit before said board of audit authorized by said act, on the 28th day of May, 1903, so that the same may be passed upon as required by said act; thirty days' notice to be given of the time and place of meeting of said board of audit." Thereafter, to wit, at their regular meeting in May, 1903, the said defendant board of commissioners made the following order, as the same appears on the minutes of said board: "Ordered by the board that the order made at its called session of April 20, 1903, authorizing the issue of bonds, be, and the same is hereby, revoked; and it is further ordered that no bonds be issued under the recent bonding act passed by the last Legislature relative to Madison county." The plaintiff has demanded of the defendants that they issue the bonds authorized by the above-recited act of 1903, and place the same in the hands of the treasurer of said county, pursuant to the provisions of said act, which the said defendants have failed and refused to do. The court, upon the foregoing state of facts, ordered and adjudged that the defendant board of commissioners and W. L. George, chairman of said board, and V. B. Davis, register of deeds, execute and issue the bonds of said county authorized by the said act, in accordance with the terms and provisions of said act of 1903, and that said bonds be delivered to the treasurer of Madison county to be held and disposed of, and the proceeds thereof applied by him in the manner and for the purposes declared, defined, and specified in the said act, and that a peremptory writ of mandamus be issued to that end. From this judgment the defendants appealed.

The preamble of chapter 289, p. 490, Laws 1903, is as follows: "The General Assembly of North Carolina do enact: Whereas, by an act of the General Assembly of North Carolina, Public Laws 1887, chapter 398, hereinafter referred to, the commissioners of Madison county were authorized to issue the bonds of the county, not to exceed the sum of \$25,000, bearing interest at 6 per cent. payable semiannually, and in conformity with the said act, the board of commissioners of Madison county issued the bonds of the said county, amounting in all to \$21,000, with coupons attached; and whereas, the said bonds are now an outstanding indebtedness against said county, and the said county will

not be able to pay the principal of the same at maturity; and whereas, it is to the best interest of the taxpayers of the said county that the said bonds shall be renewed, before their maturity, by refunding the same at a lower rate of interest than 6 per cent., and also that the present floating debt of the said county, incurred for the necessary expenses thereof prior to the first day of January, 1903, together with all accrued interest due at the date of payment or refunding, be liquidated and funded by issuing a new series of bonds to cover the same and to embrace the entire debt of said county incurred for the necessary expenses, as it existed on January 1, 1903, with the interest thereafter accruing." It is thereupon enacted that the board of commissioners "are hereby authorized and empowered to issue coupon bonds," etc., "that said bonds become payable on the 1st day of June, 1903, and bear interest at the rate of 5 per cent., payable semiannually, and that they be issued only to liquidate outstanding bonds and for the necessary expenses of said county incurred prior to January 1, 1903, with accumulated interest." Provision is then made for the form of said bonds, and authority given to levy a special tax to pay the interest and principal when the same become due. By section 7 of said act a special board of audit is created to scrutinize, examine, and adjust, and report to the said board, all bonds, claims, and debts contracted by the said county prior to January 1, 1903, which are still outstanding, unsettled, and unliquidated. Said board is required to report to the county board of commissioners all such claims, bonds, etc., as shall be audited and allowed by them. The findings of the board of audit are made conclusive in regard to the purpose for which the said bond was issued or debt contracted. Section 9 of said act provides that immediately after its ratification the chairman of the board of commissioners shall advertise in some newspaper published in the county of Madison, and at the courthouse door in said county, for 30 days, the place and time when and where the said board of audit shall sit, and require all persons holding debts against said county incurred prior to January 1, 1903, to present the same before said board of audit. The board of commissioners are authorized to retire all of the outstanding bonds issued under chapter 398, p. 696, Pub. Laws 1887, with the interest due thereon, at their par value, and pay off and discharge all of the outstanding indebtedness of the said county incurred for the necessary expenses thereof prior to January 1, 1903, as herein provided, by selling so many of the bonds issued under this act as may be necessary for such purpose, and by applying the proceeds thereof to the liquidation of such bonds so retired and of such debts. Said bonds shall sell for not less than their par value. It is made the duty of the board of commissioners to place the bonds, when issued, in the hands of the treasurer of the county, whose duty it shall be to sell the same and to place the proceeds as set out in the act. It is further provided that if any creditor of said county, whose debts or claims come within the meaning of this act, or any holder of any bonds of said county, shall desire to exchange his bonds, coupons, or other evidence of said indebtedness, it shall be the duty of said commissioners to pay off the said creditors and liquidate the said indebtedness in the bonds authorized by this act, exchanging said bonds at their par value and canceling the evidences of indebtedness taken in lieu thereof. All of the bonds issued under this act shall be exempt from county and municipal taxation. Provision is then made for the special taxes provided for. It is further provided that if any officer of the county shall apply the proceeds of any bonds issued under this act, or exchange any such in any other manner or for any other purpose, or shall issue any more of the bonds than shall be necessary for the spe-

cific purposes of this act, or shall fail and refuse to perform the duties imposed upon him by the provisions of this act, he shall be guilty of a felony. By section 19 it is enacted that, if the bonds are issued, the board of commissioners of the county shall not levy a specific tax, as authorized by section 8, c. 822, p. 469, Laws 1901, but shall levy a tax on property and polls to pay the interest on the bonds, etc.

After careful consideration and examination of this record, and of the authorities cited by the counsel and my own investigation, I am constrained to differ from the majority of the court in the conclusion reached by them. I would be content to express my dissent, without saying more; but the reasoning upon which the judgment of the court is based is so variant from my views, and, as I think, with all possible deference, from sound legal principles and authority, that it seems proper and becoming to set forth the result of my thoughts and investigation upon the very important questions involved. To my mind the principles underlying the decision of the case are of vital importance in the administration of our state and county government. My strong convictions upon the subject must be my excuse for incumbering the record with my dissent. The questions presented by the record may be stated as follows: (1) Does chapter 289, p. 490, of the Acts of 1903 impose upon the defendant board of commissioners the duty to issue the bonds and dispose of the proceeds, when sold, as directed by the terms of the statute? (2) If so, is it within the power of the Legislature to impose such duty and to make its performance mandatory? (3) Will the court by mandamus compel the performance of such duty? The plaintiff maintains that an affirmative answer should be given to each of these questions, and its claim for relief is based upon this contention. That the questions may be considered free from complications, it will be well to keep in view the admitted and essential facts as they appear in the record. The indebtedness of Madison county, which is included in the provisions of the act, may for the purpose of this discussion be thus classified: (1) The bonds issued pursuant to the act of 1887, maturing in 1907; (2) the accrued and past-due interest on said bonds; (3) the present floating debt incurred for the necessary expenses of said county prior to January 1, 1903, and past due. The plaintiff's debt falls within the third class. It will be observed that by section 7 of the act a special board of audit is created, the members thereof named, and its duties prescribed. Neither the existence of this board nor its procedure is dependent upon any action of the defendant board of commissioners. On May 30, 1903, the special board, in strict compliance with the provisions of the statute, met, and the plaintiff's claim, together with others, was "presented, proved, and allowed." It was also ascertained and declared by the said board that the plaintiff's claim was "for the necessary expenses of the county incurred prior to January 1, 1903." The action of the board was duly reported to the defendant board of commissioners, as prescribed by the act. Demand has been made by the plaintiff that the bonds be issued and other proceedings had as provided by the statute. Thus we have fixed by admission of the defendant a valid indebtedness, incurred for the necessary expenses of the county, etc.

Has the Legislature commanded the payment of this debt by the means prescribed by the statute, or has it left to the discretion of the commissioners the payment of the said debt in the manner directed? The defendant says that the language of the statute is permissive, and not mandatory; that the words "hereby authorized and empowered to issue the bonds," etc., exclude the idea that it was the purpose of the Legislature to impose any duty or to require the

issuance of the bonds, unless in the exercise of their discretion the defendant commissioners see fit to do so. The principle by which the courts have been guided in construing statutes containing the terms used by the Legislature, or other terms of similar import, was first announced in *Rex v. Barlow*, 2 Salk. 609, which the case states was an "indictment on St. 14 Car. II, c. 12, against church wardens and overseers for not making a rate to reimburse the constables. Exception was taken that the statute only puts it in their power to do so by the word 'may,' but does not require the doing of it as a duty, for the omission of which they are punishable. Sed non allocatur; for where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'; thus St. 23 Hen. VI, says the sheriff may take bail; this is construed he 'shall.'" This case has been cited as authority, and the principle announced uniformly approved. In *King v. Inhabitants of Derby*, Skinner, 370, the report of the case is as follows: "Moved to quash the indictment against divers inhabitants in Derby for refusing to meet and make a rate upon the several parishes in Derby, to pay the constables' tax, first, because they are not compellable, but the statute only says that they 'may,' so they have their election, and no coercion shall be. Non allocatur; for 'may,' in the case of a public officer, is tantamount to 'shall,' and if he does not do it he shall be punished upon an information, and though he may be commanded by a writ, this is but in aggravation of his contempt." In *Regina v. Tithe Commissioners*, 14 Q. B. 459, Mr. Justice Coleridge, construing an act conferring power on the defendant, says: "The words undoubtedly are only empowering, but it has been so often decided as to become an axiom that in public statutes words only directory, permissive, or enabling may have a compulsory force when the thing to be done is for the public benefit or in advancement of public justice." "Permissive words in respect of courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised. Such words, when used in a statute, will be construed as mandatory for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its character. They are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third persons." *Sutherland on Statutory Construction*, 597. The principle is thus stated in *Endlich on Int. of St.* § 311: "There is, therefore, abundant authority for the proposition that such powers as are here under consideration are invariably imperative, and that it is the duty of those to whom they are intrusted to exercise them whenever the occasion contemplated by the Legislature arises; and having regard to this implied duty, the enabling or facultative terms in which the power may be couched, such as 'it shall be lawful,' are to be regarded merely as the usual mode of giving a direction, as importing that it shall not be lawful to do otherwise than as directed." *McCrory*, Circuit Judge, in *Ralston v. Crittenden*, 13 Fed. 508, thus states the rule of construction: "Even if the terms of a statute are permissive only, and mean no more than the words generally employed in statutes importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are construed as mandatory, whenever the public interests or individual rights call for the exercise of the power conferred." In *Supervisors v. U. S.*, 4 Wall. 435, 18 L. Ed. 419, the language of the act was: "May, if deemed advisable, levy a special tax," etc. *Swayne, J.*, says: "The counsel for the respondent insists with zeal and ability that

the authority thus given involves no duty, that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject." The judge cites the English cases and concludes: "These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries. * * * The conclusion to be adduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interests or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demand of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless. In all such cases, it is held that the intent of a Legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'" In *Galena v. Amy*, 72 U. S. 705, 18 L. Ed. 560, the charter provided that the city council "may, if the said city council believe that the public good and best interests of the city require, annually collect a tax," etc., "for the payment of the funded debt of the city," etc., and the court said that "this power has not been exercised by the city authorities and they have made no other provision for liquidating the debts due to the relator. They have no other means of payment in possession or prospect. * * * The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. In such cases, the power is in the nature of a trust for his benefit, and it was the plain duty of the court below to give him the remedy for which he asked, by awarding a peremptory writ to compel the imposition of the tax." In *People v. Supervisors*, 51 N. Y. 401, the board of supervisors were "authorized and empowered" to hear and determine certain claims against the county and to provide for their payment. *Earle, J.*, says that "the first question to be determined is whether this act was merely permissive or mandatory to the board of supervisors. * * * This relief would be quite illusory, if it were left to the absolute discretion of the board of supervisors of any county to refund the taxes or not, as they might see fit. * * * The purpose of the act, as well as the simplest justice, requires that we should hold that it is mandatory upon the respective boards of supervisors, unless there is something in the plain language used that forbids such a construction. The words 'authorized and empowered' are usually words of permission merely, and generally have that sense when used in contracts and private affairs; but, when used in statutes, they are frequently mandatory and imperative." After examining the cases he says: "These authorities are abundant to show that the language used in the act under consideration must be construed to be imperative." In *People v. Supervisors*, 68 N. Y. 114, the language of the statute was "that the said board 'may in their discretion' cause the tax to be levied." The same learned justice, speaking of the right of the creditor, says: "He has rendered a service for the public, for which he expects to be paid, and for which he ought to be paid, either by the town or the county. * * * Under such circumstances he goes to the Legislature, and it, knowing, as we are bound to believe, the facts, passes an act for his relief. The relief might be quite illusory if it was intended to

leave it to the debtors to say whether they would pay or not. No act was necessary to enable the supervisors to pay for this bridge if they were willing to. * * * Hence it cannot be supposed that it was the intention of the Legislature simply to confer a permissive authority to do what they could do without the act, if willing. * * * Here was something directed to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'shall.' See, also, *Siford v. Morrison*, 63 Md. 14. *Smith, C. J.*, in *Johnston v. Pate*, 95 N. C. 68, says: "The term 'may' is often construed as mandatory when the statute is intended to give relief"—citing *Rex v. Barlow*, supra, and *Mason v. Pearson*, 9 How. 248, 13 L. Ed. 125, in which Mr. Justice Woodbury said: "Without going into more details, these cases fully sustain the doctrine that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do." Upon the foregoing unbroken line of authorities, which, if necessary, might be extended to almost every jurisdiction in the Union, it is clear that the language of this statute should be construed as mandatory. In the preamble of the act, the conditions existing in respect to the indebtedness of Madison county are recited, which are admitted in this record to be true. We have a debt contracted for the necessary expenses of the county, which it was the duty of the defendant commissioners to pay. The payment of this debt was demanded by every possible consideration. Public justice, the interests of the people of the county, and the rights of the creditor combine to demand relief. With all deference to the majority of the court, I think no stronger case could be presented for the application of the principle which has been recognized as controlling the courts of England and America.

It must be conceded that the second question presented by the appeal is more difficult of solution. I cannot think that it should be answered by the suggestion that the power is not vested in the Legislature, for that, "if the Legislature had this power, a casual majority could practically confiscate all property in any county by directing the issue by counties named in the respective acts of large amounts of bonds and at an excessively high rate of interest, regardless of the wishes of the taxpayers of such county." It is not necessary to cite authority to show that the Legislature has no power to compel or authorize a county to issue a single bond "regardless of the wishes of the taxpayers," except for necessary expenses. *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554. What constitute "necessary expenses" has been very clearly defined by this court. It is not easy to perceive how, in the light of the constitutional restrictions as construed by this court, the recognition of the power asserted in this act can bring about such disaster to the people. I most respectfully, but firmly, dissent from a canon of construction of the Constitution based upon the apprehension that the chosen representatives of the people of this state may not be trusted to discharge the duty imposed upon them by the Constitution, or be loyal to the trust reposed in them. We must look to the Constitution alone to find what powers are granted by the people to their agents. If the asserted power is granted, we may not, without doing violence to that instrument, prevent its exercise by indulging in grave apprehensions that it may be abused. The courts may declare what power they have granted, but they will hold their agents responsible for the manner in which it is exercised. The language of *Black, C. J.*, in *Sharpless v. Mayor*, 21 Pa. 147, 59 Am. Dec. 759, must commend itself to the heartiest approval: "The great powers given to the Legislature are liable to be abused. But this is in-

separable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to its true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours, the people have given large powers to the Legislature, and relied for faithful execution of them on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy than to imagine a thousand tyrannical things which the Legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. * * * I am thoroughly convinced that the words of the Constitution furnish the only test to determine the validity of a statute, and that all arguments based on general principles outside of the Constitution must be addressed to the people, and not to us." Mr. Justice Iredell, to whose wise foresight and clear conception of the principles of constitutional law and limitations we owe a debt of gratitude, said: "If a state Legislature shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice." In *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, Judge Baldwin said: "We may think the power conferred by the Constitution of this state too great or dangerous to the rights of the people, and that limitations are necessary, but we cannot fix them. * * * We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the people of the state, unless they are secured by some constitutional provision which comes within our judicial cognizance." *Bennett v. Boggs*, 1 Baldw. 74, Fed. Cas. No. 1,319. *Nash, C. J.*, in *Taylor v. Commissioners*, 55 N. C. 144, 64 Am. Dec. 506, said: "Whether the Legislature acted wisely or not is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it. That must be for the legislative consideration. It is sufficient that the judiciary claim to sit in judgment upon the constitutional power of the Legislature to act in a given case. It would be rank usurpation for us to inquire into the wisdom or propriety of the act." *Brodnax v. Groom*, 64 N. C. 244; *Harries v. Wright*, 121 N. C. 172, 28 S. E. 269. In *Norwich v. Com'rs*, 13 Pick. 60, *Shaw, C. J.*, says: "It will not throw much light on a question like this to put extreme cases of the abuse of the power to test the existence of the power itself." *Pearson, C. J.*, in *Brodnax v. Groom*, supra. Certainly neither of these great judges can be suspected of entertaining views dangerous to the reserved rights of the people, or sustaining the assertion of doubtful powers by either department of the government. While we should guard with jealous care the right of local self-government, and find no power to impose burdens by way of taxation or otherwise upon the people, except when they have conferred it, we should at the same time be slow, save when our vision is clear, to set aside acts of the General Assembly. Again invoking the words of Judge Black: "We can declare an act of Assembly void only when it violates the Constitution clearly, palpably, and plainly, and in such manner as to leave no doubt or hesitation in our minds."

If I were permitted to speak my mind regarding the policy, wisdom, and justice of the act

under consideration, I would find no difficulty in declaring that upon the admitted facts in this record the statute is wise, just, and promotive of the best and highest interests of the people of Madison county. Mr. Justice Montgomery in *Smathers v. Commissioners*, supra, says: "The county of Madison was indebted to various persons, the consideration being the necessary expenses of the county already incurred, and being unable to pay the same, and at the same time to conduct the ordinary business affairs of the county with its resources, obtainable through the taxes up to the full constitutional limitation," etc. This was said upon a record coming to this court in 1899 in regard to a part of the indebtedness referred to in the act of 1903. The history of the struggle with the indebtedness by the people of the county, as appears from the records of this court and the acts of the Legislature, shows that, unless in the way provided in this act they may care for their indebtedness and have time within which to pay it, the county will soon be bankrupt and unable to discharge its duties, powers, and functions as a part of the government of the state. There is no suggestion that these debts may be paid from any other resources than taxation. That they must be paid is beyond controversy. But the answer to the question presented for our decision must be found in the Constitution of the state, and not by considerations of this character. This court, by its Chief Justice, said, in *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787: "Under our form of government the sovereign power resides with the people, and is exercised by their representatives in the General Assembly. The only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled from time to time." What, under our system of administrative government, are the relations of the General Assembly to the several counties of the state? and to what extent may the former control the administration of the latter? are interesting questions. It will be well to avoid the use of the term 'municipal corporation,' because there exist important distinctions between towns, cities, and villages, which come strictly within that term, and counties, which are sometimes called 'quasi municipal corporations,' but are, strictly speaking, neither. *Dillon*, Mun. Corp. §§ 22, 23; *Moffitt v. Asheville*, 103 N. C. 249, 9 S. E. 695, 14 Am. St. Rep. 810. Const. art. 7, provides for the division and government of counties, etc.; and section 14 confers upon the General Assembly the power by statute to modify, change, or abrogate any and all of the provisions of the said article, and substitute others in their places (except certain sections not affecting the question under discussion). The history of the state since 1876 shows that the General Assembly, at its first session after the ratification of the Constitution, did repeal each section (save the ones excepted), and substitute others essentially different. Acts 1876-77, p. 226, c. 141. Many other changes equally as radical have been made from time to time, and this court has recognized the absolute power of the Legislature to do so. *Harris v. Wright*, supra. The court said: "Thus was placed at the will and discretion of the Assembly the political branch of the state government, the election of county officers, the duty of commissioners, the division of counties into districts," etc. The power of the Legislature to establish, change, and abolish counties is declared by this court in *Mills v. Williams*, 33 N. C. 558. *Pearson, J.*, speaking of different kinds of corporations, says: "The division of the state into counties is an instance of the former. There is no contract, no party of the second part; but the sovereign, for the better government and management of the whole, chooses to make the division in the same way that a farmer divides his plantation off into

fields and makes cross fences when he chooses. The sovereign has the same right to change the limits of counties," etc. This court has always held that counties are not liable to an action for damages for injuries sustained by a defective bridge or other parts of a highway, whereas a city or town is liable to such action. The reason upon which this distinction is based is manifest. In *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534, *Merrimon, J.*, discusses at length the relation which the counties bear to the state, and says: "They are subdivisions of its territory, embracing the people who inhabit the same, created by the sovereign authority, and organized for political and civil purposes. They are created by the sovereign, without any special regard for, or the solicitation, consent, or desire of, the people who reside in them," etc. They are not liable to be sued, unless the Legislature by statute gives a right of action. In *Manuel v. Commissioners*, 98 N. C. 9, 3 S. E. 829, it was held that, in the absence of any statutory provision, they were not liable to be sued for negligence of their servants or agents, as for damages sustained by one confined in the county jail. It is said that "counties are of, and constitute a part of, the state government. * * * They are in their general nature governmental, mere instrumentalities of government, and possess corporate powers adapted to their purposes." The distinction between the status and liability of towns and counties is illustrated in *Lewis v. Raleigh*, 77 N. C. 229. In *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352, this court, discussing the authority and power of the General Assembly to command the commissioners of a county in respect to discharging the duties imposed as a part of the state government, said: "The defendants contend that the act is unconstitutional (1) because, while the Legislature may authorize and empower the county commissioners to levy the special tax for a special purpose, it cannot direct or order them to do so. This contention is unfounded. Counties are but agencies of the state government. * * * They are subject to legislative authority, which can direct them to do as a duty all such duties as they can empower them to do." See, also, *Wallace v. Trustees*, 84 N. C. 164. The question is exhaustively and ably discussed by *Brinkerhoff, J.*, in *Commissioners v. Mighels*, 7 Ohio St. 109. He says: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration in matters of finance, of education, or provision for the poor, and especially for the administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy."

It is undoubtedly competent for the Legislature to make the people of a county liable for the official delinquencies of the county commissioners, and, if they think it wise and just, without any power in the people to control the acts of the commissioners or to exact indemnity from them. In *Dennis v. Maynard*, 15 Ill. 477, it is said that "the state does not allow itself to be sued, but it may hear, investigate, and determine its own indebtedness, and assume the debts to and from others; so it may direct the county authorities to ascertain and allow just claims upon the public treasury, or may ascertain and fix that amount, and direct a raising of means by taxation for its payment. The public county and township funds are under legislative control. * * * These local municipal corporations are created for convenience in the police arrangements, but

their powers and duties remain subject to the legislative will through the legislative body." The identical question involved in this case came before the Supreme Court of Nebraska in *Commissioners v. People*, 5 Neb. 127, in which it is said: "That Jefferson county is indebted to the relators for the amount of the warrants in question will not be controverted; and when such is the case there is no doubt of the power of the Legislature to require the county to issue its bonds for the amount of its indebtedness." In *Locomotive Co. v. Emigrant Co.*, 184 U. S. 559, 576, 17 Sup. Ct. 188, 193, 41 L. Ed. 552, Mr. Justice Harlan says: "The county of Calhoun is a mere political division of the state, created for the state's convenience, and to aid in carrying out within a limited territory the policy of the state. Its local government can have no will contrary to the will of the state, and it is subject to the paramount authority of the state in respect as well of its acts as of its property and revenue held for public purposes. The state made it, and could in its discretion unmake it, and administer such property through other instrumentalities." Taney, C. J., in *Maryland v. Baltimore & Ohio Railroad Co.*, 44 U. S. 534, 11 L. Ed. 714, says: "The several counties are nothing more than certain portions of territory in which the state is divided for the more convenient exercise of the powers of government. They form together one political body, in which the sovereignty resides." "The revenues of the county are not the property of the county, in the sense in which the revenues of a private corporation are, and the power of the Legislature to direct their application is plenary. The county being a public corporation, which exists only for public purposes connected with the administration of the state's government, it follows that such a corporation, and, of course, its revenues, are subject to the control of the Legislature." *New Orleans v. Water Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; *Smith, Mod. Law Mun. Corp.* § 756. "And, speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary in order to compel a municipal corporation or political division of the state to perform properly and justly any of its duties as an agency in state government, or to fulfill any obligations legally or equitably resting upon it in consequence of any corporate action, the state has ample power to direct and levy such compulsory taxation, and the people to be taxed have no absolute right to a voice in determining whether it shall be levied through their representatives in the Legislature of the state." *Cooley on Taxation* (3d Ed.) 1303.

Without further extending this opinion, I have reached the following conclusions: The state government having assumed the discharge of certain well-defined administrative duties in regard to opening and keeping in repair public highways and bridges, providing for the indigent, the insane, and other objects of her care, the administration of public justice through the courts, the punishment of crime, etc., involving the erection of courthouses, jails, and reformatories, has established, among other agencies for the better discharge of these duties and purposes of government, counties, and in a restricted sense chartered towns and cities, and committed to them, in the territory marked off, the duty of administering for the state these and such other necessary duties as may be assigned to them. For the purpose of enabling the state to discharge these governmental functions, the people in their Constitution have granted to the legislative department power to make all necessary laws, including the power to contract debts, levy taxes, etc., within, and controlled by, certain well-defined constitutional restrictions and limitations. This power may be exercised, either through agents selected by people of the entire state, or through

agents selected by the people within the territorial limits marked off and designated as counties. These agencies are required, for the purpose of carrying out the general policy of the state, to provide the necessary means. In doing so, they may contract debts for necessary expenses and, within the constitutional limit, pay the same out of the ordinary revenues. If they find it necessary to exceed such limit, they may, with the consent of the Legislature, levy taxes to pay debts contracted for such purposes. It seems to me that it is clearly within the power conferred upon the Legislature to impose upon the county officers, who are in a certain sense state officers, the duty of providing for the payment of the indebtedness contracted for necessary expenses, which is equivalent to saying expenses incurred in the discharge of their duties and powers in carrying out the general policy of the state and discharging its functions. If the Legislature may command the authorities to levy a special tax beyond the constitutional limit to pay such debts, I am at a loss to perceive why it may not command them, with the consent of the creditor, to make provision by issuing bonds with which to raise the money to pay them. If the Legislature may direct the Governor and Treasurer to issue the bonds of the state to pay the expenses of the penitentiary and asylums, both being state agencies, I cannot see why it may not, in the exercise of the power drawn from the same constitutional source, direct the counties to do so. With the policy or wisdom of the statute we have nothing to do. In *Edwards v. Commissioners*, 70 N. C. 571, *Reade, J.*, says: "But levying taxes is not the only way which the defendants have to meet the plaintiff's debt. A liberal construction of the statute upon which they rely enables them not only to give a creditor a bond for his debt, if he will take it and indulge the county, but, if he will not take it, then to raise money by the issue of bonds, and with the money so raised to pay off the debt." The manner in which the provision is to be made for paying the debt is entirely within the discretion of the Legislature. The people of the county are represented in an especial way by its own Senator and Representative; but as a part of the people of the entire state they are represented by all of the members. They must look to them to see that no harsh or unjust or oppressive burdens are put upon them. Within the orbit assigned them by the Constitution, they may act without interference or question by us.

If I am correct in my conclusions upon the question, the answer to the third must be conceded. When a duty not involving the exercise of a discretion is imposed upon a public officer, the power and duty of the courts to compel the performance of such duty by mandamus is clear. The Legislature prescribes the remedy; the courts enforce it. The power of the Legislature to establish boards of audit and other appropriate agencies to ascertain the amount of the debt and the consideration upon which it is based is not questioned. To what extent the commissioners are bound by its conclusions and excluded from litigating in the courts is not presented in this case, and I express no opinion in regard to it. I expressly refrain from expressing any opinion as to the power of the Legislature to compel, by a bond issue, the payment of a county debt contracted for any other purpose than necessary expenses. There are other questions presented upon an appeal before us in the case of *Jones v. Commissioners*, in regard to which I express no opinion here. My dissent is based upon the agreed facts in this record.

MONTGOMERY, J., concurs in the dissenting opinion.

WALKER, J. (concurring). The conclusion reached by the court in this case appears to me

to be right. Whether, under our system of government and the special provisions of the Constitution relating to counties, the Legislature has the power to compel a county to issue bonds for an existing indebtedness, either for the purpose of liquidating and renewing it or of paying it, is a very interesting and important question. In solving it, we should not rely too much upon the decisions in other states, as the solution may depend, to some extent, at least, upon the laws of the particular state in the courts of which the question is presented, and also upon a general consideration of the powers of the Legislature under the state Constitution. We would not be safe in saying that it should be settled upon principles of general law applicable to such cases, without taking into account any local provisions of law, or any peculiar constitution of our local system of government, by which those general principles may be modified. In the view taken by me of the case, it will not be necessary to express an opinion as to the power of the Legislature to require a county to pay its existing indebtedness by issuing bonds, or to exchange new bonds for those outstanding and not yet matured. It can be well seen how the exercise of such a power, if conceded, might work injustice, and by one of the elementary rules of construction and intention to exercise such a power, if injustice may ensue therefrom, should not be presumed, in the absence of a clear and explicit declaration to that effect, but, on the contrary, that meaning should be adopted which will avoid such a result. Black, *Int. of Laws*, pp. 87, 100, rules 41, 46. A careful reading of the act in question, and a consideration of it, not in detached portions, but in its entirety, convinces me that the Legislature intended to confer upon the commissioners merely a discretionary power, or, in other words, authority to issue the bonds, if in the exercise of their judgment they found it best for the interests of the people to do so. Why construe the act as a command to the commissioners to issue the bonds, when it had not been definitely determined, and could not well be, that the creditors would accept the new bonds, or even accept payment in money in advance of the maturity of the bonds held by them, and when they were not bound to accept either? Is it not more reasonable to infer that the legislative purpose was to give the commissioners power to act in the premises, as the situation might be presented to them and according to their best judgment? It would be strange, indeed, if the Legislature should peremptorily order bonds to be issued before it had been ascertained whether the commissioners would be able to execute the order. But the language of the act itself is sufficient to show that the Legislature did not intend its provisions to be mandatory. In the title of the act, and in every section where power to issue bonds is given, there is not a single word of command; but every expression used implies discretion, and in the concluding section, by the use of the words, "if the bonds authorized by this act are issued," it clearly appears that a discretion was left to the commissioners, because there could be no such doubt or contingency, as therein implied, if they were required to issue them, whether they thought it proper to do so or not. Those words cannot be considered as referring to the possibility of a refusal by the creditors to accept the bonds, for the commissioners are authorized in that event to sell the bonds and pay the matured indebtedness. Indeed, the provision is that all of the indebtedness, however evidenced, shall be paid with the proceeds of the sale of the bonds (section 10), the creditors having the option to take bonds, instead of money (section 11), and, if the creditor so elects, it is then made the duty of the commissioners to give him bonds at par to the amount of his claim and in liquidation thereof. There is an-

other view of the act which supports the construction that by it the commissioners have the right to decide whether bonds should be issued or not. In those sections which refer to the issuing of bonds, the words simply confer power and authority, and the same may be said of the title of the act; whereas, in the sections which provide for an exchange and settlement with the creditors after the bonds are issued, and which refer to the other duties to be performed under the act, the language is changed, so that the directions to the commissioners become positive and peremptory. It does seem to me that, if it was intended the provisions of the act should be mandatory, words more appropriate to express such an intention than those we find in the act would have been used. We derive little or no aid from decided cases in construing the act. We must examine the context in order to ascertain the meaning, and no two cases under the circumstances will be found to be alike. It is true the word "may" is sometimes construed as mandatory, when something is directed to be done for the sake of justice, or when the public interests or individual rights call for the exercise of the power conferred; but it is conceded that "the words 'authorized and empowered' are usually words of permission merely," and neither the word "may," nor the words "authorized and empowered," nor any other equivalent term, will be construed as imperative, if the context of the act shows that such was not the purpose. In the cases cited in support of the contrary view, the plaintiffs were attempting to enforce payment of their claims by a tax levy, and not by the issue of bonds, and to the relief sought by them they had an inherent right. It was really a part of the contract that the debts of the county should be paid in that way, and the legislation was merely in aid of the enforcement of this right. But creditors of this county have no right to receive bonds for their claims. That was no part of the contract. The law, when the original bonds were issued, provided how county debts should be paid—by taxation; and, if the Legislature had provided that a tax "may" be levied for the payment of the county's liabilities, the authorities cited would perhaps be applicable, and the courts could compel compliance with the requirements of the act, within the limits of taxation fixed by the Constitution. I do not think the cases relied on to show the plaintiffs' right to a mandamus will be found to conflict with the conclusion we have reached, if they are considered with reference to their special facts and the particular relief demanded. The words quoted from the case of *People v. Supervisors*, 68 N. Y. 114, namely, "that the said board may in their discretion cause the tax to be levied," when read with what precedes them, will be found to refer, not to a discretion to levy the tax, but to a discretion given to the supervisors of the county to decide whether the tax should be paid by the county or by the two towns specially benefited by the construction of the bridge, and they decided that it should be paid by the two towns. There was nothing in the way of paying the assessment upon the towns by taxation, and it was held that they should be compelled by mandamus to levy the necessary tax; and, so far as the ultimate question decided is concerned, the other cases cited are like that one. The principle of those cases is familiar; but it does not seem to me to have any bearing on our case, and should not affect the result. The reasons I have given are to my mind sufficient to support the conclusion of the court, and it is not, therefore, deemed necessary to discuss the other questions argued before us. It is fortunate that we have been able to reach a conclusion upon a consideration and construction of the act itself, which saves to the people of the county the privilege of local self-government. It may be that the

Legislature has the power to control directly the action of the county authorities, and I have no disposition at present to controvert the proposition; but the right of the people of the county to manage their own affairs should not be abridged, except under the pressure of a plain and positive legal requirement, and when no alternative in the law is admissible.

BRIDGERS v. WILSON COUNTY COM'RS. (Supreme Court of North Carolina. April 12, 1904.) Appeal from Superior Court, Wilson County; Moore, Judge. Mandamus by John F. Bridgers against the commissioners of Wilson county. Judgment for plaintiff. Defendants appeal. Reversed. Connor & Connor, F. A. Daniels, and W. A. Lucas, for appellants. Shepherd & Shepherd and F. A. & S. A. Woodard, for appellee.

WALKER, J. This case is substantially like that of *Barnes v. Commissioners* (decided at this term) 47 S. E. 737. As we held in that case that mandamus will not lie to control the discretion given to the commissioners by the statute in the granting of licenses, there was error in the judgment of the court in this case directing a mandamus to issue to the defendants, commanding them to issue an order for a license to the sheriff upon finding certain facts recited in the judgment. Remanded, with directions to dismiss the action. Error.

CITY OF WINSTON et al. v. HUDSON. (Supreme Court of North Carolina. May 3, 1904.) Appeal from Superior Court, Forsyth County; W. R. Allen, Judge. W. B. Hudson was charged with selling trading stamps without having first obtained a license, and from a judgment finding him not guilty the state and the city of Winston appeal. Affirmed. Watson, Buxton & Watson and the Attorney General, for plaintiffs. Glenn, Manly & Hendren and W. E. Crisp, for defendant.

WALKER, J. We have decided in *State and City of Winston v. Beeson and Sperry & Hutchison Company*, 47 S. E. 457, that the city had no power or authority under the pro-

visions of its charter to pass the ordinance for a violation of which the defendant is prosecuted, because the term "gift enterprise," as used in the charter, did not embrace the business of the Sperry & Hutchison Company; they being the only words in the charter, as was admitted by counsel for the state and the city, which could by any possible construction apply to the case. This being the law as declared by the court in that case, and the defendant Hudson being charged with a violation of the ordinance in that, as a merchant, he received stamps from the stamp company and delivered them to one of his customers, who had bought goods from him, according to the terms of his contract with the company, it follows that in so doing he committed no criminal offense, and the court upon the special verdict correctly adjudged him not guilty. Affirmed.

HOWELL v. WILSON COUNTY COM'RS. (Supreme Court of North Carolina. April 12, 1904.) Appeal from Superior Court, Wilson County; Moore, Judge. Mandamus by A. M. Howell against the commissioners of Wilson county. Judgment for plaintiff. Defendants appeal. Reversed. Connor & Connor, F. A. Daniels, and W. A. Lucas, for appellants. Shepherd & Shepherd and F. A. & S. W. Woodard, for appellee.

WALKER, J. The facts in this case are substantially like those in *Barnes v. Commissioners* (decided at this term) 47 S. E. 737, and for this reason it must be governed by the principles stated in that case. The court adjudged that a mandamus issue to the defendants, commanding them to investigate the application of the plaintiff, and, if they should find that he is a fit and proper person to have license and that the place where he proposes to sell liquors is a suitable one, then to issue an order to the sheriff to grant him a license upon his paying the fees and taxes as required by law, or show cause why a peremptory mandamus should not issue. For the reasons given in *Barnes v. Commissioners of Wilson*, there was error in said judgment. Remanded, with directions to dismiss the action. Error.

